Torts

Donald A. Orlovsky

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Recommended Citation
Donald A. Orlovsky, Torts, 32 U. Miami L. Rev. 1233 (1978)
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Torts

DONALD A. ORLOVSKY*

The author surveys the law of torts in Florida in 1977.

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* A.B., Cornell University, 1973; J.D., Rutgers University School of Law, 1976; member of the Florida and New Jersey Bars and associated with the firm of McCune, Hiaasen, Crum, Ferris & Gardner, Fort Lauderdale, Florida. The author would like to express his thanks to Mrs. Elizabeth Dahlberg for her untiring assistance in the preparation of this article.
I. ASSAULT AND BATTERY

Faced with unambiguous facts set in the context of a statute requiring that a teacher assume authority for the control of pupils assigned to him and keep good order in his classroom, the District Court of Appeal, First District, was called upon in Williams v. Cotton to decide whether "[s]imple negligence and intentional torts, such as assault and battery, are mutually exclusive causes of action, and [whether] evidence of assault and battery is fatal to an action based exclusively on simple negligence."

In Williams, an action was brought on behalf of an injured pupil against his teacher for injuries sustained as a result of a physical confrontation after the teacher attempted to restore order in his classroom. During the day in question, the plaintiff, a sixteen year old mentally retarded student, was emotionally upset and behaved in a manner disturbing to other students. After repeated requests that the plaintiff "quiet down and take his seat," an altercation ensued.

The First District held that the defendant was guilty of negligence rather than the intentional torts of assault and battery. In support of its result, the court construed section 232.27 of the Florida Statutes (1975) as necessarily implying the power to use reasonable physical force, not amounting to corporal punishment, to effect the statutory requirement of classroom order. In addition, the court stated that without such an implication, the purport of the statute would be rendered nugatory.

1. Fla. Stat. § 232.27 (1975) (current version at Fla. Stat. §§ 232.27, 275 (1977)). The law restricted the manner in which a teacher may control his pupils and keep good order in the classroom by stating that a teacher "shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature." Id. § 232.27 (current version at Fla. Stat. § 232.27(1)-(3) (1977)). Chapter 232 was amended, 1976 Fla. Laws, ch. 76-236, § 6, and is now embodied in Fla. Stat. § 232.275 (1977) which defines the liability of a teacher or principal as follows: "Except in the case of excessive force or cruel and unusual punishment, a teacher . . . shall not be civilly or criminally liable for any action carried out in conformity with the state board and district school board rules regarding the control, discipline, suspension, and expulsion of students."

2. 346 So. 2d 1039 (Fla. 1st Dist. 1977).
3. Id. at 1040.
4. Id. at 1041.
5. Id. The court stated:

This statute, in authorizing—in fact requiring—a teacher to "keep good order" in his classroom necessarily implies the power to the teacher to use reasonable physical force (not amounting to corporal punishment) to do so. Without such reasonably implied power, the requirement to "keep good order" would be meaningless.
Distinguishing the facts in *Williams* from those in *McDonald v. Ford*, the court stated:

The vital difference in the case here and the case in *McDonald* is that here the record establishes that the defendant was authorized by law to take the action he did, to lay hands on the plaintiff, but in doing so used excessive force resulting in serious injury to Cotton. The use of excessive force in the performance of a lawful and authorized act, resulting in injury to another, may constitute actionable negligence.

In holding that the exercise of excessive force by one lawfully authorized to use limited physical force may constitute negligence rather than an intentional tort, the court appeared to liken the facts before it to cases involving the use of excessive force in situations where limited physical force would be protected by either the privilege of public necessity or self-defense. In each instance, the privilege is generally limited to that which is or reasonably appears to be necessary under the circumstances. It has also been stated, however, that such excessive physical force is unprivileged and constitutes an intentional tort rather than simple negligence.

The court in *Williams* appears to provide teachers with a limited privilege to effect the statutory “good order” requirement through the use of that degree of physical force which falls short of “corporal punishment.” In balancing the defendant’s conduct against the social purpose to be achieved, however, the court fails to delineate meaningful limitations to the privilege. At what point is excessive physical force tantamount to “corporal punishment” within the statute, and under what circumstances should such force be viewed as an intentional tort rather than simple negligence? These questions are left unanswered.

II. FALSE IMPRISONMENT AND FALSE ARREST

It is well recognized that the Florida courts “have equated the torts of false arrest and false imprisonment, stating that the difference is one of terminology.” Underlying the tort of false imprison-
ment is a notion of the social desirability of protecting an individual's personal interest in freedom from restraint of movement. An action for false imprisonment will generally lie when one intentionally confines another to a limited area without consent or privilege. The confinement must be such that there is either no exit or that all available means of departure would expose the plaintiff to an unreasonable risk of harm.

In *Jackson v. Biscayne Medical Center*, the plaintiff, a former patient, brought an action against the medical center, *inter alia*, for false imprisonment. Although the facts are not reported in detail, the District Court of Appeal, Third District, held that where a hospital exercises unlawful restraint against an individual and detains him against his will in order to procure his arrest for trespassing, an action may lie for false imprisonment. In addition, the court noted that the plaintiff's claim was not within the purview of the medical liability mediation panel requirements of section 768.44 of the Florida Statutes. In so holding, the court stated:

The fact that these facts originate, rather remotely, from a hospital-patient relationship, will not bring them into the ambit of medical malpractice. To hold otherwise would lead to the absurd result that every wrongful act committed by a hospital employee in a hospital surrounding amounts to medical malpractice. Certainly, our Legislature did not desire those results.

The issue of the applicability of the statute of limitations to a cause of action for false imprisonment committed by a municipal corporation was addressed in *Leatherwood v. City of Key West*. In *Leatherwood*, the plaintiff was arrested for assaulting an officer. The action, however, was dismissed when the complaining officer failed to appear in court. Approximately twenty-nine months later, the plaintiff brought an action against the city for false arrest, false imprisonment and malicious prosecution. In affirming summary judgment for the city, the District Court of Appeal, Third District, held that an action for false imprisonment accrues on the day of the arrest, and that the period of limitation with respect to the city is one year from the accrual of the cause of action, absent facts or

12. 347 So. 2d 721 (Fla. 3d Dist. 1977).
13. Id. at 722. See also *Fla. Stat.* § 768.44 (Supp. 1976) (current version at *Fla. Stat.* § 768.44 (1977)). For a discussion of the medical mediation panel requirement and recent cases decided thereunder, see text accompanying notes 334-59 infra.
14. 347 So. 2d at 722.
15. 347 So. 2d 441 (Fla. 3d Dist. 1977).
circumstances which either toll the statute or estop the city from interposing the statute as an affirmative defense.  

III. MALICIOUS PROSECUTION AND ABUSE OF PROCESS

A. Malicious Prosecution

In Florida, six essential elements must be established to sustain a cause of action based upon malicious prosecution:

1. the commencement or continuance of an original criminal or civil judicial proceeding; 
2. its legal causation by the present defendant against the present plaintiff; 
3. its bona fide termination in favor of the present plaintiff; 
4. absence of probable cause; 
5. presence of malice; and 
6. damage conforming to the legal standards resulting to the plaintiff.

In Jackson v. Biscayne Medical Center, the Third District stated that

the essential prerequisite to bringing an action for malicious prosecution—a bona fide termination of prosecution in favor of a plaintiff—is satisfied if there is either an adjudication on the merits in a judicial proceeding or, if there is a nolle prosequi or declination to prosecute entered in good faith by the prosecutor.

In Clayton v. City of Cape Canaveral, the owner and operator of a "bottle club" initiated an action against the city and its chief of police for malicious prosecution based upon facts which reflected that city officials who opposed the operation of the club caused plaintiffs Clayton and McGrath to be arrested numerous times for alleged violations of a city zoning law. There was evidence that the plaintiffs' property was not within the scope of the zoning law and

17. 347 So. 2d at 442.
18. Arison Shipping Co. v. Hatfield, 352 So. 2d 539, 539 (Fla. 3d Dist. 1977); Shiodowsky v. National Car Rental Sys., Inc., 344 So. 2d 903, 904 (Fla. 3d Dist. 1977); Applestein v. Preston, 335 So. 2d 804 (Fla. 3d Dist. 1977).
19. 347 So. 2d 721 (Fla. 3d Dist. 1977).
21. 349 So. 2d 722 (Fla. 4th Dist. 1977) (decision withdrawn from the Southern Reporter at the request of the court).
22. The term "bottle club" refers to a business which permits the consumption of alcoholic beverages after the operating hours of bars and cocktail lounges. Id.
that the city officials were aware of the law's inapplicability.

Relying on McCain v. Andres, the District Court of Appeal, Fourth District, held that a municipality may not be held liable for malicious prosecution and added that a municipality is also immune from liability when citizens are wrongfully prosecuted by its officers and agents under an admittedly void and unconstitutional ordinance. The court noted that its result was consistent with decisions rendered by the First and Second Districts, commenting that the Third District has also acknowledged a "protective cloak of immunity."26

Assuming arguendo that the city officials in Clayton did instruct their chief of police to enforce the ordinance with the knowledge that it was inapplicable to plaintiffs' property, there would be little doubt that the necessary elements of malicious prosecution had concurred. In light of the "intentional and outrageous nature of the tort,"27 it would appear that the availability of legal redress to an injured victim would be a matter of paramount public concern. The court in Clayton, however, ignored the malicious acts of the city's policemen and councilmen and focused instead upon the "protective cloak of immunity," without considering whether the nature of the malicious conduct should affect the application of the doctrine. In a situation where the evidence indicates that city officials have abused their power by harassing one conducting himself in a lawful manner, the protective cloak of immunity should be evaluated with greater circumspection lest automatic application leave the injured plaintiff without a remedy.

The issue of "whether the filing of an information by the state attorney in a criminal prosecution raises, in a subsequent malicious prosecution action... , a presumption of probable cause to believe that the criminal defendant was guilty of the offense charged" was recently addressed by the Supreme Court of Florida in Colonial Stores, Inc. v. Scarborough,28 as a result of an alleged conflict between the First District's holding below and the Third District's decision in McKinney v. Dade County.29 In McKinney, it was held

23. 139 Fla. 391, 190 So. 616 (1939).
24. 349 So. 2d at 723; accord, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Elrod v. City of Daytona Beach, 132 Fla. 24, 180 So. 378 (1938).
25. Calbeck v. Town of S. Pasadena, 128 So. 2d 138 (Fla. 2d Dist. 1961); Middleton v. City of Fort Walton Beach, 113 So. 2d 431 (Fla. 1st Dist. 1959).
26. 349 So. 2d at 723 (citing City of Miami v. Albro, 120 So. 2d 23 (Fla. 3d Dist. 1960)). The court also noted that its view was in accord with those advanced in decisions rendered in other states. Id.
27. W. Prosser, supra note 8, § 119, at 850.
28. 355 So. 2d 1181, 1183 (Fla. 1977), aff'd 338 So. 2d 1119 (Fla. 1st Dist. 1976).
29. 341 So. 2d 1061 (Fla. 3d Dist. 1977).
that a properly filed information conclusively determines that the evidence is adequate to establish probable cause.

In Colonial Stores, the plaintiff filed an action for false imprisonment and malicious prosecution after he was arrested and incarcerated for the robbery of a food store. The store manager had observed the physical characteristics of the robber earlier in the day and reported the information to the police shortly after the robbery. On the following day, the Jacksonville police received an anonymous telephone call informing them that the robber was travelling on a certain street in a particular car. On the basis of the store manager's description and the anonymous telephone call, the plaintiff was arrested without a warrant. After the plaintiff was identified in a line-up by eyewitnesses, an affidavit was executed by the police. Based upon the affidavit, an information was filed by the state attorney. Two months later, another person confessed to the robbery. Although the confession ultimately led to a nolle prosequi of the plaintiff's case, plaintiff was incarcerated from the time of his arrest until the time of the confession.30

At the conclusion of trial, the court instructed the jury that the filing of an information against the plaintiff gave rise to a presumption of probable cause. The jury subsequently found for the plaintiff, and the defendants appealed. Although the First District disagreed with the trial court's instruction and held that no presumption of probable cause arises from the filing of an information, they nevertheless failed to find reversible error on this ground.31 The Supreme Court of Florida approved the reasoning of the First District.

Despite the defendants' reliance upon Gallucci v. Milavic,32 in which it was held that a magistrate's finding of probable cause gives rise to a conclusive presumption33 of validity in a subsequent malicious prosecution action, the court refused to extend the Gallucci presumption to a prosecutor's decision.34 Prior to McKinney, no

30. 355 So. 2d at 1183.
31. Id. at 1184.
32. 100 So. 2d 375 (Fla. 1958).
33. The so-called Gallucci presumption presupposes, however, the absence of fraud or other corrupt means employed by the person initiating the prosecution. 355 So. 2d at 1184.
34. The court, declined to "accord the Gallucci presumption" to the prosecutor's decision to prosecute, and distinguished Ward v. Allen, 152 Fla. 82, 11 So. 2d 193 (1942), which held that the filing of an information constitutes evidence tending to show reasonable grounds for prosecution without the assistance of presumptive effect. It likewise distinguished Meade v. Super Test Sales, 306 So. 2d 211 (Fla. 2d Dist. 1975), in which the District Court of Appeal, Second District, found that there was reasonable cause for the state attorney's decision to prosecute. 355 So. 2d at 1184.
The presumptive effect was accorded the filing of an information. In overruling McKinney, the Supreme Court of Florida pointed to McKinney's heavy reliance on State ex rel. Hardy v. Blount, and noted that Hardy failed to constitute a valid basis for the defendants' position. Although Hardy held that a prosecutor's finding of probable cause through the filing of an information has the same practical effect as an identical finding by a magistrate, the court distinguished the facts in Hardy from those in Colonial Stores and noted that the effect of Hardy was overturned by the Supreme Court of the United States in Gerstein v. Pugh.

At the heart of the Supreme Court of Florida's refusal to extend the Gallucci presumption is the inherent inconsistency between the prosecutor's responsibility to law enforcement on the one hand and the constitutional role of a neutral and detached magistrate on the other.

In holding that no presumption of probable cause arises from the filing of an information with respect to the charge upon which the action is based, the supreme court adhered to its earlier declaration in Ward v. Allen, where it was held that the filing of an information merely constitutes evidence of the existence of reasonable grounds for prosecution.

The subject of privilege as a defense to malicious prosecution assumed a novel dimension in a case of first impression, Stone v. Rosen. In Stone, an attorney and his law firm instituted a malicious prosecution action against a citizen who had filed a grievance against the plaintiffs with The Florida Bar. The grievance arose out of a dispute involving certain funds to be used for the purchase of realty. In that case, the Grievance Committee of The Florida Bar found no probable cause for further disciplinary proceedings.

35. The court emphasized that prior to McKinney v. Dade County, 341 So. 2d 1061 (Fla. 3d Dist. 1977), the presumption of probable cause for purposes of a malicious prosecution action applied solely to a judicial determination of probable cause in the prior criminal proceeding. 355 So. 2d at 1185.
36. 261 So. 2d 172 (Fla. 1972).
37. Id. The court's holding in Hardy was predicated upon the rationale that both the magistrate and the state attorney are Florida Constitutional Officers. See Fla. Const. art. V, §§ 5, 6 & 17.
38. 420 U.S. 103 (1975). In Gerstein, the Supreme Court refused to find the filing of an information to be the constitutional equivalent to a neutral and detached magistrate's finding of probable cause.
39. 355 So. 2d at 1184-85. Gerstein v. Pugh, 420 U.S. 103 (1975), highlights the contrast between the executive role of the prosecutor in vindicating the interests of the state, and the judicial role of the magistrate which requires that he remain wholly unbiased and disinterested.
40. 152 Fla. 82, 11 So. 2d 193 (1942).
41. 355 So. 2d at 1185.
42. 348 So. 2d 387 (Fla. 3d Dist. 1977).
affirming the trial court's judgment that the defendant was qualifiedly privileged in filing a complaint against Stone with The Florida Bar, the District Court of Appeal, Third District, went on to hold that, in fact, a citizen enjoys an absolute privilege to make a complaint against a member of Florida's integrated Bar.  

Notwithstanding a split of authority regarding the extent of a citizen's privilege to file a complaint against an attorney, the court relied heavily upon the New Jersey case of Toft v. Ketchem, which focused upon the need to balance two conflicting policy considerations:

On the one hand, there is injury that may be suffered by an attorney as a result of the institution of disciplinary proceedings against him on what turns out to be improper or groundless charges. Even if the charges against him are found to be baseless and the complaint is dismissed, he still may suffer from the public knowledge of these proceedings which may damage his reputation and injure his ability in the future to earn a living.

On the other hand, however, it is in the public interest to encourage those who have knowledge of any unethical conduct of attorneys to present such information to the appropriate ethics and grievance committee so that this court may carry out its constitutional disciplinary duties.

In attempting to do justice as between these two conflicting interests, we are necessarily forced to give great weight to the fact that we have been charged by Constitution with the solemn duty of ridding the bar of those who are unfit to practice our profession . . . . If each person who files a complaint with the ethics and grievance committee may be subject to a malicious prosecution action by the accused attorney there is no question but that the effect in many instances would be the suppression of legitimate charges against attorneys who have been guilty of unethical conduct, a result clearly not in the public interest. And although to deprive an attorney of his right to recover damages in a civil action for the malicious filing of such a complaint without probable cause occasionally works a hardship upon the attorney . . . we are of the opinion that this result must follow if we are to properly carry out our constitutional duty to maintain the high standards in our bar.  

In holding that an absolute privilege was an appropriate defense, the Third District adopted the balancing test set forth in Toft, and stated:

43. Id. at 388.
45. 348 So. 2d at 389 (quoting Toft v. Ketchem, 18 N.J. 280, 284-87, 113 A.2d 671, 674-75, cert. denied, 350 U.S. 887 (1955)).
Members of the legal profession are accorded rights and privileges not enjoyed by the public at large; the acceptance of these carries with it certain responsibilities and obligations to the general public. . . . One who elects to enjoy the status and benefits as a member of the legal profession must give up certain rights or causes of action. . . .

Recognizing the potential impact of Stone, the Third District properly expressed its intention to certify the decision to the Supreme Court of Florida as passing upon a question of great public interest. It cannot be gainsaid that the balancing approach embraced by the courts in Toft and Stone takes great pains to balance the equities of all parties affected by the relationship between the attorney and the public which he has sworn to serve with integrity and competence. Moreover, the collective effect of attorney misconduct casts an indelible aspersion upon the Bar in the eyes of the public. Although arguments can be made in support of either position, the real question seems to be whether members of the Bar, solely by reason of their occupational status, should be precluded from vindicating the legitimate right of self-protection against groundless abuses of process. The proper solution, it seems, is one of degree.

Before leaving the attorney without any viable means of recovering damages for even the most groundless and spurious allegations, it seems necessary to consider two additional matters apparently overlooked by the court in Stone. Firstly, each member of the public is charged with the general duty to refrain from engaging in intentionally tortious conduct such as malicious prosecution. If the public is given an absolute privilege to file grievances with the Florida Bar, what measures will be left to prevent abuse? Secondly, what legitimate end suggested by the absolute privilege could not be equally well served by a carefully constructed qualified privilege that fairly attempts to protect both the competent attorney and the interests of society? Absolute privilege is a defense rarely ac-

46. Id.
47. Id.
48. See W. PROSSER, supra note 8, § 119, at 834.
49. One measure which could serve to mitigate the potentially harsh results arising from an abuse of the absolute privilege is the confidentiality of grievance proceedings until a determination of probable cause has been made. Although confidentiality would not prevent abuses of the privilege, it would appear to assist in achieving a manageable balance between the attorney's right to protect his professional reputation from baseless aspersions on the one hand and the public's need to rid the bar of unethical practitioners on the other.
50. A carefully constructed qualified privilege could provide an atmosphere conducive to the socially beneficial objective of encouraging the public to file their justifiable complaints with the appropriate authority while still permitting the attorney to protect his professional
corded in the law, and it should not be expanded without substantial justification. Unless The Florida Bar is willing, for example, to hold confidential grievance procedures up to and including the time when probable cause is found, the absolute privilege accorded to the public could easily be abused in such a manner as to become tantamount to subjecting the attorney to harassment for proper conduct which is nevertheless disappointing to the client. Clearly, the law never contemplated that an attorney ensure the total satisfaction of his client.

B. Abuse of Process

Closely related to the tort of malicious prosecution is that of abuse of process. A leading authority explains that the underlying purpose of this cause of action is to provide a remedy for cases "in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed." Abuse of process differs from malicious prosecution in that the "gist of the tort is not commencing an action or causing

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51. See, e.g., W. PROSSER, supra note 8, § 114, at 776.

52. By stripping an attorney of his right to recover affirmative relief in an action for malicious prosecution under circumstances which would otherwise be proper, the court runs the risk of creating an environment in which attorneys may, like other professional groups, harbor feelings of alienation and distrust toward the public they have undertaken to serve. Such a situation is counterproductive to the open communication necessary for the development of a mutually satisfying attorney-client or attorney-public relationship.

It cannot be gainsaid that those most severely injured by the unethical practitioner are the members of the legal community themselves. It would not seem unfair that as a quid pro quo for maintaining the right to seek legal, albeit qualified redress for injuries incurred through the malicious prosecution of grievance proceedings, the legal community must make a collective effort to rid the bar of those whose conduct obviously falls below a minimal level uniformly applied to all members of the bar. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 1, DR 1-103, fashions each attorney as "his brother's keeper." Perhaps a more conscientious adherence to this grave, often unpleasant responsibility would serve to obviate the court's willingness to surrender certain rights or causes of action on behalf of attorneys solely because of their occupational status as members of the bar.

53. W. PROSSER, supra note 8, § 121, at 856. See also Baya v. Revitz, 345 So. 2d 340, 342 (Fla. 3d Dist.) (Haverfield, J., dissenting), cert. discharged, 355 So. 2d 1170 (Fla. 1977); Cline v. Flagler Sales Corp., 207 So. 2d 709 (Fla. 3d Dist. 1968).
process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish.” Thus, it is the purpose for which the process is used once it is issued that lies at the heart of the tort.

In a dissenting opinion filed by Judge Haverfield in Baya v. Revitz, the elements of abuse of process are clearly set forth as follows:

The elements of an action for abuse of process are (1) the defendant made an illegal, improper, perverted use of the process, a use neither warranted nor authorized by the process; (2) the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of process; (3) the plaintiff sustained damages as a result thereof.

Unlike the tort of malicious prosecution, it is unnecessary, in alleging abuse of process, to show that the prior proceedings were terminated in favor of the plaintiff or that the proceeding was initiated without probable cause. The two torts do, however, share “the common element of an improper purpose in the use of legal process.”

The ulterior motive element of the tort usually manifests itself as a form of coercion used to obtain a collateral advantage not properly a part of the proceeding forming the basis of the abuse. In other words, abuse of process often assumes the dimensions of extortion in which legal process is substituted for the threat or the club.

In Baya, the plaintiff instituted an action for abuse of process based upon an appeal taken by defendant from a consent judgment.

54. W. Prosser, supra note 8, § 121, at 856.
55. 345 So. 2d 340, 342 (Fla. 3d Dist.) (Haverfield, J., dissenting), cert. discharged, 355 So. 2d 1170 (Fla. 1977).
56. Id.
57. W. Prosser, supra note 8, § 121, at 856-57. In the treatise, an example is provided which simplifies the distinction between the torts of malicious prosecution and abuse of process and which was quoted with approval by the District Court of Appeal, First District, in Bradley v. Peaden, 347 So. 2d 455, 456-57 (Fla. 1st Dist. 1977), and the District Court of Appeal, Third District, in Cline v. Flagler Sales Corp., 207 So. 2d 709, 711 (Fla. 3d Dist. 1968). It reads: “[i]f the defendant prosecutions an innocent plaintiff for a crime without reasonable grounds to believe him guilty, it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process.” W. Prosser, supra note 8, § 121, at 857.
58. W. Prosser, supra note 8, § 121, at 857. Prosser provides examples of the types of cases which show the context in which the extortion inherent in abuses of process was effected. The examples include attachment, garnishment, execution, sequestration, criminal arrest and prosecutions and even the use of a subpoena for the collection of a debt. Of greater importance, however, is Prosser’s observation that although “[t]he ulterior motive or purpose may be inferred from what is said or done about the process, . . . the improper act may not be inferred from the motive.” Id. at 858.
In the prior appeal, the District Court of Appeal, Third District, held that since the record established that the stipulation by and between the parties constituted a settlement, the resulting consent judgment could not be appealed. In the instant case, the trial court resolved the abuse of process action in the plaintiff's favor.

Holding that the consensual partition judgment formed a proper basis for appeal, the Third District stated:

[The taking of an appeal which presents to the appellate court justiciable issues decided after a full consideration hereof upon the briefs, oral argument and record, as a matter of law is not an abuse of process under the elements of the common law action as they exist in the State of Florida.]

In a sound dissent, Judge Haverfield carefully clarified the facts set forth by the majority and noted that the defendant testified that he would have been placed in an unfavorable income tax bracket if he had received the money pursuant to the 1972 consent judgment during that year. Judge Haverfield also emphasized that upon the entry of the consent judgment, the money was tendered by plaintiff but rejected. As indicated in the dissent:

 Delaying the receipt of money pursuant to a consent judgment so as to avoid the tax consequences resulting therefrom clearly is an end other than which an appeal is designated to accomplish. There being no dispute that plaintiff-appellee was damaged by the prosecution of the appeal in Baya v. Revitz, supra, a prima facie case was proven by plaintiff-appellee and, therefore, I would affirm the judgment entered.

In light of the additional facts supplied by the dissent, it would appear that the majority lost sight of the fact that it is the ulterior motive or improper purpose underlying the appeal that determines the abuse of process and not merely the propriety of a consent judgment as a basis for appeal. Although the elements of the tort were framed in a unique context, Judge Haverfield's appraisal that the plaintiff proved a prima facie case, appears to reflect a clear under-
standing of both the nature and application of the tort. 44

In Bradley v. Peaden, 5 an action for abuse of process was filed
by plaintiff against her uncle as a result of a dispute arising from
the sale of two sets of scuba equipment owned by the defendant’s
daughter. The defendant alleged that plaintiff paid for one set,
while plaintiff maintained that the parties understood that the pur-
chase price was to be applied to the purchase of both sets. 66

Thereafter, defendant told plaintiff that if she did not pay for
the equipment or return it, he would swear out a warrant for her
arrest and that, as a result, she would be unable to obtain employ-
ment. When plaintiff failed to return the equipment, the defendant
signed a criminal affidavit charging plaintiff with grand larceny.
The plaintiff was tried and acquitted. At the trial of her subsequent
action for abuse of process, the court directed a verdict for defen-
dant.

The District Court of Appeal, First District, reversed, noting
that an issue of fact is presented where evidence reflects that a
defendant utilized criminal process as a means of coercing another
to return property or to pay a civil debt. 67

IV. DEFAMATION

A. Libel

1. DEVELOPMENTS IN THE DEFENSE OF PRIVILEGE

Broadly stated, a prima facie case of defamation is formulated
when it has been established that: (1) A statement defamatory of

64. The majority’s holding appears to confuse the tort of abuse of process with that of
malicious prosecution. It appears to ignore that the nature of the action is not the action of
causation process to issue without justification or probable cause, but rather the misapplication
or misuse of process “justified in itself for an end other than that which it was designed to
accomplish.” W. Prosser, supra note 8, § 121, at 856. The fact that the issues presented on
appeal were justiciable and decided upon briefs, oral argument and the record may have a
bearing on an action for malicious prosecution, but is by no means inconsistent with a cause
of action for the tort of abuse of process. Of greater significance are the following facts: (1)
defendant refused plaintiff’s tender of money upon entry of the consent judgment; (2) defend-
ant testified that he would have been placed in an unfavorable income tax bracket if he had
received the funds during the year of the consent judgment; (3) delaying receipt of the money
tendered under the consent judgment for the purpose of avoiding adverse tax consequences
is an ulterior or improper end neither warranted nor authorized by the appellate process; and
(4) damage to plaintiff existed as a result of defendant’s prosecution of the appeal. 345 So. 2d
at 342. It would appear that the foregoing factual considerations should have been regarded
by the court as being of operative significance in determining whether the plaintiff stated a
cause of action for abuse of process.

65. 347 So. 2d 455 (Fla. 1st Dist. 1977).

66. Id. at 456.

67. Id.; see Cline v. Flagler Sales Corp., 207 So. 2d 709 (Fla. 3d Dist. 1968); W. Prosser,
supra note 8, § 121, at 857.
and concerning the plaintiff has been published to a third person for which statement and publication the defendant is responsible; (2) the third party understood the defamatory meaning; and (3) the publication is actionable. Once these elements have been established, it becomes incumbent upon the defendant to interpose his defenses. Privilege and truth are two defenses which are firmly entrenched in the jurisprudence of defamation and, when successfully proved, operate as complete defenses to the tort.

During the past year, the defense of privilege has been a focus of judicial attention in Florida's district courts of appeal.

In Campbell v. LoPucki, the issue facing the District Court of Appeal, First District, was whether defamatory allegations contained in a complaint drafted and signed by an attorney are privileged where a subsequent libel action has been brought against the attorney. Under the facts of Campbell, the defendant-attorney was employed to represent a decedent's parents in a wrongful death action arising from the automobile death of their son. In the second count of the complaint, it was alleged that one McMullen murdered the decedent either by striking him or by pushing him from the vehicle. It was also alleged that McMullen and Campbell conspired to purchase large amounts of insurance on the decedent's life with the intention of staging his death and collecting the insurance proceeds. In a subsequent newspaper article, the defendant-attorney was reported as having agreed that the wording of the complaint was intended to accuse Campbell and McMullen of murder. The attorney took sole responsibility for all of the allegations contained in the complaint.

Relying upon the authority of Myers v. Hodges, the First District agreed with the trial court's finding that allegations contained in a complaint are absolutely privileged and affirmed the dismissal of the libel action. The court stated:

68. See W. Prosser, supra note 8, § 114, at 776 n.64 (citing Restatement of Torts § 613 (1938)). For a more detailed definition of the so-called "twin torts" of libel and slander, see id. § 112, at 751-66.

69. See W. Prosser, supra note 8, § 114, at 776.

70. 345 So. 2d 860 (Fla. 1st Dist. 1977).

71. Id. at 861.

72. 53 Fla. 197, 44 So. 357 (1907). In Myers, the Supreme Court of Florida announced the long standing Florida rule regarding the publication of defamatory words during the course of a judicial proceeding. Briefly stated, defamatory words published by counsel, parties or witnesses in the due course of a judicial proceeding are absolutely privileged if relevant to or connected with the case before the court. Even when the defamatory words are not relevant to the proceeding, to be actionable they must also be malicious and spoken or written without a belief in their relevance or without reasonable or probable cause to believe so.

73. 345 So. 2d at 861.
In sum, we agree with the trial court's holding that the allegations of murder, homicide, conspiracy and other wrongdoings were relevant to the previous action. As noted by the Supreme Court in the *Myers* case, "In determining what is pertinent, however, much latitude must be allowed to the judgment and discretion of those who maintain a cause in court. Much allowance should be made for the earnest though mistaken zeal of a litigant who seeks to address his wrong and for the ardent and excited feelings of the fearless, conscientious lawyer, who must necessarily make his client's cause his own."\(^7\)

The defense of qualified privilege to an action for libel was addressed in the recent case of *Belcher v. Schilling*.\(^7\) In *Belcher*, certain policy disagreements divided the board of directors of Belcher Oil Company into two factions which subsequently became involved in a proxy battle calculated to obtain support for the respective company policies of each faction. The Belcher group prevailed, and, as a result, the Schilling group brought an action to set aside the election on the ground that the proxies were procured by fraud. Subsequently, the parties to the suit entered into a stipulation which provided that the status quo of the company would be maintained. Throughout this period, the Belcher group had been negotiating with an Exxon executive concerning the possibility of his becoming the new president of Belcher Oil.\(^7\)

Upon learning of the negotiations, an attorney for the Schilling group sent a letter to the Exxon executive informing him of the stipulation as well as the pending litigation against the Belchers. Based upon this letter, the Belcher group instituted an action against the Schillings for libel. At the trial's conclusion, judgment was entered for the defendants.

In affirming the trial court's verdict for the defendants, the District Court of Appeal, Third District, restated the law regarding the nature and extent of the qualified privilege defense in defamation actions when the communication is made in good faith by one who either has an interest in the subject matter or a duty to communicate with another having a corresponding duty or interest.\(^7\)

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\(^7\) *Id.* at 862 (quoting 53 Fla. at 211, 44 So. at 362). The First District refused to distinguish *Myers* and its progeny on the ground that the subject pleadings were signed by the attorney and not by the complaining parties as in *Myers*. Finding that such a distinction is "ill-founded," the court noted that under *Fla. R. Civ. P. 1.030(b)*, an attorney must sign his pleadings and added that an attorney's signature on a pleading does not and usually cannot guarantee the truthfulness of the facts cited. 345 So. 2d at 862 (citing Metcalf v. Langston, 296 So. 2d 81 (Fla. 1st Dist. 1974)).

\(^75\) 349 So. 2d 185 (Fla. 3d Dist. 1977).

\(^76\) *Id.* at 186.

\(^77\) *Id.* For a discussion of the context in which the qualified privilege defense to defama-
The first amendment constitutional privilege regarding defamations of public officials and public figures, which has evolved from *New York Times Co. v. Sullivan* and *Curtis Publishing Co. v. Butts*, framed the legal issues addressed in *Finkle v. Sun Tattler Co.*, Applying this first amendment privilege, the District Court of Appeal, Fourth District, found that the plaintiff, having formerly held the position of city attorney, was a public official or public figure under the *New York Times* rule with respect to his activities "relating thereto or emanating therefrom."" Thus, the *New York Times* standard of "actual malice" is the "applicable rule by which to measure accountability of [the paper] for . . . libel."" A written notice was placed on the

**2. DEVELOPMENTS IN THE LAW OF LIBEL PER SE AND LIBEL PER QUOD**

Under the facts of *Barry College v. Hull,* Hull was employed by Barry College as its director for business affairs and later as vice president for business affairs under two consecutive one year employment contracts. Prior to the expiration of the latter contract, Hull entered into a two year contract which was to extend through June 30, 1974. In March 1973, Hull notified the president of the college by written memorandum that he would be seeking employment elsewhere. After several policy disagreements between Hull and the Barry administration, the board of trustees "determined to accept Hull's 'resignation.'" A written notice was placed on the

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**Notes:**

78. 376 U.S. 254 (1964). In the *New York Times* case, the Supreme Court of the United States articulated a standard in defamation actions which is applicable to public officials and which is markedly distinct from that which is applicable to private individuals. The distinction between the two standards is predicated upon the Court's definition and use of the term "malice" with respect to defamation actions involving public officials. Thus, from the *New York Times* case and its progeny evolved the constitutional limitation under which a public official or public figure is permitted to recover damages for defamatory falsehoods. Recovery could be had only if it were first shown that the statement had been made with "actual malice" as defined by the Court; that is, that the statement had been made with the knowledge that it was false or with reckless disregard as to the truth or falsity thereof. Malice in the sense of spite or ill will is not sufficient to defeat the qualified privilege. See *Henry v. Collins*, 380 U.S. 356 (1965).


80. 348 So. 2d 51 (Fla. 4th Dist. 1977).


82. See note 78 supra.

83. 348 So. 2d at 52.

84. 353 So. 2d 575 (Fla. 3d Dist. 1977).

85. *Id.* at 577.
bulletin board of Barry College informing the college community that Hull had tendered his resignation several months prior to the date of the memo and that the board "makes it effective as of this date." Based upon this memorandum, Hull brought an action against Barry College for libel and slander, which resulted in a jury verdict in favor of Hull based upon a jury charge of libel per se which effectively precluded the jury from deciding whether the notice "constituted libel per se, libel per quod or no libel at all." The District Court of Appeals, Third District, reversed, finding that the trial court erred in determining that the notice constituted libel per se.

It is well-settled that a defamatory publication will constitute libel per se if, in the absence of innuendo, it: (1) tends to subject one to hatred, distrust, contempt or ridicule; (2) tends to injure one in his trade or business; or (3) "imputes to another conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession or office."

Libel per quod, on the other hand, is established when, in addition to publication, extrinsic facts are necessary to ascertain the defamatory meaning conveyed.

Following what it called the "pertinent holding" in Wolfson v. Kirk, that "neither the court nor the jury may go beyond the four corners of the publication in determining whether or not there is...
libel per se," the Third District held that there could be no libel per se since, in order to ascertain whether Hull resigned or was fired, it would be necessary to step beyond the four corners of the allegedly defamatory notice. Noting that the record reflected no evidence of damages arising from the publication, so as to give rise to an action for libel per quod, the court concluded that it was error for the trial judge to fail to direct a verdict for Barry College on the issue of libel.  

B. Slander

The District Court of Appeal, First District, in Bobenhausen v. Cassat Avenue Mobile Homes, Inc., discussed and clarified the law relating to statements constituting slander per se.

After terminating his employment with the defendant, plaintiff Bobenhausen sought employment with other companies which requested that he provide information relating to his past employment. In each instance, the plaintiff was denied employment based upon statements made by his prior employer that Bobenhausen was a "thief and a crook" who "stole him blind." Thereafter, Bobenhausen organized his own company which he attempted to finance through Finance America Company. After receiving a credit report reflecting that Bobenhausen was discharged from the defendant's employ for stealing, Finance America terminated its relationship with plaintiff and refused to deal further with him. Bobenhausen then brought suit against the defendant for slander. At the conclusion of the trial, the jury returned a verdict in favor of Bobenhausen, awarding $30,000 in compensatory damages and $50,000 in punitive damages.

In response to the defendant's contention that punitive damages may not be awarded unless actual damages are shown, the court reviewed the applicable law regarding the types of compensatory damages recoverable in defamation actions. It stated:

In determining the types of compensatory damages recoverable in a defamation suit, Florida recognizes two classes: general and special. General damages are those which the law presumes must naturally, proximately and necessarily result from publication of the libel or slander. They are allowable whenever the

92. 353 So. 2d at 578.
93. 344 So. 2d 279 (Fla. 1st Dist. 1977).
94. Id. at 280.
95. Id. at 281. The amount of damages awarded to Bobenhausen was later made subject to a remittitur of $40,000.
immediate result is to impair the plaintiff's reputation, although no actual pecuniary loss is demonstrated. . . .

Special damages do not result by implication of law from a wrongful publication and, unlike general damages, must be specially pled. It is necessary for a plaintiff to show his special damages proximately resulted from the defamation. 96

In explaining the types of defamation which justify an award of general damages without the pleading and proving of special damages, the court stated:

Words which are actionable in themselves, or per se, necessarily import general damages and need not be pleaded or proved but are conclusively presumed to result. Moreover malice is presumed as a matter of law from the publication of such words.

... Spoken words falsely imputing a criminal offense to another are actionable per se. Clearly then the statement made by Boucher to another that Bobenhausen was a "thief and a crook" who "stole him blind" was slander per se, if false. 97

Rejecting the defendant's argument that a plaintiff's pecuniary loss must be determined to a reasonable certainty as a prerequisite to punitive damages, the First District, following the general rule applied in libel actions, stated: "[E]ven though no special damages may have been proved, a plaintiff may still recover punitive damages upon a showing that the publication was made for malice or ill-will toward him. . . . [W]e are of the opinion that punitive damages may be awarded independent of proof of compensatory damages. . . ." 98

96. Id.
97. Id. (emphasis added) (citations omitted). Certain categories of slander are presumed, by their very nature, to cause damage. Such categories are actionable as slander per se. The four categories of slander most frequently deemed to be actionable per se include words which: (1) impute that plaintiff is guilty of a crime involving moral turpitude; (2) impute that plaintiff is afflicted with a contagious, infectious or loathsome disease; (3) tend to harm plaintiff in his trade, business profession or office; or (4) impute unchastity to a female. Of the foregoing categories, only the first three were recognized at common law. Words which are considered as slanderous per se are considered more egregious than other words because of their increased tendency to harm one's reputation, to exclude one from society or to jeopardize one's means of earning a living.

Related to the third category of slander per se are the torts of trade libel and trade slander. In the recent case of Kilgore Ace Hardware, Inc. v. Newsome, 352 So. 2d 918 (Fla. 2d Dist. 1977), the Second District opined that:

It is now well recognized that a person, and a corporation as well, may recover damages for injuries suffered because of . . . [the] publication of false defamatory matter which tends to be prejudicial in the conduct of a trade or business or to deter third persons from dealing in business with him.

Id. at 920, Compare Collier County Pub. Co. v. Chapman, 318 So. 2d 492 (Fla. 2d Dist. 1975) with Upton House Cooler Corp. v. Aldritt, 73 So. 2d 848 (Fla. 1954). See also Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co., 378 F.2d 377 (5th Cir. 1967).

98. 344 So. 2d at 282.
In determining whether the award of punitive damages was excessive, the court noted that the answer was dependent upon whether plaintiff adequately established malice resulting from the publication and whether plaintiff adequately established special damages to support the award. Holding that the trial judge abused his discretion in granting a remittitur, the First District reversed, noting that “courts have uniformly held that the relationship of punitive damages to actual damages cannot be reduced to a mathematical certainty. . . . [A] ratio of ten to one punitive damages was impliedly approved by the court.”

V. FRAUD AND DECEIT

Under Florida law, in order for fraud to be actionable, the following elements must appear:

(1) a misrepresentation of a material fact,
(2) [a] knowledge of the representor of the misrepresentation, or [b] representations made by the representor without knowledge as to either truth or falsity, or, [c] representations made under circumstances in which the representor ought to have known, if he did not know, of the falsity thereof,
(3) an intention that the representation induce another to act on it, and
(4) resulting injury to the party acting in justifiable reliance on the representation.

The same elements are required in cases in which fraud is asserted as a defense to a contract.

With respect to the element of reliance, it has been held that when a defendant made affirmative representations for the purpose of inducing a plaintiff to act to his detriment, he cannot thereafter complain that the plaintiff did, in fact, rely upon the representations made. This rule, however, is not without exception. Citing Davis v. Dunn and Beagle v. Bagwell, the District Court of Appeal, Fourth District, has noted that:

99. Id.
100. Id. at 283 (emphasis added). It is well-settled in Florida that “the power of the court to permit or require the entry of a remittitur should only be exercised in cases where the amount of excess is apparent or readily ascertainable.” Smith v. Jackson County, 134 Fla. 354, 356, 183 So. 738, 739 (1938).
102. See, e.g., George Hunt, Inc. v. Wash-Bowl, Inc., 348 So. 2d 910 (Fla. 2d Dist. 1977).
103. Martin v. Paskow, 339 So. 2d 266 (Fla. 3d Dist. 1976).
104. 58 So. 2d 539 (Fla. 1952).
105. 215 So. 2d 24 (Fla. 1st Dist. 1968).
In *Davis*, supra, the Supreme Court held that a purchaser is not entitled to rely on the representations of the seller where the means and opportunity to inspect the premises are equally available to both parties. In a later decision the First District recognized a necessary corollary to the *Davis* rule:

In essence, then, where a vendor by his actual deception, artifice, or misconduct conceals the evidence of a defective condition in such a way as to render it incapable of detection from a reasonable and ordinary inspection of the house, the vendor can no longer rely upon the purchaser’s duty to inspect because such conduct by the vendor serves to impair the purchaser’s opportunity to make a meaningful inspection.\(^{106}\)

It has also been suggested that, under certain circumstances, the facts giving rise to injury may be such as to place the plaintiff on sufficient notice that he should make further investigation regarding the truth of the defendant’s representations.\(^{107}\)

In *Butts v. Dragstrem*,\(^{108}\) purchasers of a mobile home subdivision brought an action against the seller to recover damages for misrepresentations regarding the net income of the property. In stating that the plaintiff should have done more than merely request an opportunity to inspect the vendor’s books, the District Court of Appeal, First District, held that the plaintiff’s reliance upon the fraudulent representations was not justified under the circumstances. The court stated:

*The right of reliance is also closely bound up with a duty on the part of the representee to use some measure of protection and precaution to safeguard his interests*. His justifiable reliance goes to the heart of the problem. *In the absence of a showing of a fiduciary or confidential relationship, if there is no accompanying actual deception, artifice, or misconduct, where the means of knowledge are at hand and are equally available to both parties and the subject matter is equally open to their inspection, one*

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106. Queenan v. Flynn, 347 So. 2d 686, 687 (Fla. 4th Dist. 1977) (quoting 215 So. 2d at 26).

107. See Pitzer v. Levine, 344 So. 2d 307 (Fla. 2d Dist. 1977). In *Pitzer*, an action was brought by a lessee against the lessors for alleged fraudulent misrepresentations regarding the square footage of office space upon which the lessee relied in entering into a lease for office space. No mention was made in the lease as to the square footage or rental per square foot. However, a preliminary layout of the office space, including its dimensions, was attached to the lease. The Second District held that there was a genuine issue of material fact as to whether or not plaintiff was on sufficient notice to require him to investigate and to determine the true square footage of the office space.

108. 349 So. 2d 1205 (Fla. 1st Dist. 1977).
disregarding them will not be heard to say that he was deceived by the other's misrepresentations.\textsuperscript{109}

The court added that plaintiff's former close, personal friendship and mutual religious interests with the defendant did not give rise to the fiduciary or confidential relationship necessary to justify his reliance under the circumstances.\textsuperscript{110}

In \textit{Charter Air Center, Inc. v. Miller},\textsuperscript{111} the District Court of Appeal, Second District, emphasized that where one relies upon a misrepresentation, actionable fraud will not lie unless the plaintiff actually suffers damages or injury from the reliance.\textsuperscript{112} The principle, as applied to fraud as a contractual defense, is explained in \textit{George Hunt, Inc. v. Wash-Bowl, Inc.},\textsuperscript{113} in which the Second District remarked:

\begin{quote}
It is recognized, in Florida and other jurisdictions where fraud is asserted as a defense to a contract, that all essential elements of the fraudulent conduct, including some injury, must be met. [citations omitted]. As stated in the early case of \textit{Stokes v. Victory Land Co.}, 99 Fla. 795, 128 So. 408, 410 (1930),

"it is of the very essence of an action of fraud and deceit that the same shall be accompanied by damage, and neither damnum absque injurie nor injurie absque damnum by themselves constitute a good cause of action. . . .

This principle is so generally understood and universally recognized that citation of authority is a work of supererogation."
\end{quote}

This rule then is applicable whether the pleadings alleging fraud are defensive or offensive in nature and is not dependent on the stage of performance of the contract at the time suit is instituted. . . . [T]he general rule enunciated in 37 Am. Jur. 2d, Fraud and Deceit § 292 (1968), [is] "[D]amage need not be subject to accurate measurement in money, but may result from the fact that the defrauded party has been induced to incur legal liabi-

\begin{itemize}
\item \textsuperscript{109} \textit{Id.} at 1207 (emphasis added). \textit{See also} Farnham v. Blount, 152 Fla. 208, 11 So. 2d 785 (1942); Beagle v. Bagwell, 215 So. 2d 24 (Fla. 1st Dist. 1968); Kaminsky v. Wye, 132 So. 2d 44 (Fla. 2d Dist. 1961).
\item \textsuperscript{110} \textit{349 So. 2d} at 1207. The First District did note, however, that although close friendship was not enough to sustain Dragstrem's action, "the relation and correlative duties necessary to give rise to such status need not be legal but may be moral, social, domestic or merely personal." \textit{Id.} \textit{See also} Dale v. Jennings, 90 Fla. 234, 107 So. 175 (1925).
\item \textsuperscript{111} \textit{348 So. 2d} 614 (Fla. 2d Dist. 1977).
\item \textsuperscript{112} \textit{Id.} at 616.
\item \textsuperscript{113} \textit{348 So. 2d} 910 (Fla. 2d Dist. 1977).
\end{itemize}
ties or obligations different from those represented or contracted for. . . ."\textsuperscript{114}

It is well-settled that both punitive and compensatory damages may be properly awarded for an action based upon fraud. Punitive damages are not proper, however, unless the basis for the action is a tort "which involve(s) ingredients of malice, moral turpitude, or wanton and outrageous disregard of the plaintiff's rights."\textsuperscript{115}

In \textit{Hermes v. Anton},\textsuperscript{116} the court noted that the degree of maliciousness, the defendant's ability to pay and the reasonableness of the relationship between the respective awards of punitive and compensatory damages are all factors to be considered in determining the amount of punitive damages to be awarded. In addition, the District Court of Appeal, Third District, held that punitive damages amounting to approximately ten times the compensatory award were not excessive.\textsuperscript{117} Attorney's fees, absent special circumstances, are not a proper element of damages for fraud in Florida.\textsuperscript{118}

The legal effect of a party's performance of obligations under a theretofore wholly executory contract after the discovery of fraud was recently discussed in \textit{Mirenda v. Steinhardt}.\textsuperscript{119} In \textit{Mirenda}, Steinhardt brought an action against the vendors of his condominium apartment for fraud and breach of contract with respect to an obstruction of his view of the Intracoastal Waterway from his balcony. At trial, Steinhardt testified that: (1) his primary purpose for selecting his condominium unit was its view of the Intracoastal Waterway; (2) he experienced the view prior to purchase; (3) the defendant's brochure contained representations regarding the view; and (4) although he knew that the defendants were planning to construct an identical condominium to the east of his building, he was assured that his view of the Intracoastal Waterway would not be affected.\textsuperscript{120} Based upon these representations, Steinhardt executed the purchase contract.

Prior to closing, Mirenda discovered that the view from the condominium apartment complex would be obstructed and, as a result, wrote to each of the affected owners, informing them of the problem and advising that those prospective purchasers wishing to

\begin{footnotes}
\textsuperscript{114} Id. at 912-13 (emphasis added).
\textsuperscript{115} 348 So. 2d at 616 (quoting 9 \textsc{Fla. Jur. Damages} § 119 (1956)).
\textsuperscript{116} 346 So. 2d 1205 (Fla. 3d Dist. 1977).
\textsuperscript{117} Id. at 1206. \textit{See also} Bobenhausen v. Cassat Ave. Mobile Homes, Inc., 344 So. 2d 279, 283 (Fla. 1st Dist. 1977); \textit{Air Line Employees Ass'n Int'l v. Turner}, 291 So. 2d 670 (Fla. 3d Dist. 1974).
\textsuperscript{118} Martin v. Paskow, 339 So. 2d 266, 267-68 (Fla. 3d Dist. 1976).
\textsuperscript{119} 350 So. 2d 499 (Fla. 4th Dist. 1977).
\textsuperscript{120} Id. at 500.
\end{footnotes}
rescind their contract could do so. Steinhardt received the letter but did not respond or take any action toward rescinding this contract. Instead, he attended the closing, paid the contract price and received a warranty deed. Several months later, Steinhardt brought suit. At trial, judgment was entered for plaintiff.

The District Court of Appeal, Fourth District, reversed, following the generally accepted rule in Florida that:

Where a contract is wholly executory, . . . if one party ascertains that the other has been guilty of fraud in the procuring or making of the contract or with reference to the subject matter thereof, he may repudiate the contract, . . . and in such circumstances the defrauded party may not remain silent as to the fraud and perform the contract and then claim damages for the fraud. It is very generally held that one who discovers that fraud has been practiced upon him while the transaction remains wholly executory, but nevertheless either executes or performs it on his part or requires performance on the part of the other thereby waives the fraud and cannot subsequently maintain an action for damages therefor. 121

VI. CONSPIRACY

Ordinarily, an act which does not constitute a cause of action against one alleged offender cannot be made the basis of a civil action for conspiracy. 122 In Margolin v. Morton F. Plant Hospital Association, Inc., 123 the District Court of Appeal, Second District, eschewed the general rule in favor of an exception recognized in cases where “by reason of the force of numbers of other exceptional circumstances the conduct of the defendants acting in concert could be such as to give rise to an independent wrong.” 124

In Margolin, the plaintiff, a surgeon in good standing at the defendant hospital brought an action against a group of anesthesiologists on the hospital staff, alleging that he had been effectively prevented from practicing surgery at the hospital as a result of the defendants’ concerted refusal to provide necessary anesthesia serv-

121. Id. at 501 (emphasis added) (quoting with approval from 37 Am. Jur. 2d Fraud and Deceit § 394 (1968)); see Street v. Barrow Growers Processing Corp., 67 So. 2d 228, 232 (Fla. 1953), in which the Supreme Court of Florida stated that “[t]he party claiming fraud . . . cannot sit idly by and wait until conditions suit him to put the other party on notice or to take action with reference to rescission of . . . [the] contract.”

122. Churruca v. Miami Jai-Alai, Inc., 353 So. 2d 547 (Fla. 1977); Snipes v. West Flagler Kennel Club, Inc., 105 So. 2d 164 (Fla. 1958); Liappas v. Agoustis, 47 So. 2d 582 (Fla. 1950); Margolin v. Morton F. Plant Hosp. Ass’n, Inc., 342 So. 2d 1090 (Fla. 2d Dist. 1977).

123. 342 So. 2d 1090 (Fla. 2d Dist. 1977).

124. Id. at 1092; see Churruca v. Miami Jai-Alai, Inc., 353 So. 2d 547, 550 (Fla. 1977); Snipes v. West Flagler Kennel Club, Inc., 105 So. 2d 164, 165 n.1 (Fla. 1958).
ices to plaintiff's patients until such time as plaintiff's wife dismissed a pending legal claim against them. The plaintiff further alleged that "by virtue of their unique position as the only anesthesiologists on the hospital staff and their concerted refusal to provide him with general anesthesia services, the members of the group have interfered with the contractual rights between him and his patients."\(^{125}\)

The court recognized that although any of the group members could have lawfully declined to render services to the plaintiff, for any reason, a different result inheres when the entire group declines to do so, and the effect is to preclude the plaintiff from practicing surgery at the hospital.\(^{128}\)

Following *Snipes v. West Flagler Kennel Club, Inc.*,\(^{127}\) and the *Restatement of Torts*\(^{128}\) regarding a group's concerted refusal to deal, the court held that the plaintiff stated a cause of action for conspiracy and stated:

In essence, even though a person has the privilege of selecting those with whom he wishes to conduct business, when several persons who occupy a coercive position with respect to another act in concert to decline to do business with him, their refusal may under certain circumstances constitute an independent tort.\(^{129}\)

As a result of an allegation that a District Court of Appeal, Third District, decision\(^{129}\) was in conflict with *Margolin* and *Snipes*, the Supreme Court of Florida in *Churruca v. Miami Jai-Alai*\(^{31}\) granted certiorari to decide the issue of "whether a complaint is actionable which alleges that defendants maliciously conspired to punish plaintiffs by depriving them of their livelihood."\(^{132}\) In *Churruca*, the controversy arose out of a strike affected by newly unionized Jai Alai players against the frontons where they were employed. The frontons responded to the strike by hiring less distinguished players who eventually became well liked by the fans. After recognizing the failure of their collective effort, the striking Jai Alai players unsuccessfully sought reemployment from their respective frontons. As a result of their unemployed status, the players were

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125. 342 So. 2d at 1091.
126. Id. at 1093.
127. 105 So. 2d 164 (Fla. 1958).
129. 342 So. 2d at 1094 (emphasis added).
130. Churruca v. Miami Jai-Alai, 338 So. 2d 228 (Fla. 3d Dist. 1976), rev'd in part, 353 So. 2d 547 (Fla. 1977).
131. 353 So. 2d 547 (Fla. 1977), rev'g in part 338 So. 2d 228 (Fla. 3d Dist. 1976).
132. 353 So. 2d at 548.
refused licenses from the Department of Business Regulation. The players then sued the frontons for conspiring not to employ them.\textsuperscript{133}

The Supreme Court of Florida held that the players' complaint stated a cause of action for tortious conspiracy against the frontons. The court noted that the players must "demonstrate that the conspirators acted with evil motive"\textsuperscript{134} in order to sustain their cause of action. Relying heavily on \textit{Margolin} and \textit{Snipes}, the court stated: "In essence, this Court stated that ordinarily there can be no independent tort for conspiracy. However, if the plaintiff can show some peculiar power of coercion possessed by the conspirators by virtue of their combination, which power an individual would not possess, then conspiracy itself becomes an independent tort."\textsuperscript{135} The court then went on to articulate the nature of the tort: "\textit{The essential elements of this tort are a malicious motive and coercion through numbers or economic influence.}"\textsuperscript{136}

In response to the defense contention that at common law, as well as under applicable federal\textsuperscript{137} and state statutes,\textsuperscript{138} combinations for economic coercion in connection with labor disputes did not give rise to an actionable wrong, the court particularly clarified its holding with respect to so-called "labor disputes."

While we do not hold ... that Chapter 542, Florida Statutes (1975) provides a cause of action to petitioners in the context of this case, nevertheless, we do not accept the contention that a cause of action for tortious conspiracy is precluded simply by casting the veil of "labor dispute" over the controversy. When the conduct of a combination of employers, maliciously conceived and executed, amounts to a "black listing" of employees so as to permanently deprive them of the means of earning a livelihood, a common law cause of action is presented upon which a jury may return damages.\textsuperscript{139}

\textbf{VII. "TORT OF INSURER'S BAD FAITH"}

In recognizing that an insurer has an implied duty under its contract of insurance to deal fairly and in good faith with its in-

\begin{itemize}
  \item \textsuperscript{133} \textit{Id.} at 549. The Department of Business Regulation was also named as a defendant but was dismissed from the suit because, as a department of the executive branch, it had not waived its sovereign immunity. The Supreme Court of Florida agreed and upheld the department's dismissal from the suit. \textit{Id.} at 551.
  \item \textsuperscript{134} \textit{Id.} at 549.
  \item \textsuperscript{135} \textit{Id.} at 550. \textit{See also} Des Lauries v. Shea, 300 Mass. 30, 13 N.E.2d 932 (1938).
  \item \textsuperscript{136} 353 So. 2d at 550. \textit{See also} Hunter Lyon, Inc. v. Walker, 152 Fla. 61, 11 So. 2d 176 (Fla. 1942); Regan v. Davis, 97 So. 2d 324 (Fla. 2d Dist. 1957).
  \item \textsuperscript{138} \textit{Fla. Stat.} § 542 (1977).
  \item \textsuperscript{139} 353 So. 2d at 551.
\end{itemize}
sured, the United States District Court for the Northern District of Florida, in Escambia Treating Co. v. Aetna Casualty & Surety Co.,140 expanded the insurer's liability for bad faith. It concluded that, under Florida law, an insurer is tortiously liable for wrongfully refusing to pay the valid claims of its insured.141

Underlying the decision in Escambia is a progressive willingness in Florida and in a growing number of other jurisdictions to provide a tort remedy for an insurer's bad faith refusal to honor the reasonable expectations of its insured under the insurance contract.142

In determining that Florida would recognize a cause of action for the breach of an implied duty arising from the insurance contract to deal fairly and in good faith with its insured in the processing and payment of the insured's claims, the Escambia court relied upon the rationale developed by the California courts in Fletcher v. Western National Life Insurance143 and Gruenberg v. Aetna Insurance Co.144 Since these decisions, California has achieved recognition as the leading jurisdiction for permitting recovery, in tort, where an insurer breaches its duty to deal fairly and in good faith.145 In Gruenberg, the Supreme Court of California articulated its analysis of an "emerging cause of action" which the Escambia court acknowledged as "reflect[ing] the policy or concept that an insured purchases insurance and not an unjustified court battle when he enters the insurance contract."146 The supreme court stated:

It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Where in so doing, it fails to deal fairly and in good faith with its insured by refusing, without

141. Id. at 1368. In Escambia, the district court's jurisdiction was predicated upon diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332 (1970). Although Florida substantive law was controlling, the legal issue presented in Escambia pertained to law on which Florida courts had not ruled. In such an instance, the task of the district court is to determine how the Florida courts would pass on the issue if it were before them.
143. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (Ct. App. 1970).
144. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973).
145. 421 F. Supp. at 1369.
146. Id.
proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. It is manifest that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured.

... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.147

Following the *Gruenberg* rationale that the duty to act fairly and in good faith in the processing and payment of the legitimate claims of its insured is a different aspect of the insurer's existing duty to deal fairly and in good faith in accepting reasonable settlement offers, the *Escambia* court reasoned: "Florida courts have clearly recognized the insurer's duty to act in good faith and accept reasonable settlements... Logically, the Florida courts would also accept the 'aspect of the same duty' requiring the insurer to act fairly and in good faith in handling the claims of its own insured."148 In addition, the federal district court noted that in an action for breach of the implied duty, a "plaintiff... may recover compensatory, and in the proper case punitive, damages in accordance with existing Florida law."149

The Florida courts have not hesitated to impose judgments in excess of policy limits against insurers who have failed to act in good faith in accepting reasonable offers.150 This aspect of the duty was first recognized by the Supreme Court of Florida in *Campbell v. Government Employees Insurance Co.* In that case, the court upheld both the existence of the implied duty and an award of punitive damages for its breach.

In *Butchikas v. Travelers Indemnity Co.*, the Supreme Court of Florida qualified the *Campbell* result in cases involving insurer nonfeasance by refusing to allow punitive damages and damages for mental anguish.153 Viewing the nonfeasance situation as "less egre-

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148. 421 F. Supp. at 1370.
149. *Id.* at 1371.
151. 306 So. 2d 525 (Fla. 1975).
152. 343 So. 2d 816 (Fla. 1976).
153. *Id.* at 818. The court noted that its independent research was unproductive of precedent supporting an award of compensation for mental anguish in an "excess" case. "The
gious than those involving deliberate, overt and dishonest dealing," the court held that an aggrieved insured was made amply whole through a compensatory award and recovery of attorney's fees. The thrust of these cases appears clear: "Tort liability does not result from the mere assertion of a weak and ultimately insufficient defense by the insurance company. The refusal to pay the insured's claim must be unreasonable and in bad faith." 

VIII. ASSUMPTION OF RISK

The interposition of the doctrine of assumption of risk as an affirmative defense has long been an effective shield for personal injury defendants, acting as a complete bar to recovery. Frequently regarded as a disfavored defense, the doctrine of assumption of risk has been viewed by many as the judicial articulation of a morally unacceptable social policy, which reveals in a history replete with instances of indiscriminate misapplication, entailing substantial human misery.

Faced with a conflict among districts, the Supreme Court of Florida in Blackburn v. Dorta was called upon to assess whether, in light of Florida's acceptance of the doctrine of comparative negligence in Hoffman v. Jones, the doctrine of assumption of risk remained viable as an absolute bar to recovery. Accepting what it termed as an invitation to join the growing "trend of dissatisfaction with the doctrine," Florida became the most recent jurisdiction to abrogate the defense.

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rule in Florida has been that, absent a physical injury, a plaintiff can recover damages for mental anguish only where it is shown the defendant acted with such malice that punitive damages would be justified." Id. at 819. See also Crane v. Loftin, 70 So. 2d 574 (Fla. 1954).

154. 343 So. 2d at 818.
157. 348 So. 2d at 289 n.1.
158. 348 So. 2d 287 (Fla. 1977).
159. 280 So. 2d 431 (Fla. 1973). In the Hoffman case, the Supreme Court of Florida abandoned contributory negligence as a complete bar to recovery and instead adopted the rule of comparative negligence. Hoffman expressly left open the question whether assumption of risk was, in effect, the functional equivalent of contributory negligence. Id. at 439.
160. 348 So. 2d at 290.
161. Id. at 290-91:
The breed of assumption of risk with which we deal here is that which arises by implication or implied assumption of risk. Initially it may be divided into the categories of primary and secondary. The term primary assumption of risk is simply another means of stating that the defendant was not negligent, either
Acknowledging that the "line of demarcation" between contributory negligence and assumption of risk had been difficult to define, the court determined that assumption of risk is tantamount to contributory negligence and, therefore, subject to the principles of comparative negligence enunciated in Hoffman.162

IX. COMPARATIVE NEGLIGENCE

For the first time since its adoption of comparative negligence in Hoffman v. Jones,163 the Supreme Court of Florida in Lawrence v. Florida East Coast Railway Co.164 addressed the issue of whether special verdicts must be used in trials at which comparative negligence is in issue if either party requests their use. This issue arose in view of the supreme court's statement that "[i]n accomplishing these purposes, the trial court is authorized to require special verdicts to be returned by the jury and to enter such judgment or judgments as may truly reflect the intent of the jury as expressed in any verdict or verdicts which may be returned."165

The court acknowledged that special verdicts assist courts in ascertaining whether the comparative negligence doctrine is actually being applied to effect its "desired goal of apportioning damages on the basis of fault."166 In aligning itself with a small number of states that specifically provide for special verdicts in comparative negligence cases, the court held:

[S]pecial verdicts shall be required in all jury trials involving

because he owed no duty to the plaintiff in the first instance, or because he did not breach the duty owed. Secondary assumption of risk is an affirmative defense to an established breach of a duty owed by the defendant to the plaintiff. . . .

The affirmative defense brand of assumption of risk can be subdivided into the type of conduct which is reasonable but nonetheless bars recovery (sometimes called pure or strict assumption of risk), and the type of conduct which is unreasonable and bars recovery (sometimes referred to as qualified assumption of risk).

162. Id. at 293; accord, Weedman v. Sunland Roller Rink, Inc., 349 So. 2d 752 (Fla. 3d Dist. 1977) (action for injuries received at a roller rink); Carlin v. Goldman Indus. Inc., 347 So. 2d 827 (Fla. 3d Dist. 1977) (action for injuries sustained in a fall on a dance floor).
163. 280 So. 2d 431 (Fla. 1973).
164. 346 So. 2d 1012 (Fla. 1977).
165. Id. at 1015 (quoting Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973)).
166. Id. at 1016. See also Maloney, From Contributory to Comparative Negligence: A Needed Reform, 11 U. FLA. L. REV. 135 (1958); Prosser, Comparative Negligence, 51 MICH. L. REV. 465 (1953); Timmons & Silvis, Pure Comparative Negligence in Florida, 28 U. MIAMI L. REV. 737 (1974). It has also been observed that special verdicts: (1) allow for the correction of jury error; (2) force detailed consideration by the jury rather than allowing it to jump to a conclusion on a "gut reaction;" and (3) enable the court to avoid the necessity of long, complicated jury instructions which could give rise to reversible error. Id. at 802.
comparative negligence. When comparative negligence is at issue in non-jury trials, the court shall make findings of record required by special verdicts.

Since courts have heretofore exercised their discretion in requiring special verdicts, as authorized in *Hoffman v. Jones*, *supra*, this decision shall be prospective only from the effective date of this decision and shall have no retroactive effect.167

In *Stuyvesant Insurance Co. v. Bournazian*,168 the Supreme Court of Florida was asked to construe the meaning and operation of the terms “set-off” and “recoupment” as used in the *Hoffman* case. *Stuyvesant* arose from a personal injury action between the Bournazians and the Rileys based upon an accident between an automobile owned and driven by Bournazian and an automobile driven by Riley and owned by her husband.169 At the conclusion of the trial, separate jury verdicts were returned for each party under the doctrine of comparative negligence. The trial court then aggregated the personal injury verdicts for each set of parties and netted the lesser award against the greater award, thereby producing a net judgment in favor of the parties receiving the larger award. The District Court of Appeal, Second District, reversed by awarding each recipient the full amount of his individual award.170 In affirming the decision of the Second District, the Supreme Court of Florida distinguished the facts and set-off theory enunciated in *Hoffman* from the case before it.171

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167. 346 So. 2d at 1017. The court explained:

The trial court was following the law as it existed at the time of the trial when he chose not to require special verdicts. To require a new trial now because special verdicts were not used would be like changing the rules after a game had been played and requiring a rematch.

*Id*. at 1016. *See also* Kirkland v. Johnson, 346 So. 2d 132 (Fla. 2d Dist. 1977); Public Health Foundation for Cancer & Blood Pressure Research, Inc. v. Cole, 352 So. 2d 877 (Fla. 4th Dist. 1977).

168. 342 So. 2d 471 (Fla. 1977).

169. *Id*. at 472. The sequence of events can best be illustrated as follows: B was involved in an automobile accident with an automobile driven by R and owned by R's husband. B brought an action against the Rs and their insurer. B's wife filed a derivative claim as a result of the injuries to her husband. R counter-claimed against B and his insurer for her injuries, and R's husband filed a derivative claim. B was awarded $8,500. B's wife was awarded $1,500, against both of the Rs and their insurer. R was awarded $19,000, and R's husband was awarded $1,000. After the trial court aggregated the Bs' verdicts and netted them against the aggregate of the Rs' verdicts, the result was a net judgment of $10,000 in favor of the Rs.

170. The effect was to hold both insurance companies liable for the full amount assessed by the jury against their respective insureds with no dollar off-sets between identical party insureds.

171. 342 So. 2d at 472 n.2. The court distinguished *Hoffman* from the instant case noting that *Hoffman* involved the significantly different fact situation where the plaintiff and defendant were the only parties to the litigation. The question of insurer's liability did not arise. It is this distinction to which the court attributed the difficulty encountered by the trial court and district court in attempting to apply the “set-off” theory announced in *Hoffman*. 

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After reconsidering the rationale of its original decision, the court concluded that "the notion of set-off should have no effect on the contractual obligation of liability insurance carriers to pay the amounts for which their insureds are legally responsible." The court noted that the verdicts resulting from the trial determine the "legal liability" of the parties under section 624.605(1)(b) of the Florida Statutes (1975). The insureds' legal liabilities give rise to a duty, under the terms of each insurance contract, on the part of the respective insurers to pay the awards entered against their insureds. Conforming its decision to that of the Second District, the court concluded:

Nothing in Hoffman, the insurance laws, or the public policy of this state justifies our reading into a standard automobile liability insurance contract a requirement that a partially-negligent but fully-insured person should absorb a portion of the cost of his negligence. The purpose of the contract is precisely to the contrary, being designed and paid for to relieve the insured of all financial liability to other parties would materially vary the terms of each insurance contract. The court provided the following helpful example:

The jury here determined that Royce Bournazian was entitled to receive $8,500 from Betty Riley. If recoupment is allowed for the insurer to the extent of the $19,000 which Royce owed Betty, then (i) he would receive nothing from her carrier despite its contract liability to pay the amounts for which Betty became legally liable, and (ii) Betty would receive $10,500 from Royce's carrier despite its contract liability to pay all amounts for which he became legally liable. The effect of so holding would be tantamount to our requiring Royce to pay to Betty $8,500 of the $19,000 which Allstate had contracted to pay as a result of the accident.
such obligations (within policy limits and over agreed deductibles, of course). We conclude, therefore, that the concept of “set off” (more properly “recoupment”) as announced in Hoffman applies only between uninsured parties to a negligence action, or to insured parties to the extent that insurance does not cover their mutual liabilities. The doctrine has no effect on the contractual obligations of liability insurance carriers.¹⁷⁵

In Mosca v. Middleton,¹⁷⁶ a recent automobile collision case in which the evidence disclosed that both the plaintiff and defendant entered an intersection against a red light, the District Court of Appeal, Third District, held that notwithstanding a plaintiff’s negligence, “a jury may find that defendant’s negligence was the sole proximate cause of the accident.”¹⁷⁷ The court further acknowledged that even if the plaintiff had been negligent, it is possible that the plaintiff’s negligence “may not have contributed to the proximate cause of the accident.”¹⁷⁸ In so holding, the court made clear its refusal to eschew the traditional rules of causation as an accommodation to the adoption of the comparative negligence framework.

X. NEGLIGENCE

Generally stated, “negligence is the omission to do that which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or the doing of an act which a reasonable person would not do.”¹⁷⁹ The essential elements in the traditional formula of actionable negligence are: (1) the existence of a legal duty owing to the plaintiff from the defendant; (2) a breach of that duty by the defendant; (3) a causal relation between the breach of the duty; and (4) actual injury or damage.

A. Negligent Acts and Duties Owed

It is well-settled in Florida, as well as in other jurisdictions, that the duty aspect of the negligence formulation presupposes a standard of conduct, recognized by law, for the protection of others against unreasonable risks of harm.¹⁸⁰ The failure of a defendant to

¹⁷⁵. Id.
¹⁷⁶. 342 So. 2d 986 (Fla. 3d Dist. 1977).
¹⁷⁷. Id. at 987. See also Petroleum Carrier Corp. v. Gates, 330 So. 2d 751 (Fla. 1st Dist. 1976); Vertommen v. Williams, 287 So. 2d 116 (Fla. 4th Dist. 1974); Henry v. Britt, 220 So. 2d 917 (Fla. 4th Dist. 1969).
¹⁷⁸. 342 So. 2d at 987.
¹⁸⁰. See generally W. PROSSER, supra note 8, §§ 53-56, at 324-50.
conform his conduct to that standard is the fulcrum on which the question of liability generally rests. The duty is measured by the scope of the risk which the negligent conduct foreseeably entails, and it is incumbent upon the plaintiff to show that he is within the class of persons sought to be protected.

The duty of an owner and operator of a store to provide a reasonably safe method of ingress and egress was recently evaluated in Thompson v. Ward Enterprises. In that case, an injured customer brought an action for injuries sustained when an automobile parked perpendicular to the entranceway of the store started forward and struck the customer who was waiting for the store’s truck to pick up his groceries for delivery. The area in which the customer was standing was open, level and without physical barriers separating the entranceway from parked automobiles. There was a sign which prohibited parking in front of the store entrance. The court viewed the case as revolving around the concept of duty.

Distinguishing Thompson from a case in which a business invitee was injured inside the store by an automobile, the court held that the customer presented a prima facie showing of negligence based upon the duty of the store to provide a reasonably safe method of ingress and egress.

In Speigel v. Southern Bell Telephone & Telegraph Co., an action was brought against the utility company on the theory that it negligently maintained a utility pole so near the highway as to cause the decedent’s fatal injury when his automobile collided with the pole. In affirming the trial court’s summary judgment for defendant, the court stated: “a utility company is under no obligation to

181. See generally id. at 338-50.
182. See RESTATEMENT OF TORTS § 281 (1938).
183. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). See also RESTATEMENT OF TORTS § 281, Comment c (1938); Prosser, Palsgraf Revisited, 52 Mich. L. Rev. 1 (1953). In Palsgraf, Judge Cardozo, speaking for the New York Court of Appeals, noted that a finding of negligence was a function of the foreseeability of harm to the person injured.
184. 341 So. 2d 837 (Fla. 3d Dist. 1977).
185. Id. at 838. The court held that “the defendant owed the plaintiff a duty to exercise sufficient care to maintain the store premises, including the parking area, in a reasonably safe condition for the use of the store’s customers.” Id.
186. See Schatz v. 7-Eleven, Inc., 128 So. 2d 901 (Fla. 1st Dist. 1961). In Schatz, it was claimed that the defendant store breached its duty of care to a business invitee by either failing to regulate the parking of motor vehicles in front of the store so that they would not be directly headed toward the interior of the store while parked or to provide an adequate curb, barrier or wall. The First District, however, held that the injury to the plaintiff inside the store by an automobile parked facing the store was unusual and extraordinary and, therefore, unforeseeable.
187. 341 So. 2d at 838-39. See also Shields v. Food Fair Stores, 106 So. 2d 90 (Fla. 3d Dist. 1958).
188. 341 So. 2d 832 (Fla. 3d Dist. 1977).
guard against extraordinary exigencies created when a vehicle leaves the traveled portion of a roadway out of control."

An interesting aspect of the duty element was presented in *MacIntyre v. Green's Pool Service, Inc.* The owner of a building brought a third party action in a mechanic's lien foreclosure suit to recover damages for the alleged negligence of an architect in advising him in the selection of a general contractor who, after undertaking the work, abandoned the project, leaving behind several unpaid subcontractors.

In affirming judgment for the architect, the court found that the architect was under no contractual or statutory duty to provide the owner with a general contractor. The District Court of Appeal, Third District, added that the owner made no showing that the duties alleged were among those normally assumed by or imposed upon architects under the custom and practice of the business community.

The issue of informed consent and a physician's duty of disclosure was the gravamen of a patient's complaint in *Thomas v. Berrios.* In that case, a medical patient brought an action against her doctor for injuries sustained during the performance of a hysterectomy. Shortly after surgery the patient began to suffer from an infection, which was later determined to have been caused by the presence of an opening or fistula in the left ureter which permitted urine to enter the body. The physician admitted that he did not advise his patient with respect to the possible problems or complications which could result from the operation and added that it was not customary practice in the locality to do so.

Adopting the language of *Zebarth v. Swedish Hospital Medical Center,* the District Court of Appeal, Second District, emphasized

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189. 347 So. 2d 1081 (Fla. 3d Dist. 1977).
190. Id. at 1083. Additionally, the plaintiff alleged that the defendant architect was negligent in advising plaintiff as to when and to whom payments were to be made and negligent in failing to file and to record a notice of commencement with the clerk of the circuit court, or in the alternative, for failing to advise plaintiff of the necessity to file and record same. Id.
191. Id. at 1083. The plaintiff thereafter underwent corrective surgery in which the damaged left ureter was attached to the right ureter.
192. Id.
193. 348 So. 2d 905 (Fla. 2d Dist. 1977).
194. Id. at 906. The plaintiff. The plaintiff thereafter underwent corrective surgery in which the damaged left ureter was attached to the right ureter.
195. 81 Wash. 2d 12, 499 P.2d 1 (1972). The duty of a medical doctor does not encompass the duty to elucidate upon all of the possible risks but only those of a serious nature, nor does it presuppose that the patient is completely ignorant in medical matters:

Thus, the information required of the doctor by the general rule is that information which a reasonably prudent physician or medical specialist of that medical
the duty of a physician to advise his patient of all material risks involved when obtaining consent to an operation or course of treatment. In addition, the court pointed out that the extent of information required under the doctrine of informed consent varies with the particular circumstances of each case.\textsuperscript{196}

Following \textit{Ditlow v. Kaplan},\textsuperscript{197} the court held that in order to determine whether a physician has discharged his duty to disclose material risks under the doctrine of informed consent: \textit{"[E]xpert testimony is required . . . to establish whether a reasonable medical practitioner in the community would make the pertinent disclosures under the same or similar circumstances."}\textsuperscript{198} Underlying the expert witness requirement is the reasoning that the factors involved in making such a determination are often beyond the knowledge of ordinary laymen who are uneducated in medicine.\textsuperscript{199}

In \textit{Harrell v. Martin},\textsuperscript{200} a patron of a race track brought an action against its operators for injuries sustained when a loading ramp "kicked back" and struck the patron while a race car was being loaded onto a trailer. The patron predicated his action on defendants' failure to maintain their premises in a reasonably safe condition. In addition, the patron alleged that, as a paying spectator, he should not have been allowed in the pit area where automobiles were being loaded and that the defendant, in the exercise of reasonable care, should have supplied an area other than wet grass for the loading of vehicles.\textsuperscript{201}

In holding that the proximate cause of the injury was not attributable to the conduct of the defendants,\textsuperscript{202} the District Court of

\textit{community should or would know to be essential to enable a patient of ordinary understanding to intelligently decide whether to incur the risk by accepting the proposed treatment or avoid that risk by foregoing it. A doctor or specialist who fails to discharge this duty to inform would thus be liable as for negligence to the patient for the harm proximately resulting from the treatment to which the plaintiff submitted.}

\textit{Id. at 26-27, 499 P.2d at 9-10} (emphasis added). \textit{See also} Miriam Mascheck, Inc. v. Mausner, 264 So. 2d 859 (Fla. 3d Dist. 1972); Bowern v. Talmage, 159 So. 2d 888 (Fla. 3d Dist. 1964).


197. 181 So. 2d 226 (Fla. 3d Dist. 1966).

198. 348 So. 2d at 908. The Second District noted that its ruling was in accord with the majority of courts which have considered the issue. \textit{Id.} (citing Annot., 52 A.L.R.3d 1084 (1973)).

199. \textit{Id.}

200. 345 So. 2d 868 (Fla. 1st Dist. 1977).

201. \textit{Id.} at 869.

202. \textit{See also} Reynolds v. Deep Sports, Inc., 211 So. 2d 37 (Fla. 2d Dist. 1968); Elmore v. Sones, 140 So. 2d 59 (Fla. 2d Dist. 1962); Wometco Theatres Corp. v. Rath, 123 So. 2d 472 (Fla. 3d Dist. 1960). In each of the foregoing cases, it was held that knowledge of the particular risk was not present. Quoting from Warner v. Florida Jai Alai, Inc., 221 So. 2d 777, 778 (Fla. 4th Dist. 1969), the First District stated that "[t]he operator of a place of public entertain-
Appeal, First District, emphasized that the foreseeability test employed in reaching its conclusion requires objective rather than subjective consideration.203

Sabugo v. GDS Drugs, Inc.204 also involved a negligence action for injuries sustained by a business invitee. In that case, a customer established that she had slipped and fallen on paper debris on the floor of the store. There had not been an inspection by a store employee for at least three and one-half hours prior to the accident.205 Following well-settled Florida law, the court held:

The law is clear that if a dangerous condition on the floor of a business establishment is created by (1) a servant or agent of the owner or (2) an outsider and the condition is one which has existed for sufficient length of time that the owner should have known of it, the owner is liable for any ensuing injuries proximately caused by the dangerous condition when sustained by a business invitee.206

B. Presumptions of Negligence

The standard of due care imposed upon a bailee was explored in Clermont Marine Sales, Inc. v. Harmon,207 in which an action was brought for the loss of a boat delivered to a bailee for repairs. The bailee alleged that the boat was stolen by unknown third parties.

Acknowledging that a bailee has the burden of showing that he exercised the degree of care required by the nature of the bailment,208 the District Court of Appeal, Second District, guided itself

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203. See also Pinkerton-Hays Lumber Co. v. Pope, 127 So. 2d 441 (Fla. 1961) (indicating that the foreseeability test presupposes an objective standard).
204. Id. at 23.
205. Id. at 22 (emphasis added) (footnotes omitted).
206. Id. at 22 (emphasis added) (footnotes omitted). See also Food Fair Stores, Inc. v. Trusell, 131 So. 2d 730, 732 (Fla. 1961); Food Fair Stores, Inc. v. Patty, 109 So. 2d 5, 6 (Fla. 1959); Carls Markets, Inc. v. Meyer, 69 So. 2d 789, 791-92 (Fla. 1953).
207. With respect to the so-called "status" of a plaintiff at the time of an injury and the defendant's duty in relation thereto, see McCabe v. Walt Disney World Co., 350 So. 2d 814 (Fla. 4th Dist. 1977) in which the court noted that "the question of whether . . . [the plaintiff] held the status of a 'public invitee' or that of a 'trespasser' at the moment of injury [is of particular importance] because the determination of the status defines the scope of the duty owed . . . ." Id. at 815.
208. See also Marine Office-Appleton & Cox Corp. v. Aqua Dynamics, Inc., 295 So. 2d 370 (Fla. 3d Dist. 1974); Adelman v. M & S Welding Shop, Inc., 105 So. 2d 802 (Fla. 3d Dist. 1958).
by the settled principle that the delivery of the bailed chattel to a bailee and his subsequent failure to return it according to the bailment contract gives rise to a rebuttable presumption of negligence on the part of the bailee for the damage or disappearance of the chattel[^209] unless the loss, damage or disappearance is satisfactorily explained.

No stranger to Florida jurisprudence is the principle of law that the “rear-ending” of one who is lawfully stopped in traffic creates a rebuttable presumption of negligence[^210]. Whether the defendant’s explanation is sufficient to rebut the presumption of negligence has traditionally been regarded as a matter which, under the totality of circumstances, is within the province of the trier of fact[^211], who may find the defendant free from negligence[^212]. This rule was recognized when the courts adhered to contributory negligence and remains valid today under the doctrine of comparative negligence[^213].

In a recent case decided under section 316.030 of the Florida Statutes (1975),[^214] it was held that “a rear-end collision does not create a rebuttable presumption of guilt under the careless driving statute.”[^215]

It is also well-settled that once the plaintiff shows that he was lawfully stopped at the time of the rear-end collision, the presumption of negligence is established and the burden of going forward with evidence to rebut the presumption shifts to the defendant[^216].

[^209]: 347 So. 2d at 841.
[^210]: See, e.g., Gulle v. Boggs, 174 So. 2d 26 (Fla. 1965); Brethauer v. Brassell, 347 So. 2d 656 (Fla. 4th Dist. 1977); McNulty v. Cusack, 104 So. 2d 785 (Fla. 2d Dist. 1968). Contra, State v. Steele, 348 So. 2d 398 (Fla. 3d Dist. 1977).
[^211]: Young v. Boyle, 340 So. 2d 939, 940 (Fla. 4th Dist. 1976).
[^212]: See Metropolitan Dade County Transit Auth. v. Espinosa, 344 So. 2d 1290 (Fla. 3d Dist. 1977). The right to find that a driver who rear-ends another vehicle is free from negligence was first recognized in Stark v. Vasquez, 168 So. 2d 140 (Fla. 1964).
[^213]: Metropolitan Dade County Transit Auth., 344 So. 2d 1290, 1291 (Fla. 3d Dist. 1977) (citing Petroleum Carrier Corp. v. Gates, 330 So. 2d 751 (Fla. 1st Dist. 1976) and City of St. Petersburg v. Naden, 284 So. 2d 15 (Fla. 2d Dist. 1973)).
[^214]: Fla. Stat. § 316.030 (1975) (current version at Fla. Stat. § 316.1925 (1977)). This statute defines careless driving under the Florida Uniform Traffic Control Law, Fla. Stat. §§ 316.001-.660 (1977), and requires that one operate a motor vehicle “in a careful and prudent manner . . . so as not to endanger the life, limb, or property of any person.” Id. at § 316.1925.
[^215]: State v. Steele, 348 So. 2d 398, 402 (Fla. 3d Dist. 1977) (emphasis added). The court emphasized that each case “must be evaluated on its own facts based on all the attendant circumstances.” Id.
[^216]: Brethauer v. Brassell, 347 So. 2d 656, 657 (Fla. 4th Dist. 1977). The cases cited by the court indicated that the defendant must produce evidence which fairly and reasonably tends to show that the real fact is not as presumed. In Brethauer, the defendant argued that his attention was upon the vehicle in front of him. It swerved and passed plaintiff’s vehicle on the median strip. Defendant never saw the plaintiff’s car until moments before impact. The court held that defendant’s explanation was no more than a mere description of the
C. Proximate Cause

1. GENERALLY

In addition to the elements of duty, breach and damage, the law of negligence requires that there be a causal connection between the breach of the duty and the resulting damage. This causal connection is generally referred to as the proximate cause.\textsuperscript{217} This, of course, presupposes that the defendant’s negligence was the actual cause or “cause in fact” of the plaintiff’s injury.\textsuperscript{218} Generally stated, proximate cause is that which, in a continuous and natural sequence of events, unbroken by any efficient intervening agency, produces the result complained of and without which the result would not have occurred. A vast majority of jurisdictions, including Florida, also view reasonable foreseeability of harm as an integral element of proximate cause. Under that view, a defendant will not be liable unless the consequence was one which, in light of all circumstances, a reasonably prudent person would have \textit{foreseen} as a result of his negligence. Thus, subsumed under the element of proximate cause is the subelement of foreseeability.\textsuperscript{219}

The issue of proximate cause was one of the matters addressed by the Supreme Court of Florida in \textit{Helman v. Seaboard Coast Line Railroad}.\textsuperscript{220} In \textit{Helman}, an automobile passenger sustained injuries when the vehicle in which she was riding collided with a train at dusk, on wet roads, and at an intersection which had previously been recognized as perilous because of a thick growth of trees and shrubbery which concealed the crossing.\textsuperscript{221} A driver’s view would be obstructed until his car was within seventy-five feet of the crossing.

The jury rendered a verdict for the plaintiff based upon the railroad’s negligence in failing adequately to warn of the oncoming train by emitting a sufficiently audible warning whistle, in traveling at an excessive rate of speed and in failing to maintain a proper lookout.\textsuperscript{222} The District Court of Appeal, Fourth District, reversed, finding that the speed at which the train was traveling was not the proximate cause of the collision, notwithstanding the fact that the train was exceeding the speed limit prescribed by company rules.\textsuperscript{223}

\begin{itemize}
\item \textsuperscript{217} See generally W. Prosser, \textit{supra} note 8, § 42, at 244-50.
\item \textsuperscript{218} See generally id. § 41, at 236-44.
\item \textsuperscript{219} See Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928); Memorial Park, Inc. v. Spinelli, 342 So. 2d 829, 833 (Fla. 2d Dist. 1977).
\item \textsuperscript{220} 349 So. 2d 1187 (Fla. 1977).
\item \textsuperscript{221} Id. at 1188.
\item \textsuperscript{222} Id. at 1189.
\item \textsuperscript{223} Seaboard Coast Line R.R. v. Helman, 330 So. 2d 761 (Fla. 4th Dist. 1976).
\end{itemize}
In addition, the Fourth District found that failure to maintain a proper lookout could not have been the proximate cause of the accident in light of a brakeman’s testimony that he was watching the crossing, saw the vehicle and timely called to the engineer who applied the emergency brakes.

In reinstating the judgment of the trial court, the Supreme Court of Florida stated:

[the question of whether the defendant’s negligence was the proximate cause of the injuries is generally one for the jury unless reasonable men could not differ in their determination of that question.

... After conceding that respondents were negligent in exceeding their own speed regulations by five (5) miles per hour, the District Court concluded that such negligence was not the proximate cause of the injury. By so concluding, the court substituted its judgment for the judgment of the jury whose function it was to determine proximate cause by drawing inferences from the evidence before it ... For the District Court’s decision to be sustained, there needed to be a complete absence of competent evidence to support the verdict, or, in the alternative, it was necessary that the evidence be of such a nature that reasonable men could only conclude that the behavior of the individual driving petitioner’s truck was the sole proximate cause of the accident. Neither is apparent from the record in the instant cause.

The question of whether an owner’s or contractor’s negligence was the proximate cause of injuries sustained by a third person, after the owner had accepted the completed project, was addressed in *El Shorafa v. Ruprecht.* The District Court of Appeal, Fourth District, followed *Slaven v. Kay,* which it summarized as follows:

[I]f the offending defect was latent and unknown to the owner, the contractor remained liable, even after the project was completed and accepted by the owner. The rationale of that holding is that the contractor’s negligence is the proximate cause of the injury. The *Slaven* court held, however, that if the defect were patent or if the owner learned of it and did not rectify the condition then the owner’s negligence is the proximate cause of the injury rendering the owner liable and exonerating the contractor.

224. 349 So. 2d at 1189-90 (emphasis added) (footnotes omitted).
225. 345 So. 2d 763 (Fla. 4th Dist. 1977).
226. 108 So. 2d 462 (Fla. 1958).
227. 345 So. 2d at 764; accord, Mai Kai, Inc. v. Colucci, 205 So. 2d 291 (Fla. 1967); Roman Spa, Inc. v. Lubell, 334 So. 2d 298, 299-300 (Fla. 1st Dist. 1976); Forte Towers South, Inc. v. Hill York Sales Corp., 312 So. 2d 512 (Fla. 3d Dist. 1975).
2. THE CHAIN OF CAUSATION AND THE INDEPENDENT INTERVENING AGENCY

In *Nicholas v. Miami Burglar Alarm Co.*, the owner of a tobacco warehouse brought an action against a burglar alarm company for its negligence with respect to losses sustained in the burglary of the warehouse. Miami Burglar Alarm Company installed and maintained an alarm system in the warehouse. Under this system, an unauthorized entry into the warehouse was supposed to trigger an audible as well as silent alarm. The alarm would be transmitted through telephone lines to an answering service which would then notify Miami Burglar Alarm Company of the signal it received. The company was then to notify the police or the owner upon notice of either an alarm or a trouble signal. On the night in question, an employee of the company received notice of a "trouble signal" when two of the alarm's telephone wires were cut by burglars. No alarm signal was ever received. In accordance with company policy, the employee notified the telephone company but did not call the police or the owner, Nicholas.

The District Court of Appeal, Third District, labeled the burglary as an intervening criminal act which broke the chain of causation and held that the original negligence of the burglar alarm company was, therefore, not the proximate cause of the resulting damages. The Supreme Court of Florida reversed, reasoning that since the burglary was foreseeable, it was not an intervening cause of defendant's losses which would bar recovery. The court stated that "Florida recognizes the general rule that though a person's negligence is a cause in fact of another's loss, he will not be liable if an act unforeseeable to him and independent of his negligence intervenes to also cause the loss." Nevertheless, the court refused to apply literally the general rule and instead followed the principle expressed in *Cooper v. IBI Security Service, Inc.*, holding that:

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228. 339 So. 2d 175 (Fla. 1976).
229. *Id.* at 176. A "trouble signal" indicates that a voltage drop has taken place over the lines, and could signal no more than a problem with the telephone lines. Although the contract between the parties required Miami Burglar Alarm Co. to take action only in the event of an alarm, it was plaintiff's position that the company also assumed the duty to take action in cases involving trouble signals.
230. *Id.* The burglars worked uninterrupted and, after knocking a two foot square hole in the wall, left with over $15,000 worth of cigarettes.
231. *Nicholas v. Miami Burglar Alarm Co.*, 266 So. 2d 64, 66 (Fla. 3d Dist. 1972).
232. 339 So. 2d 175, 177 (Fla. 1976) (citing *Nicholas v. Miami Burglar Alarm Co.*, 297 So. 2d 49, 50 (Fla. 3d Dist. 1974) (Haverfield, J., dissenting)).
233. *Id.* at 177.
234. 281 So. 2d 524 (Fla. 3d Dist. 1973).
The foreseeability in the instant case was sufficient to withstand a motion to dismiss for lack of proximate cause. We hold a burglar alarm company under contract to monitor an alarm system may be negligent for failure to inform the police or the warehouse owner of a trouble signal which its employees had received. In the instant case there was no system malfunction or spontaneous failure. The monitoring employees followed company policy and directions in handling this telephone circuit disruption trouble signal in only notifying the telephone company.

In *Singer v. Durbin, Inc.*, the Singers brought an action for damages against companies which had supplied burglar alarm systems in the home they purchased and with whom they contracted for monthly service of the alarm system. Notwithstanding obvious factual distinctions, the District Court of Appeal, Third District, determined that *Nicholas* was dispositive of the outcome in *Singer*. The Third District noted that a person usually has no reason to foresee the criminal acts of another, and, if such is the case, it is usually held that the intervening criminal acts break the chain of causation. Therefore, the original negligence is precluded from becoming the proximate cause of the resulting damage. The court recognized, however, that:

Those who contract to have a burglar alarm system installed in a home or building are entitled to the benefit of their bargain, that is, a properly installed system which provides reasonable protection of the premises, and not just selected windows or doors, unless otherwise contracted for.

We hold, therefore, that just as a burglary is foreseeable where the alarm company's agent fails to notify the police when a trouble signal is received, a burglary is also foreseeable where the alarm company is guilty of an omission in not wiring all of the windows of a home, as contracted for, in order to connect them to the alarm system.

In *Concord Florida, Inc. v. Lewin*, an action was filed against the owner of a cafeteria for injuries suffered as a result of the owner's failure to provide ample emergency fire exits, failure to designate clearly the location of existing exits and failure to provide a reasonably safe place for its patrons. Such failures adequately to protect patrons were violations of the Metropolitan Dade County Fire Prevention and Safety Code. The injuries complained of arose out of

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235. 339 So. 2d at 177 (emphasis added).
236. 348 So. 2d 370 (Fla. 3d Dist. 1977).
237. *Id.* at 372 (emphasis added).
238. 341 So. 2d 242 (Fla. 3d Dist. 1976).
a peculiar factual scenario in which an arsonist ran in the front door of a crowded cafeteria, threw a five gallon container of gasoline on the floor, lit a match to the gasoline and then ran away. As a result, many patrons were burned or suffered smoke inhalation while others were injured in their chaotic attempts to flee the burning building. At the end of the negligence issue of the bifurcated trial, the trial judge charged the jury with what amounted to a “negligence per se” instruction. In the second portion of the bifurcated trial, the owner was permitted to interpose the defense that the arsonist’s intervening act created a break in the chain of proximate causation. The jury, however, found for the plaintiffs.

The gravamen of the owner’s appeal was that it was entitled to present the question of whether the arsonist’s activities were so foreseeable that the defendants were negligent in not guarding against such an incident. At the heart of the proposed issue was the suggestion that the act of the arsonist was an intervening cause which would insulate the owner from liability.

In affirming the trial court, the District Court of Appeal, Third District, citing Mozer v. Semenza and the Restatement (Second) of Torts, reasoned that:

[T]he scope of defendant’s duty to maintain reasonably safe premises does not include a duty to foresee a particular fire but it does include a duty to reasonably guard against the risk of fire. Viewed from this standpoint it is not important to the liability of the appellant whether the fire started in one way or another. It was reasonably foreseeable that there would, even under modern conditions, be a likelihood of fire and it was the duty of the defendant to provide a reasonably safe place in anticipation of that danger.

In both Concord and Mozer, the scope of the risk created was not that of an arsonist setting fire to a building, per se, but rather the risk of fire itself. By failing adequately to protect its customers from the danger of fire, the court held that the owner “assumed the foreseeable risk that fire might someday trap its patrons leaving them without an escape route.” Viewing the risk as that of fire

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240. 341 So. 2d at 243.
241. Id. at 244. The judge instructed the jury as follows: “Violations of the Miami Beach Fire Code is negligence whether the defendant knew of the existence of the ordinance or not. If you find that the person alleged to have been negligent violated the ordinance, such person would be negligent.” Id.
242. 177 So. 2d 880 (Fla. 3d Dist. 1965).
243. Restatement (Second) of Torts § 442B (1965).
244. 341 So. 2d at 244 (quoting Mozer v. Semenza, 177 So. 2d 880, 883 (Fla. 3d Dist. 1965)).
245. Id. at 245.
itself, the Third District refused to hold that the act of the arsonist, standing alone, constituted an independent intervening cause which would serve to insulate the owner from liability.

In the recent case of *Vining v. Avis Rent-A-Car Systems, Inc.*, the issue certified to the Supreme Court of Florida by the Third District was whether "the owner of a car, who leaves it unlocked with the key in the ignition in violation of Florida’s Unattended Motor Vehicle Statute § 316.097 F.S. (1975), is liable for the conduct of a thief who steals the car and subsequently injures someone while operating the stolen vehicle." In upholding the trial court’s dismissal of the complaint with prejudice, the Third District reasoned that Avis would not be liable for the damages caused by the thief since the criminal act broke the chain of causation, and that "therefore, as a matter of law, Avis’ negligence was not the proximate cause of the plaintiff’s injuries."

The Supreme Court of Florida reversed, recognizing that a number of jurisdictions have eschewed the “traditional approach” employed in key-in-the-ignition cases. Following the reasoning of *Nicholas v. Miami Burglar Alarm Co.*, in the context of a statute prohibiting one to leave keys in one’s car while the vehicle is unattended, the court held that if the plaintiff can establish that the statutory violation was the proximate cause of his injury, he will be entitled to recover. The plaintiff was within that class of persons that the statute was intended to protect, and his injuries were of the

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246. 354 So. 2d 54 (Fla. 1977).
247. Id. at 55. FLA. STAT. § 316.097 (1975) (current version at § 316.1975 (1977)) prohibits a person from leaving his vehicle unattended "without first stopping the engine, locking the ignition and removing the key." The court noted that the legislature recognized that an automobile operated by an unauthorized person is more likely to be "operated in a manner hazardous to the well being of the general public." 354 So. 2d at 56.
248. 354 So. 2d at 55. The Third District placed heavy reliance upon Lingefelt v. Hanner, 125 So. 2d 325 (Fla. 3d Dist. 1960), which was decided on facts similar to those in *Vining*.
249. 354 So. 2d at 55. Those jurisdictions outside Florida following the so-called “traditional approach” have generally denied relief to the injured plaintiff either by holding that the theft is an independent intervening agency which breaks the chain of causation between plaintiff and owner or by holding that the owner was never under a duty to the injured plaintiff in the first instance. See, e.g., Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 372 P.2d 333 (1962); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Liberty v. Holfeldt, 221 Md. 62, 155 A.2d 698 (1959); Merchants Delivery Serv., Inc. v. Joe Esco Tire Co., 533 P.2d 601 (Okla. 1975); Clements v. Tashjoin, 92 R.I. 308, 168 A.2d 472 (1961). But see Gaither v. Meyers, 404 F.2d 216 (D.C. Cir. 1968); Davis v. Thornton, 384 Mich. 138, 180 N.W.2d 11 (1970); Zinck v. Whalen, 120 N.J. Super. 432, 294 A.2d 727 (Super. Ct. App. Div. 1972). The Supreme Court of Florida placed heavy reliance upon the reasoning in *Zinck* for the proposition that the “key to duty, negligence, and proximate cause” in such a case is the reasonable foreseeability of harm to other motorists. 354 So. 2d at 55.
250. 339 So. 2d 175 (Fla. 1976); see text accompanying notes 226–33 supra.
type that the statute was designed to prevent.\textsuperscript{252} In concluding that the plaintiff alleged sufficient facts to state a cause of action, the supreme court stated:

The key to proximate cause is foreseeability. In light of the facts alleged by plaintiff, it could be said that a reasonable man should foresee the theft of an automobile left unattended with the keys in the ignition in a high crime area. Also, a reasonable man could foresee the increased danger of injury to the general public using the highways should such a theft occur. The owner of a dangerous instrumentality must exercise due care to ensure that such a danger does not occur.\textsuperscript{253}

XI. THE DANGEROUS INSTRUMENTALITY DOCTRINE

Briefly stated, the dangerous instrumentality doctrine relates to situations in which a master is held liable when his servant misuses an instrumentality which has been entrusted to him for his own purposes. The instrumentality must either be highly dangerous or easily capable of misuse so as to raise a high risk of harm to others. In general, the doctrine can apply only when the servant is engaged in his employment and, while so engaged, has custody of the instrumentality. It has been stated that the justification for the doctrine lies "in the especial opportunity and temptation afforded to the servant to misuse the instrumentality under the conditions likely to arise in the employment—or in other words, again, the foreseeability and indeed especial likelihood of the tort."\textsuperscript{254}

In \textit{Bickley v. Castillo},\textsuperscript{255} the defendant drove his automobile into a service station for repairs and entrusted it to a mechanic who, while road testing the vehicle, became involved in an accident with the plaintiff. The precise question facing the District Court of Appeal, Third District, was whether "the dangerous instrumentality doctrine applies to hold an owner of a vehicle liable for damages to a person injured by said vehicle on the public highway, as a result of the negligent road testing of the vehicle by a garage repairman, who maintained both control and custody over the vehicle."\textsuperscript{256} Find-

\textsuperscript{252} 354 So. 2d at 56. The supreme court added that the holding of the Third District, in addition to being in conflict with \textit{Nicholas}, would logically serve, if followed, to bar recovery for injured parties under the Florida Unattended Motor Vehicle Statute, FLA. STAT. § 316.097 (1975) (current version of FLA. STAT. § 316.1975 (1977)), since the theft necessarily precedes the injury. \textit{Id.}

\textsuperscript{253} 354 So. 2d at 56.

\textsuperscript{254} \textit{W. PROSSER}, supra note 8, § 70, at 467.

\textsuperscript{255} 346 So. 2d 625 (Fla. 3d Dist. 1977).

\textsuperscript{256} \textit{Id.} at 626.
ing Harfred Auto Repairs, Inc. v. Yaxley to be dispositive, the court held that the dangerous instrumentality doctrine was inapplicable. In support of its ratio decidendi, the Third District briefly articulated the basis for applying the doctrine to automobiles: "The rationale . . . is founded upon the principle that the dangerous instrumentality doctrine as applied to automobiles is grounded exclusively upon respondent superior (master-servant), and garagemen and mechanics are generally independent contractors." 258

Although Bickley did not go as far as Harfred in articulating the underpinnings of the evolving independent contractor exception to the dangerous instrumentality doctrine, the basic principle is the same in each case. When an owner places his automobile in the custody of a repairman and thereafter has no knowledge of or control over the operation of the vehicle while it is in the repairman's possession, then "[i]n the absence of negligence on the part of the owner, an independent contractor should be solely liable for negligent operation of the automobile during the period in which it has custody and control of it." 259

XII. THE RESCUE DOCTRINE

Since Perotta v. Tri-State Insurance Co., 260 the rescue doctrine has been described in the following manner: "[O]ne who is injured in reasonably undertaking a necessary rescue, may recover for his personal injuries from the person whose negligence created the peril necessitating the rescue." 261 In essence, Florida law recognizes that "danger" often invites rescue. This doctrine was addressed recently in Newsome v. Saint Paul Fire & Marine Ins. Co., 262 in which the plaintiff rescuer was attempting to assist two other persons in pushing a motor vehicle from a crowded highway when a passing vehicle struck him. Holding that a jury question was properly presented, the District Court of Appeal, Second District, explained that "[f]or the rescue doctrine to come into play the defendant must have been

257. 343 So. 2d 79 (Fla. 1st Dist. 1977); accord, Comer v. Rodriguez, 346 So. 2d 113 (Fla. 3d Dist. 1977).
258. 346 So. 2d at 626 (emphasis added).
259. In Harfred, the First District provides an excellent synopsis of the dangerous instrumentality doctrine and the independent contractor exception thereto. The court noted, however, that the Supreme Court of Florida had not ruled on the independent contractor exception in the context presented. 343 So. 2d at 81.
260. Id. at 82; accord, Comer v. Rodriguez, 346 So. 2d 113 (Fla. 3d Dist. 1977).
261. 317 So. 2d 104 (Fla. 3d Dist. 1975), cert. denied, 330 So. 2d 20 (Fla. 1976).
262. Id. at 105.
263. 350 So. 2d 825 (Fla. 2d Dist. 1977).
negligent, the person (or property) to be rescued must have been in imminent peril, and the rescuer must have acted reasonably."\(^{264}\)

XIII. **Wrongful Death**

In a case of first impression, the Supreme Court of Florida in *Stern v. Miller*\(^{265}\) was called upon to decide "whether an unborn, viable child killed as a direct and proximate result of another's negligence is a 'person' within the intent of section 768.19, Florida Statutes (1973)."\(^{266}\) The issue was first touched upon in *Davis v. Simpson*\(^{267}\) in which the District Court of Appeal, First District, held that an unborn, viable fetus was not a person for the purposes of the wrongful death statute.\(^{268}\) In *Stern*, the supreme court acknowledged that this view was contrary to the weight of authority in other jurisdictions as a result of a rapid growth of tort law in the area of prenatal injuries.\(^{269}\) Recognizing that only eleven states continue to adhere to the common law requirement of live birth, the supreme court appeared persuaded by the rationale that favors a cause of action for the death of a viable but unborn fetus.

Notwithstanding its dissatisfaction with the live birth requirement, the supreme court viewed the issue presented in *Stern* as one which should be addressed by the legislature.\(^{270}\) Emphasizing the legislature's awareness of *Stokes v. Liberty Mutual Insurance Co.*\(^{271}\) at the time it enacted the new Florida Wrongful Death Act,\(^{272}\) the court reasoned that the legislature had an ample opportunity to define further the term "person" since it is presumed to know the existing law when enacting a statute. Based upon the foregoing and other factors, the court answered the certified question in the negative and stated:

The mere reading of the section regarding damages clearly indicates, on the basis of logic, that the legislature did not intend to

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\(^{264}\) *Id.* at 826.

\(^{265}\) 348 So. 2d 303 (Fla. 1977). In *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968), the court held that a stillborn fetus, prenatally injured by the negligence of a third person, was not a "minor child" under Florida's former Wrongful Death of Minors Act. *Fla. Stat.* § 768.03 (1971) (repealed 1972). In addition, it was expressly stipulated in *Stokes* that viability was not an issue.

\(^{266}\) 348 So. 2d at 304. *Fla. Stat.* §§ 768.16-.27 (1977) are commonly known as the "Florida Wrongful Death Act." Section 768.19 provides for the right of action against those persons causing the "wrongful" death of the decedent.

\(^{267}\) 313 So. 2d 796 (Fla. 1st Dist. 1975).


\(^{269}\) 348 So. 2d at 305 n.4, 306 n.5.

\(^{270}\) *Id.* at 307.

\(^{271}\) 213 So. 2d 695 (Fla. 1968); see note 265 supra.

\(^{272}\) 348 So. 2d at 307. *See also* 1972 Fla. Laws, ch. 72-35, § 1.
create a cause of action for a stillborn child. We recognize that the new Wrongful Death Act is remedial in nature and is to be construed liberally. However, we cannot construe the statutory provisions so "liberally" as to reach a result contrary to the clear intent of the legislature. The act must be construed to be consistent with the objective sought to be accomplished. . . . This court is without authority to do by statutory construction that which the legislature has not intended. 273

The issue of viability also was raised in Duncan v. Flynn. 274 In Duncan, an action was brought for the death of a baby that could not be separated successfully from its mother after its head had emerged from the womb. Concluding that the child could not be born alive, the attending physicians directed their efforts toward saving the mother's life and, with her husband's permission, removed the baby's head. The baby's torso was thereafter removed through Caesarean section. 275 In their complaint, the parents alleged that the doctors were negligent in failing to recognize initially that a Caesarean section would be required. Underlying the action was the threshold issue of whether a live birth had occurred so as to give rise to an action for the wrongful death of the child.

Although the issue was one of first impression under Florida law, the District Court of Appeal, Second District, was guided by several cases from other jurisdictions that set forth the requirements for establishing the existence of live birth. 276 The court adopted the view that a prerequisite to live birth in the context of an action for wrongful death is the separate and independent existence of the child from its mother. 277 The Second District went on to state:

This view, we think provides a reasonably definitive test, is logical, and is supported by the authorities. Generally, the requirements of separate and independent existence will be met by a showing of expulsion (or in a Caesarean section by complete removal) of the child's body from its mother with evidence that the cord has been cut and the infant has an independent circulation of blood. 278

273. 348 So. 2d at 308.
274. 342 So. 2d 123 (Fla. 2d Dist. 1977).
275. Id. at 124.
276. Id. at 125-26. Under the prevailing view, live birth requires expulsion from the body of the mother. See, e.g., Goff v. Anderson, 91 Ky. 303, 15 S.W. 866 (1891). The more recent cases have concluded that live birth does not take place until the child has been completely expelled and has attained a separate and independent existence. See generally Annot., 65 A.L.R.3d 413 (1975). It has been thought that this requires that there be an independent circulation of blood. See also Wehrman v. Farmers' & Merchants' Sav. Bank, 221 Iowa 249, 259 N.W. 564 (1935).
277. 342 So. 2d at 126.
278. Id.
Unlike Stern, the court in Duncan followed Stokes on the issue of whether the word “person” or “minor child” includes a viable full-term fetus not born alive. It concluded that it was not a person under the wrongful death statute.

The decision in Henderson v. Insurance Co. of North America involved the statutory interpretation of the term “person” under the Florida Wrongful Death Act. In Henderson, the personal representative of the decedent’s estate brought an action for loss of net accumulations on behalf of four surviving adult children who were not dependent upon the decedent for support.

In response to the personal representative’s contention that the statutory term “lineal descendants” indicates a legislative intention not to restrict beneficiaries of that section to minor children, the District Court of Appeal, Fourth District, held that adult children, who were not dependent upon the decedent for support, were not “survivors” under section 768.21(6)(a).

A different side of the question raised in Henderson was presented to the Fourth District in Wojcik v. United Services Automobile Association. The precise issue was whether “parents of a deceased are entitled to recover for their mental pain and anguish as a result of the death of their son where he is not a minor.” In Wojcik, an action was brought by the personal representative on behalf of the mother and father of a decedent killed in an auto

279. 348 So. 2d 303 (Fla. 1977).
280. 213 So. 2d 695 (Fla. 1968).
282. See id. § 768.03.
283. 342 So. 2d at 127. The court stated: “We perceive the legislative purpose of the wrongful death statute being to provide compensation within the ordinary contemplation of persons who have been born alive.” See also Davis v. Simpson, 313 So. 2d 796 (Fla. 1st Dist. 1975).
284. 347 So. 2d 690 (Fla. 4th Dist. 1977).

The statute defines survivors as:

[T]he decedent’s spouse, minor children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate child of a mother, but not the illegitimate child of a father unless the father has recognized a responsibility for the child’s support.

Id.
286. See Fla. Stat. § 768.21(6)(a) (1977). Under this section the decedent’s personal representative may recover decedent’s loss of earnings “from the date of injury to the date of death, less lost support of survivors.” In addition, “[i]f the decedent’s survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered.”
287. 347 So. 2d 692.
288. 347 So. 2d 1051 (Fla. 4th Dist. 1977).
289. Id.
accident. Damages predicated upon loss of services and pain and suffering were sought. The personal representative maintained that by consolidating survival and wrongful death actions into the new Florida Wrongful Death Act,290 the legislature intended to allow a decedent's survivors to recover damages for their own pain and suffering in lieu of that recognized under the former survival statute291 for the decedent's pain and suffering prior to his death. In enacting the Florida Wrongful Death Act,292 the legislature continued to recognize the decedent's loss of earnings, medical expenses and funeral expenses as recoverable damages but eliminated the claim for a decedent's pain and suffering from the time of injury to the time of death by replacing it with a claim for the pain and suffering of "close relatives." The question properly before the court, therefore, was whether the parents of an adult decedent are "close relatives" under the Florida Wrongful Death Act.

In construing the term "close relatives" as not including the parents of an adult decedent, the Fourth District stated:

A fair reading of the cited cases in the Florida Wrongful Death Act leaves little doubt in our mind that the term "close relatives" initially used by Chief Justice Overton in Martin was not intended to be an accurate specification of the persons who can recover pain and suffering for wrongful death. In context "close relatives" is a collective phrase intended to describe certain survivors whom the Act authorizes to recover for pain and suffering, viz., a surviving spouse, minor children of the decedent, and each parent of a deceased minor child, 768.21(4).293

The court went on to emphasize that the Supreme Court of Florida, in Bassett v. Merlin,294 resolved the question whether the surviving parents of adult offspring have the right to recover damages for their own mental pain and suffering by ruling that section 768.21 was constitutional even though "it denied parents of an adult child the right to damages for mental pain and suffering."295

In another case of first impression, the District Court of Appeal, Fourth District, in Wilcox v. Jones,296 determined that the Florida Wrongful Death Act permits the father of an illegitimate child to recover damages for his child's wrongful death. In arriving at its

290. 1972 Fla. Laws, ch. 72-35 § 1 (current version at Fla. Stat. §§ 768.16-.27 (1977)).
292. 1972 Fla. Laws, ch. 72-35 §§ 1, 2 (current version at Fla. Stat. §§ 768.16-.27 (1977)).
293. 347 So. 2d at 1052.
294. 335 So. 2d 273 (Fla. 1976).
295. Id. at 274.
296. 346 So. 2d 1037 (Fla. 4th Dist. 1977).
determination, the court relied upon the language of the Florida Wrongful Death Act, the decision of the Supreme Court of the United States in *Trimball v. Gordon* and a growing trend toward the recognition of the rights of the illegitimate father. In addition, the Fourth District was careful to avoid potential equal protection problems by emphasizing that the natural mother has been recognized as a parent of an illegitimate child within the statute. Acknowledging that the Florida Wrongful Death Act lends itself to a liberal construction, the court concluded:

> To recognize the right of a natural mother of an illegitimate child to maintain a wrongful death action but in the same breath to refuse to recognize the corresponding right of the natural father, would violate the equal protection clauses of the state and Federal constitutions. "The father is no more nor less guilty of immorality than is the mother."  

Whether evidence that a decedent intended to divorce his wife is admissible in a wrongful death action brought on behalf of the widow was addressed for the first time under Florida law in *Adkins v. Seaboard Coast Line Railroad Co.* In *Adkins*, it was held that such evidence would be admissible as probative of the decedent’s "intent and probable future actions" in assessing the survivor’s damages, in light of the statute’s provision for recovery of both sentimental and economic losses. Additionally, the District Court of Appeal, Second District, held that evidence of domestic discord is logically relevant in ascertaining the extent of the survivor’s mental pain and suffering and loss of companionship and protection. The court reasoned that a contrary ruling would “authorize the perpetration of fraud upon the jury” and, relying on *Florida Central & Peninsular Railroad Co. v. Foxworth*, stressed the necessity of

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298. 346 So. 2d at 1038.
299. Id.
300. 351 So. 2d 1088 (Fla. 2d Dist. 1977).
301. Id. at 1093. FLA. STAT. § 768.21 (1975) (current version at FLA. STAT. § 768.21 (1977)), articulates the nature of the damages recoverable by the potential beneficiaries in an action for wrongful death.
302. 351 So. 2d at 1093.
303. 41 Fla. 1, 25 So. 338 (1899).
allowing the presentation of "an honest and accurate picture of the marriage relationship." 304

XIV. INDEMNITY AND CONTRIBUTION

A. Indemnity

It is well-settled that the obligation to indemnify is predicated upon an express305 or implied contractual relationship between tortfeasors.306 In addition, it has been recognized that the violation of a duty owed by a third party defendant who is actively negligent to a third party plaintiff who is passively negligent can give rise to an implied contractual obligation to indemnify.307 In proceeding against a third party defendant, a third party plaintiff is not confined to the plaintiff's version of the facts as asserted in the complaint but is instead permitted to present his own allegation of fact from which all reasonable inferences will be deemed admitted for the purpose of a motion to dismiss.308

It has been held that an indemnitee's rights are determined by actual wrongdoing and not by mere allegations thereof.309 As stated by the District Court of Appeal, Fourth District, in Insurance Co. of North America v. King: "A plaintiff should not be able to arbitrarily deprive a defendant of his right to indemnification from a third party by alleging that he was actively negligent when in fact

304. 351 So. 2d at 1093. The court noted that its decision was in accord with the trend of authority. See, e.g., Peterson v. Pete-Erickson Co., 244 N.W. 68 (Minn. 1932); Allen v. Riedel, 425 S.W.2d 665 (Tex. Ct. App. 1968). See generally Annot., 79 A.L.R.2d 819 (1968).

305. See Kressley-Davis, Inc. v. Winn-Dixie Stores, Inc., 340 So. 2d 501 (Fla. 3d Dist. 1976).

306. First Church of Christ Scientist v. City of St. Petersburg, 344 So. 2d 1302, 1304 (Fla. 2d Dist. 1977).

307. Id. See also Florida Power Corp. v. Taylor, 332 So. 2d 687 (Fla. 2d Dist. 1976); Stuart v. Hertz Corp., 302 So. 2d 187 (Fla. 4th Dist. 1974).

The Second District noted in First Church that an implied contractual duty to indemnify has been fashioned from the violation of a duty owed to the third party plaintiff by the third party defendant and also the third party plaintiff's passive negligence as compared to the third party defendant's active negligence. 344 So. 2d at 1304.

Addressing the nature and consequence of the active-passive negligence distinction, the Third District recently stated:

In order for appellant, as a subcontractor, to have been held liable to the contractor-defendant for indemnification, pursuant to the third party complaint, a jury would have to find appellant actively negligent and the defendant-contractor passively negligent. . . . As an actively negligent tortfeasor then, appellant could not pursue a cause of action in indemnity against appellees . . . notwithstanding the admitted absence of either an express or implied contract between appellant and appellees.

Florida Rock & Sand Co. v. Cox, 344 So. 2d 1296, 1298 (Fla. 3d Dist. 1977).

308. 344 So. 2d at 1303.

309. Insurance Co. of N. Am. v. King, 340 So. 2d 1175 (Fla. 4th Dist. 1976).
the defendant is found not to have been actively negligent.\textsuperscript{310}

Once the right to indemnification has been established, an indemnitee is entitled to recover attorney's fees and reasonable and proper legal costs and expenses which he is compelled to pay as a result of actions by or against him with reference to the matter against which he is indemnified.\textsuperscript{311}

**B. Contribution**

In *New Hampshire Insurance Co. v. Petrik*,\textsuperscript{312} the issue raised on appeal was whether a court, as a matter of law, must dismiss a third party action for contribution brought by a defendant against a third party not named by the plaintiff as a party-defendant. Unlike *Nationwide Mutual Insurance Co. v. Fouts*,\textsuperscript{313} in which the trial court resolved the identical issue in favor of third party practice as a means of achieving contribution, the trial court in *Petrik* held that section 768.31(4)(d) of the Florida Statutes precludes the use of third party practice as a means of effecting contribution.\textsuperscript{314} In reversing the trial court, the District Court of Appeal, First District, expanded the reasoning set forth in *Nationwide* by addressing the issue in the interrelated context of the Uniform Contribution Among Tortfeasors Act and the Florida Rules of Civil Procedure regarding third party practice.\textsuperscript{315}

Carefully avoiding the trial court's emphasis on section 768.31(4)(d), the First District instead focused upon the language of section 768.31(4)(a),\textsuperscript{316} which it viewed as affecting contribution

\textsuperscript{310} Id. at 1176.

\textsuperscript{311} Id.

\textsuperscript{312} 343 So. 2d 48 (Fla. 1st Dist. 1977).

\textsuperscript{313} 323 So. 2d 593 (Fla. 2d Dist. 1975). In *Nationwide*, the District Court of Appeal, Second District, dealt with the same question as that addressed in *Petrik*. Unlike *Petrik*, *Nationwide* relied on *Fla. R. Civ. P. 1.180* and the Commissioner's comments to the Uniform Contribution Among Tortfeasors Act, *Fla. Stat.* § 768.31 (1977), as reflecting Florida's intention to provide for the enforcement of contribution by way of third party practice.

\textsuperscript{314} New Hampshire Ins. Co. v. Petrik, 343 So. 2d at 48; see *Fla. Stat.* § 768.31(4)(d) (1977), which states in pertinent part:

> If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either:
>
> 1. Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment, or
>
> 2. Agreed, while the action is pending against him, to discharge the common liability and has within 1 year after the agreement paid the liability and commenced his action for contribution.

\textsuperscript{315} 343 So. 2d at 49-50; *Fla. Stat.* § 768.31 (1977); *Fla. R. Civ. P. 1.180*.

\textsuperscript{316} *Fla. Stat.* § 768.31(4)(a) (1975) (current version at *Fla. Stat.* § 768.31(4)(a) (1977)) reads in pertinent part: "Whether or not judgment has been entered in an action against two
by way of a separate action as a procedural alternative to third party practice. The court reasoned that: (1) the drafters had left the enforcement of the Uniform Contribution Among Tortfeasors Act to the states; (2) the Supreme Court of Florida had approved the use of third party practice; and (3) the proposed method had won approval in other jurisdictions. The absence of a provision relating to the use of third party practice to effect contribution, therefore, would not be fatal.

In Best Sanitary Disposal v. Little Food Town, Inc., an action was brought against the owner of a refuse disposal container and the landlord and tenant of the property on which it was located on behalf of a minor who was injured while playing on the container. Thereafter, crossclaims were filed. After the landlord, tenant and their insurer settled with the plaintiff, the jury returned a verdict against the tenant and the owner. The tenant then filed a motion for contribution, seeking reimbursement from the owner for one-half of the judgment.

Under the Uniform Contribution Among Tortfeasors Act, one of several persons liable in tort for the same injury has a right to recover from the other tortfeasors whatever he has paid in excess of his pro rata share of the common liability. Of particular significance is that section of the Act which appears to preclude a joint tortfeasor from recovering contribution in an action where he enters

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or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action."

317. The Petrik court listed cases from other jurisdictions which had approved third party practice as a method for achieving contribution under the Act. Such states include New Jersey, Maryland, Massachusetts, New Mexico, North Carolina and Rhode Island. 343 So. 2d at 50.

318. Id. The First District added:

The logic is recognized that to allow such a procedure efficiently conserves the court's time, effort, expense, and provides consistency of result wherein the action which establishes the plaintiff's right to recovery also establishes against whom that recovery should be made. The same jury that "understands" the plaintiff's case should also be permitted to relate why it found in favor of the plaintiffs by naming the defendants against whom recovery should be made. If there is no recovery for the plaintiff, there can be no right of contribution.

The Florida Uniform Contribution Among Tortfeasors Act does not prohibit the third party practice recognized by the Supreme Court in the Florida Rules of Civil Procedure. Since the establishment of procedure is peculiarly a judicial function and because of the implicit logic that the same jury which assesses recovery for the plaintiff should also assess against whom such recovery is made, the third party action for contribution against a party not made a defendant is not prohibited as a matter of law.

319. 339 So. 2d 222 (Fla. 2d Dist. 1976).
320. Id. at 225.
321. FLA. STAT. § 768.31 (1977).
into a settlement with a claimant and the other tortfeasor’s liability is not also extinguished by the settlement.\textsuperscript{322}

The owner argued that the tenant was not entitled to contribution since it settled with the plaintiffs without also obtaining an extinguishment of the owner’s liability to the plaintiffs. The tenant, on the other hand, argued that since the amount it agreed to pay would be deducted from any verdict obtained against the owner under section 768.31(5)(a) of the Florida Statutes,\textsuperscript{323} the effect of this was equivalent to an extinguishment of the owner’s liability.

The District Court of Appeal, Second District, did not agree that the language of section 768.31(5) could be read to equate a reduction in the amount of the claim against the owner to the extinguishment of the owner’s liability and noted that when one of several tortfeasors settles a claim, that tortfeasor is relieved of liability for contribution to any other tortfeasor. Viewing subsections (1)(d) and (4)(b) of the Act as presenting “opposite sides of the same coin,”\textsuperscript{324} the court stated:

Thus, if tortfeasor A (Little Food Town) settles out and tortfeasor B (Best) elects to go to trial and suffers a large verdict, Section (4)(b) protects tortfeasor A from any claim for contribution by tortfeasor B. However, at the same time section (1)(d) provides that if tortfeasor A (Little Food Town) buys its peace before trial without absolving tortfeasor B (Best) from all further responsibility, then tortfeasor A cannot later obtain contribution from tortfeasor B. This is borne out by the comment of the Commissioners under Section (4) of the uniform act.\textsuperscript{325}

As a result, it was held that the tenant absolutely limited its liability to $45,000 by virtue of the agreement and that the tenant’s payment of a disproportionate amount of the plaintiffs’ claim was a circumstance of its own making for which it was not entitled to receive contribution.

Prior to the enactment of the Uniform Contribution Among Tortfeasors Act, it was well-settled that a codefendant could not

\textsuperscript{322} \textit{Id.} § 768.31(2)(d) (1977) reads:

A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement or in respect to any amount paid in a settlement which is in excess of what was reasonable.

\textsuperscript{323} \textit{Fla. Stat.} § 768.31(5)(a) (1975) (current version at \textit{Fla. Stat.} § 768.31(5)(a) (1977)) provides that a release or covenant not to sue, given in good faith, will not discharge other tortfeasors unless it so provides, but that it will reduce the claim against the others to the extent of any amount stipulated by the release or the covenant or in the amount of the consideration paid for it, whichever is greater.

\textsuperscript{324} \textit{339 So. 2d} at 226.

\textsuperscript{325} \textit{Id.}
challenge a verdict rendered in favor of another codefendant since there was no common law right to contribution. In *Northshore Hospital v. Martin,* this issue was reexamined in light of the Florida Uniform Contribution Among Tortfeasors Act and the division of authority between jurisdictions which had addressed the issue.

Adopting an approach similar to that taken in New York and California, the District Court of Appeal, Third District, noted that the contribution statute had not changed the existing rule that a party has no right of appeal from judgment favoring a codefendant and that the right of contribution was wholly dependent upon the "presence of specific statutory conditions." Emphasizing that "common liability" is a prerequisite to the right of contribution, the Third District concluded: "If the legislature had intended to allow a defendant to appeal the exoneration of a codefendant whose liability was not actively pursued by the complaining party, it would have done so clearly, given the prevailing policy which denies such appeals."

**XV. Professional Malpractice**

**A. Medical Malpractice**

Since the constitutionality of the Florida Medical Malpractice Reform Act was upheld in *Carter v. Sparkman,* a series of cases regarding the medical mediation provisions of the Act have arisen. The question of whether a circuit judge, sitting as a judicial

327. 344 So. 2d 256 (Fla. 3d Dist. 1977).
329. *See,* e.g., Bocchi v. Karnstedt, 238 Minn. 257, 56 N.W.2d 628 (1953) (codefendant permitted to challenge a verdict rendered in favor of another codefendant); Eller v. Crowell, 238 S.W.2d 310 (Mo. 1951) (appealing defendant could not complain of alleged error in a codefendant's instruction to the jury); Hutcherson v. State, 105 W. Va. 184, 142 S.E. 444 (1928).
331. 344 So. 2d at 258.
332. *Id.*
334. 335 So. 2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977); accord, Berman v. Duane, 341 So. 2d 996 (Fla. 1976).
referee, has the authority to alter the ten month time limit for medical mediation was raised in *State ex rel. McGuirk v. Cowart*.\(^3\) In *McGuirk*, a request for medical mediation was filed on a medical malpractice claim pursuant to statute.\(^3\) Thereafter, the relator challenged the constitutionality of the statute. The circuit court dismissed the request for medical mediation and transferred the cause to the circuit court. In the interim, the Supreme Court of Florida, in *Carter v. Sparkman*,\(^3\) declared the statute to be constitutional, and the circuit court then reinstated the medical mediation claim. The claimant then alleged that the ten month time limit under the statute had expired and that a fortiori the panel lost its jurisdiction to proceed. Relying in part on *State of Florida ex rel. Mercy Hospital v. Vann*,\(^3\) the District Court of Appeal, Third District, held that medical defendants should not be deprived of mediation and that the circuit court’s order dismissing the claim and transferring the cause to the circuit court was unauthorized and void, stating that:

[T]here still adheres to the mediation panel the time which remained on the ten month statutory period at the time the unauthorized order was entered.

\(^3\)335. 344 So. 2d 624 (Fla. 3d Dist. 1977).

\(^3\)336. FLA. STAT. § 768.44(1)(a) (Supp. 1976) (current version at FLA. STAT. § 768.44(1)(a) (1977)). The section requires that any person claiming damages for malpractice “submit such claim to an appropriate medical liability mediation panel before that claim may be filed in any court of this state.” The time limitations of the Act are found in § 768.44(3) which reads in pertinent part, as follows:

The hearing shall be held within 120 days of the date the claim was filed with the clerk unless, for good cause shown upon order of the judicial referee, such time is extended. Such extension shall not exceed 6 months from the date the claim is filed. If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with law.

\(^3\)337. 335 So. 2d 802 (Fla. 1976).

\(^3\)338. 342 So. 2d 1073 (Fla. 3d Dist. 1977). In *Mercy Hospital*, the hospital sought a writ of mandamus to compel the medical mediation panel to proceed in a case in which the hospital was a defendant. Under the facts in *Mercy Hospital*, a mediation panel was appointed but was thereafter stayed by the circuit judge, who was also the judicial referee of the panel, pending the Supreme Court of Florida’s determination as to the constitutionality of the Act. After the Act was held constitutional in *Carter v. Sparkman*, 335 So. 2d 802, *cert. denied*, 429 U.S. 1041 (1977), the hospital moved for dissolution of the order staying the proceedings. Thereafter, the circuit judge signed an order stating that the mediation panel was without jurisdiction on the ground that the case had been pending for a period of longer than 10 months.

Limiting its holding to the specific facts before it, the Third District held:

The circuit judge who has by his own action in the stay order and over the objection of the defendant rendered the progress of the mediation panel impossible, has a duty now to proceed with the cause based upon the concept that a party . . . may not be deprived of a valuable legal right without due process of law.

\(^3\)342 So. 2d at 1075.
The ten month statutory limit for holding medical malpractice mediation hearings is clear and unequivocal. It should be rigidly enforced so as to mitigate the plaintiff's pre-litigation burden imposed by the Act. 339

Although the statute provides for a hearing on the merits within 120 days from the filing of the claim and for extensions up to six months for good cause shown, when more than six months passes and there has been no hearing on the merits, a claimant's motion to terminate should be denied even if there is no extension for up to ten months from the filing of the claim. As stated in State ex rel. Love v. Jacobson: 340

The statute, by providing that if there is no hearing on the merits within ten months of the date the claim is filed the jurisdiction of the mediation panel terminates, thus provided that jurisdiction of the panel to holding a hearing on the merits necessarily extended until the expiration of such ten month period. 341

Notwithstanding the language of the statute, it has been held that where one files but fails to prosecute his claim for medical mediation due to inadvertance and not to design or to neglect, the court may stay a medical malpractice action pending under the order of trial court. 342 The situation differs from that in which a hospital fails to take affirmative action during the 120 day period following the filing of a claim for medical mediation. 343 In the latter case, the court in Mercy Hospital, Inc. v. Badia, 344 noted:

[T]he statute should be strictly construed against those seeking the benefits of it, the statute being in derogation of the normal right of a claimant to seek immediate redress in the courts. This pre-litigation burden was recognized by the Supreme Court of Florida . . . which upheld the constitutionality of these statutes. 345

In Mercy Hospital, the Third District affirmed the judicial referee's position that he was without jurisdiction to grant an extension request after the expiration of the 120 day period, and held that the

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339. Id. at 626-27.
340. 343 So. 2d 1328 (Fla. 3d Dist. 1977); accord Limond v. Llanio, 349 So. 2d 214 (Fla. 3d Dist. 1977).
341. 343 So. 2d at 1328 (emphasis added).
342. Richards v. Foulk, 345 So. 2d 402 (Fla. 3d Dist. 1977).
344. Id.
345. Id. at 632.
claimant was free to pursue its claim in circuit court without further delay. 348

It has been held that where a hospital files a third party complaint against a physician for contribution or indemnity during the pendency of a malpractice action which was brought before the effective date of the statute, the hospital's third party claim against the physician is exempt from the mediation requirement 347 since the third party complaint was procedurally authorized and, therefore, a part of the case. 348

1. STATUTE OF LIMITATIONS

The statute of limitations regarding medical malpractice actions 349 has generated controversy in the area of retroactive application of its provisions.

In Foley v. Morris, 350 the petitioner filed his complaint against Dr. Morris on September 17, 1974, alleging that the physician left a rubber drain in his body during surgery performed on April 14, 1971. The drain had been removed in September, 1971. 351 The doctor sought dismissal on the ground that the action was barred by the recent two year statute of limitations rather than the four year statute of limitations which was in effect at the time the cause of action accrued.

Refusing to hold the new statute of limitations applicable to the case before it, the Supreme Court of Florida recognized that the lower court, in effect, retroactively applied the new statute in a manner contrary to the intent of the legislature. After reviewing the new statute, the court stated: "Nothing in the language of the act manifests an intention by the Legislature to do otherwise than prospectively apply the new two-year statute of limitations." 352

346. Id. See Riccobono v. Cordis Corp., 341 So. 2d 805, 806 (Fla. 3d Dist. 1977) in which the court stated the policy underlying the Act as follows:

This statute clearly provides that prior to filing a malpractice claim in the circuit court, the complainant must submit such a complaint to a medical liability mediation panel. Plaintiff having failed to submit his claim to a mediation panel, the trial judge was eminently correct in entering the order of dismissal.

347. See Mt. Sinai Hosp., Inc. v. Mora, 342 So. 2d 1063 (Fla. 3d Dist. 1977); accord, O'Grady v. White, 345 So. 2d 358 (Fla. 3d Dist. 1977).

348. 342 So. 2d at 1064.

349. FLA. STAT. § 95.11(4)(b) (1977). The statute requires that the action be commenced within two years from the time the incident giving rise to the action occurred or within two years from the time the incident is discovered or should have been discovered in the exercise of due diligence, but in no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action accrued.


351. Id. at 216. This would be the date on which the plaintiff's cause of action "accrued."

352. Id. at 217.
supreme court adopted the following as a part of its ratio decidendi:

Where the Legislature has not sufficiently manifested its intent whether a statute of limitations should apply retrospectively or should apply prospectively only, the question is passed onto the courts to determine, as a matter of construction, in which of these ways the statute should apply. In most jurisdictions, in the absence of a clear manifestation of legislative intent to the contrary, statutes of limitation are construed as prospective and not retrospective in their operation, and the presumption is against any intent on the part of the legislature to make such a statute retroactive . . . .

2. RULES OF CIVIL PROCEDURE

In a case of original jurisdiction, the Supreme Court of Florida, in In re: The Florida Bar, Rules of Civil Procedure, approved certain amendments to the discovery provisions of the Rules of Civil Procedure in connection with the proposed rules of medical mediation procedure. The recent amendments allow depositions taken in a medical liability mediation proceeding and answers to interrogatories propounded in a medical liability mediation proceeding to be used in a subsequent civil action as if the deposition was originally taken or the interrogatories originally propounded for it.

3. OTHER MEDICAL MALPRACTICE CASES

In Sims v. Helms, the Supreme Court of Florida answered the question of whether expert testimony is required in determining whether a doctor properly proceeded in an "emergency situation."

Acknowledging that "[n]egligence cannot be inferred from the fact that the surgery was unsuccessful or terminated in unfortunate results," the court followed the authority of O'Grady v. Wickman and held that where the method of treatment is challenged, expert testimony is required.

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353. Id. (quoting 51 AM. JUR. 2d Limitation of Actions § 57 (1970)); accord, Reinhardt v. Schwab, 343 So. 2d 837 (Fla. 1977); Fishman v. Crane, 340 So. 2d 1274 (Fla. 4th Dist. 1976).
354. 348 So. 2d 325 (Fla. 1977).
356. 345 So. 2d 721 (Fla. 1977).
357. Id. at 723.
358. 213 So. 2d 321 (Fla. 4th Dist. 1968). The court also noted that "the overwhelming weight of authority [in other jurisdictions] supports this view." 345 So. 2d at 724.
359. Id. at 723.
B. Attorney Malpractice

In a case of first impression, the District Court of Appeal, Fourth District, in McAbee v. Edwards, addressed the issue of an attorney's liability to an intended beneficiary under a will for erroneously advising the testatrix that it would not be necessary for her to redraft the will after her remarriage in order to ensure that her daughter would remain the sole beneficiary of her estate. As a result of the attorney's advice, his client's widower successfully claimed an interest in the estate as a pretermitted spouse, which led to a settlement of $27,000 with the estate. The plaintiff beneficiary brought an action against the defendant attorney based upon negligence and breach of contract.

Recognizing a division of authority on the question presented, the court followed a line of California cases and noted that the better view favors a cause of action in favor of the intended beneficiary. The Fourth District quoted with approval language from Heyer v. Flaig, a case handed down by the Supreme Court of California:

[In a prior case,] we embraced the position that an attorney who erred in drafting a will could be held liable to a person named in the instrument who suffered deprivation of benefits as a result of the mistake. Although we stated that the harmed party could recover as an intended third-party beneficiary of the attorney-client agreement providing for legal services, we ruled that the third-party could also recover on a theory of tort liability for a breach of duty owed directly to him.

Accordingly, the Fourth District held that an attorney owes an intended testamentary beneficiary of an estate the duty properly to advise the testatrix of the necessity of changing her will after remarriage in order to effect her intended disposition. In so doing, the court adopted a "balancing of factors" test. The Fourth District stated:

[The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty

360. 340 So. 2d 1167 (Fla. 4th Dist. 1976).
361. Id. at 1168.
364. 340 So. 2d at 1169.
that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.\textsuperscript{365}

Underlying this determination, the court approved the California rationale regarding foreseeability and stated: "A reasonably prudent attorney should appreciate the consequences of a post-testamentary marriage, advise the testator of such consequences, and use good judgment to avoid them if the testator so desires. In the present case, defendant allegedly knew that the testatrix wished to avoid such consequences."\textsuperscript{366}

The statute of limitations on a cause of action for an attorney's negligence accrues when the client has notice or knowledge of the negligent act\textsuperscript{367} since "[i]t is impossible to rationalize how an injured client can be required to institute an action within a limited time after his cause of action accrues if he has no means of knowing by the exercise of reasonable diligence that the cause of action exists."\textsuperscript{368}

In Henzel v. Fink,\textsuperscript{369} the District Court of Appeal, Third District, applied this standard to hold that a client was chargeable with notice of alleged errors at or shortly after trial so as to preclude him from maintaining an action against his attorney some seven years after his conviction. Henzel makes it clear that, under some circumstances, one may be obligated to use "reasonable diligence" in apprising oneself of one's rights against one's attorneys.\textsuperscript{370}

The unique question of the liability of a seller's attorney to an unrepresented buyer in a real estate transaction for negligent errors favoring the seller in a closing statement was presented in Adams v. Chenowith.\textsuperscript{371} Noting that the attorney was ethically precluded from representing both parties\textsuperscript{372} and that the buyer was free to hire his own attorney, the District Court of Appeal, Fourth District, acknowledged that the attorney's allegiance was solely to the seller. In holding that a buyer cannot hold the seller's attorney liable for

\begin{itemize}
  \item \textsuperscript{365} Id. at 1169.
  \item \textsuperscript{366} Id. at 1170.
  \item \textsuperscript{367} Edwards v. Ford, 279 So. 2d 851 (Fla. 1973); Green v. Adams, 343 So. 2d 636 (Fla. 4th Dist. 1977); Henzel v. Fink, 340 So. 2d 1262 (Fla. 3d Dist. 1976), cert. denied, 348 So. 2d 948 (Fla. 1977).
  \item \textsuperscript{368} Edwards v. Ford, 279 So. 2d 851, 853 (Fla. 1973) (quoting Downing v. Vaine, 228 So. 2d 622, 625 (Fla. 1st Dist. 1969)).
  \item \textsuperscript{369} 340 So. 2d 1262, 1263 (Fla. 3d Dist. 1976), cert. denied, 348 So. 2d 948 (Fla. 1977).
  \item \textsuperscript{370} Id. at 1264.
  \item \textsuperscript{371} 349 So. 2d 230 (Fla. 4th Dist. 1977).
  \item \textsuperscript{372} See, e.g., FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY EC 514.
\end{itemize}
negligence in preparing a closing statement, the court stated: "[i]f anyone was negligent then no one was more negligent than the buyer in failing to take any minimum steps to complete this business deal in a proper fashion." The court concluded that where there are two interests to be protected, it cannot hold an attorney liable to all parties in the transaction unless it is alleged that he committed some nonnegligent tort such as fraud or theft. This is not the case, however, where an attorney acts in a patently negligent manner towards his own client by failing, for example, to file a claim in timely fashion.

An attorney's duty can become confusing, however, in circumstances such as those set forth in Amsler v. American Home Assurance Co. In that case, certain limited partners brought an action against an attorney for failing to obtain their written consent prior to recording certain financing documents with respect to partnership property. After examining the language of section 26 of the Uniform Limited Partnership Act and finding that the plaintiffs failed properly to allege the element of duty, the District Court of Appeal, Fourth District, followed the Washington case of Lieberman v. Atlantic Mutual Insurance Co. and concluded that the limited partner plaintiffs lacked standing to institute the suit. The court emphasized that any duty owing to the plaintiffs would be owed to the entire membership of the limited partnership, and, therefore, only the general partners would have had the right to institute the action.

XVI. ANIMALS

In Wamser v. City of St. Petersburg, the plaintiff brought an action against the city and its carrier for injuries sustained as a result of a shark attack while swimming in waters adjacent to a beach operated by the City of Treasure Island. Although the city had received reports of shark sightings on several occasions, each sighting proved to be porpoises. The District Court of Appeal, Sec-

373. 349 So. 2d at 231.
374. Id.
375. See, e.g., Tobin v. Witherspoon, 342 So. 2d 836 (Fla. 3d Dist. 1977).
376. 348 So. 2d 68 (Fla. 4th Dist. 1977).
377. FLA. STAT. §§ 620.26 (1975) (current version at FLA. STAT. § 620.26 (1977)). Section 620.26 reads as follows: "A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership."
379. 348 So. 2d 71.
380. 339 So. 2d 244 (Fla. 2d Dist. 1976).
ond District, found that there was nothing in the record to indicate that the city had any knowledge of a shark hazard or that an attack should have been expected.\textsuperscript{381} In holding that the city was under no duty to guard against the shark attack, the court stated:

We have found no Florida case dealing with the owners' or possessors' liability for injuries inflicted by wild animals in their natural habitat. The rule is that generally the law does not require the owner or possessor of land to anticipate the presence of or guard an invitee against harm from animals \textit{ferae naturae} unless such owner or possessor has reduced the animals to possession, harbors such animals, or has introduced onto his premises wild animals not indigenous to the locality.

In the absence of reasonable foreseeability of the danger, there was no duty on the part of the city to guard an invitee against an attack by an animal \textit{ferae naturae}, or to warn of such an occurrence. . . . Nor was the city under a duty to obtain information from local agencies to determine the frequency with which sharks appeared in and around the beach area, since there was no attack on record in the history of the beach to indicate the necessity for obtaining such information.\textsuperscript{382}

In \textit{O'Steen v. Kemmerer},\textsuperscript{383} the issue facing the District Court of Appeal, First District, was whether liability for injuries caused by wild monkeys may be imposed upon an owner of real property for damages sustained on the property of another as a result of wild animals negligently maintained on the former's property by an occupant who is either an agent or employee of the property owner in the absence of some interest or relationship between the property owner and the wild animals or other dangerous instrumentality?\textsuperscript{384}

Distinguishing \textit{Christie v. Anchorage Yacht Haven, Inc.},\textsuperscript{385} on the ground that the injuries in \textit{O'Steen} were sustained on the plaintiff's rather than the defendant's property, the court refused to hold the defendant landowner liable in the absence of some interest or relationship between the owner and the wild animal.

In \textit{Mapoles v. Mapoles},\textsuperscript{386} the District Court of Appeal, First District, was called upon to construe section 767.01 of the Florida Statutes\textsuperscript{387} in an action arising out of a "bizarre accident" that

\begin{itemize}
\item \textsuperscript{381} \textit{Id.} at 246.
\item \textsuperscript{382} \textit{Id.}
\item \textsuperscript{383} 344 So. 2d 313 (Fla. 1st Dist. 1977).
\item \textsuperscript{384} \textit{Id.} at 314.
\item \textsuperscript{385} 287 So. 2d 359 (Fla. 4th Dist. 1973).
\item \textsuperscript{386} 350 So. 2d 1137 (Fla. 1st Dist. 1977).
\item \textsuperscript{387} \textit{Fla. Stat.} § 767.01 (1975) (current version at \textit{Fla. Stat.} § 767.01 (1977)). This
\end{itemize}
occurred when a loaded shotgun was accidentally discharged after the defendant owner placed his large dog in the backseat of a compact automobile where the loaded shotgun was resting. Relying on the statutory language that “[o]wners of dogs shall be liable for any damage done by their dogs . . . to persons,” the court reasoned that since the defendant was the owner of the dog and the damage was caused to a person by the dog, the owner is liable for the damage done. In so holding, the court recognized that the subject statute “virtually makes an owner the insurer of the dog’s conduct.”

XVII. IMMUNITY

A. Municipal Corporations

In Sapp v. City of Tallahassee, an action was brought by an employee of a motel against her employer and the city for injuries sustained when she was severely beaten and robbed in the motel in which she worked. Prior to the beating, officers specially assigned to the motel observed two suspicious males in the parking area loitering near the entrance to the motel for approximately ten minutes. One of the officers observed the men follow the plaintiff into the motel and, approximately twenty minutes later, emerge running.

In alleging that the city was negligent, the plaintiff claimed that the police officers had a special duty to protect her from physical assaults and that its officers were negligent in failing to investigate the behavior of the men. The trial court dismissed the action. In affirming the order of the trial court with respect to the City of Tallahassee, the District Court of Appeal, First District, noted that “before a municipality may be held liable for the negligence of its employees, there must be shown the existence of a special duty, something more than the duty owed to the public generally.”

section is concerned with an owner’s liability for damage done by dogs.

388. 350 So. 2d at 1138.
390. 350 So. 2d at 1138. The dissent, however, regarded the majority’s holding as a “draconian reading of the statute.” The dissent reasoned that where “the damage results from some physical agency set into motion by a chain of events which may have been triggered by the presence of the dog, absolute liability should not be imposed.” Id. at 1139 (quoting Smith v. Allison, 332 So. 2d 631, 634 (Fla. 3d Dist. 1976)).
391. Id. at 1138.
392. 348 So. 2d 363 (Fla. 1st Dist. 1977).
393. Id. at 364.
394. Id. (emphasis added). See also Gordon v. City of West Palm Beach, 321 So. 2d 78 (Fla. 4th Dist. 1975); Evett v. City of Inverness, 224 So. 2d 365 (Fla. 2d Dist. 1969).
Notwithstanding the plaintiff's contention that the police undertook a special duty to those persons using the rear area of the motel and that the plaintiff was a person within the class designed to be protected, the court noted that the plaintiff did not show a violation of statutory procedures by the police or a direct and personal contact with the plaintiff or that the plaintiff relied upon the city's police surveillance at the time the incident took place. Citing *Riss v. City of New York*, the First District noted further that: "[t]his is not a situation where police authorities undertook a responsibility to particular members of the public, exposing them, without adequate protection, to risks which then materialize into actual injury."  

### B. Familial Immunity

In *Shor v. Paoli*, the underlying rationale of the Uniform Contribution Among Tortfeasors Act and the common law doctrine of interspousal immunity forced the Supreme Court of Florida to make a priority determination between two competing and mutually exclusive alternatives inherent in the certified question. The issue before the court was whether "the common law doctrine of interspousal immunity control[s] over the Uniform Contribution Among Joint Tortfeasors Act . . . to prevent one tortfeasor from seeking a contribution from another tortfeasor when the other tortfeasor is the spouse of the injured person who received damages from the first tortfeasor?" In *Shor*, Mrs. Shor's husband was injured while riding as a passenger in an automobile driven by her when it collided with a vehicle driven by Paoli. Although Mrs. Shor was awarded $12,000 against Paoli, she was found to be thirty-five percent at fault. After satisfying the judgment for the Shors, Paoli and the other defendant sought contribution from Mrs. Shor as a joint tortfeasor.

Holding that the District Court of Appeal, Fourth District, correctly answered the certified question in the negative, the supreme court quoted the Fourth District's reasoning:

The doctrine of family or interspousal immunity is based on the desirability of the preservation of the family unit. The law of contribution of joint tortfeasors is meant to apportion the responsibility to pay innocent injured third parties between or among

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396. 348 So. 2d at 366.
397. 353 So. 2d 825 (Fla.), aff'd 345 So. 2d 789 (Fla. 4th Dist. 1977).
398. FLA. STAT. § 768.31 (1975) (current version at FLA. STAT. § 768.31 (1977)).
399. 345 So. 2d at 790.
those causing the injury. In the case at bar it was determined that both Paoli and Shor caused the injury. Shor's husband collected 100% of his damages from Paoli. To say that Shor does not have to contribute and account for her wrongdoing would be unfair to Paoli and a windfall to Shor. . . . This is a case where the joint tortfeasor sued the joint tortfeasor and we are ruling in support of that statute.400

C. State Sovereign Immunity

At issue in Metropolitan Dade County v. Kelly401 was the question of whether a county employee can be held personally liable in tort for negligent acts committed within the scope of his employment. The defendant bus driver, relying upon section 768.28(9) of the Florida Statutes,402 argued that the complaint failed to state a cause of action. The District Court of Appeal, First District, held that since the plaintiff failed to allege that the driver acted in bad faith, the motion to dismiss should have been granted. In so holding, the court emphasized that in the absence of any allegation or proof of bad faith or malicious purpose, the defendants would be immune from personal liability.403

It should not be overlooked that before the question of immunity or waiver can be properly addressed, it must first be found that the sovereign body owes a duty which inures to the individual. This subtle point was raised in Commercial Carrier Corp. v. Indian River County,404 in which a defendant in an automobile accident case

400. Id. (emphasis added). The supreme court noted that its decision overruled Mieure v. Moore, 330 So. 2d 546 (Fla. 1st Dist. 1976), in which the question on appeal was whether a joint tortfeasor may seek contribution from the other joint tortfeasor who is the spouse and parent of the injured party. There the court refused to allow contribution since common liability between Moore and the defendants was lacking.

401. 348 So. 2d 49 (Fla. 1st Dist. 1977). In Kelly, an automobile passenger brought suit against the owner, the driver and the driver's insurer for injuries sustained in a collision with a county owned bus. Defendants filed a third party complaint against the county and the bus driver.

402. FLA. STAT. § 768.28(9) (1975) (current version at FLA. STAT. § 768.28(9) (1977)). This section deals with waiver of sovereign immunity and reads in pertinent part as follows:

No officer, employee, or agent of the state or its subdivisions shall be held personally liable in tort for any injuries or damages suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Subject to the monetary limitations set forth in subsection (5), the state shall pay any monetary judgment which is rendered in a civil action personally against an officer, employee, or agent of the state which arises as a result of any act, event, or omission of action within the scope of his employment or function.

Id.

403. 348 So. 2d at 50. See also Pennington v. Serig, 353 So. 2d 107 (Fla. 3d Dist. 1977).

404. 342 So. 2d 1047 (Fla. 3d Dist. 1977).
impleaded Indian River County and the State Department of Transportation for the negligent failure of the county to maintain a stop sign at a particular intersection and for the failure of the Department of Transportation to paint the word “Stop” on the pavement prior to the entrance of the intersection.

It was urged that section 768.28 constitutes a total waiver of sovereign immunity by the state, its agencies and subdivisions in tort actions and that under section 768.31, the county and Department of Transportation were liable to a defendant for contribution or indemnity. The District Court of Appeal, Third District, conveniently disposed of those issues by deciding, as an initial matter, that the thrust of Florida decisions holds that “it is not actionable negligence against an individual that a governmental authority has failed to maintain a traffic control device at a given time and place.”

XVIII. TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

It has long been held that in order to establish a prima facie case of tortious interference with contractual relations, it must be shown that:

1. The acts were willful and intentional;
2. Said acts were calculated to cause damage to the plaintiff in his or her business;
3. That the acts were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (constituting malice); and
4. That actual damages and loss resulted.

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405. FLA. STAT. § 768.28(1) (1977) reads in pertinent part as follows:

(1) In accordance with S. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

Id.
406. FLA. STAT. § 768.31 (1975) (current version at FLA. STAT. § 768.31 (1977)). This section is known as the Florida Uniform Contribution Among Tortfeasors Act. See discussion at notes 312-32 and accompanying text supra.
407. 342 So. 2d at 1049.
408. Bermil Corp. v. Sawyer, 353 So. 2d 579, 585 (Fla. 3d Dist. 1977); Reagan v. Davis, 97 So. 2d 324 (Fla. 2d Dist. 1957).
In *Bermil Corp. v. Sawyer*, this formula was applied to a factual context in which a failing debtor agreed to pay a mortgage broker a $6,000 fee if she could obtain a $60,000 loan for him at an interest rate of fifteen percent per annum for five years. Despite substantial difficulty in locating interested lenders, the mortgage broker finally found a lender willing to deal with the debtor. Thereafter, the lender contacted the borrower and told him that he would not fund the mortgage as promised, but instead suggested that for the same $60,000, he would buy forty percent of the shopping center. The net result of the transaction was as follows: The borrower deeded over a forty percent interest in the shopping center in exchange for $60,000 with an option to repurchase at the end of one year for $100,000. Prior to a pending receivership hearing, $54,000 was paid to satisfy the mortgage default. The lender kept the remaining $6,000 which had originally been earmarked as the plaintiff’s brokerage commission.

Plaintiff broker subsequently brought suit against the borrower and lender. After a jury trial, the plaintiff was awarded a favorable verdict against the borrower for her brokerage commission and against the lender for tortious interference with the brokerage contract. The District Court of Appeal, Third District, affirmed, notwithstanding the lender’s contention that once a judgment has been rendered in favor of a broker and against a vendor on a contract action for the price, an action for tortious interference with the contract cannot be pursued to judgment.

Citing *Meade Corp. v. Mason*, the Third District held that where a seller and purchaser act in concert to deprive a broker of a commission pursuant to a contract entered into between the broker and seller, an action for tortious interference with that contract will lie against the purchaser, as well as an action for breach of the brokerage contract against the seller.

It has been noted that “tortious interference with a contract and tortious interference with a business relationship are basically the same cause of action. The only material difference appears to be that in one there is a contract and in the other there is only a business relationship.” It has been held that a cause of action for tortious interference with a contractual relationship may be maintained notwithstanding the unenforceability of the contract under

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409. 353 So. 2d 579 (Fla. 3d Dist. 1977).
410. Id. at 582.
411. 191 So. 2d 592 (Fla. 3d Dist. 1966).
412. 353 So. 2d at 585.
413. Smith v. Ocean State Bank, 335 So. 2d 641, 642 (Fla. 1st Dist. 1976).
the statute of frauds. The same is true where there is a lack of
consideration.

Unlike Bermil Corp. v. Sawyer, most of the recent Florida
cases involving tortious interference with economic relationships
have involved what at least appears to be a curious admixture of
both business and contractual relations. Such was the case in Young
v. Pottinger. In Young, the plaintiffs entered into a written four
year option to purchase certain real property which was exercised
and communicated to the optionor in writing. The optionors re-
quested that the plaintiffs delay closing on the property since the
optionors were elderly and desired to continue residing on the prop-
erty. The defendants, knowing of the plaintiffs' validly exercised
option to purchase, procured the execution of a deed to the property
from the optionors without explaining to the optionors that they
were conveying their property to the defendants. Based on the
foregoing facts, the District Court of Appeal, Second District, had
little difficulty in holding that the complaint stated a cause of ac-
tion for tortious interference with the plaintiffs’ contract to pur-
chase the property. In addition, the court held that since the defen-
dants were not parties to the contract, they were not in a position
to raise the affirmative defense of the statute of frauds in suit
brought against them for tortious interference.

In Hales v. Ashland Oil, Inc., an action was brought against
Ashland Oil for tortious interference with plaintiffs' advantageous
business relationship with Pickard, from whom plaintiffs had
agreed to purchase 200 trawlers. The plaintiffs also asserted that
they were third party beneficiaries to the agreements between Pick-
ard and Ashland in that Ashland knew or should have known that
Pickard would be induced to procure orders for finished vessels from
persons such as the plaintiffs. At trial, it was held that the plaintiffs’
allegations failed to state a cause of action.

Although Florida recognizes a separable and independent tort
of malicious interference with contractual rights and advantageous

414. See Young v. Pottenger, 340 So. 2d 518 (Fla. 2d Dist. 1976).
415. See Chipley v. Atkinson, 23 Fla. 206, 2 So. 934 (1887); Franklin v. Brown, 159 So.
2d 893 (Fla. 1st Dist. 1964).
416. 353 So. 2d 579 (Fla. 3d Dist. 1977).
417. 340 So. 2d 518 (Fla. 2d Dist. 1976).
418. Id. at 519.
419. 342 So. 2d 984 (Fla. 3d Dist. 1977), cert. denied, ___ So. 2d ___ (Fla. 1978). For a
detailed explanation of the facts in Hales, see Ashland Oil, Inc. v. Pickard, 269 So. 2d 714
(Fla. 3d Dist. 1972), cert. denied, 285 So. 2d 18 (Fla. 1973).
420. 342 So. 2d at 986.
business relationships, the District Court of Appeal, Third District, emphasized that one important element of the tort is that "in order to secure an advantage, the defendant, by fraud, [must induce] plaintiff’s business associate to act in a way which destroys plaintiff’s business relationship." After examining prior case law, the court observed that in each case the respective defendants sought to procure a business advantage directly over others, and noted that it was unable to find a single case which allowed recovery based on indirect or incidental harm inuring to the plaintiffs’ detriment. The court found that plaintiffs had not incurred direct harm in this case. In affirming the trial court’s dismissal, the Third District went on to state that were it to decide otherwise, “the defendants would be subjected to an endless array of suits by persons who have been indirectly injured by virtue of their dealings with the party over whom the defendants had sought to gain an advantage.”

In Serafino v. Palm Terrace Apartments, Inc., an action was brought against a nonprofit corporation charged with the responsibility of approving the transfer of leaseholds in a cooperative apartment complex. The action was based upon the corporation’s refusal to approve the transfer of a leasehold to plaintiff pursuant to a contract between plaintiff and another lessee. In the subject lease, a clause pertaining to the conditions of transfer permitted the lessor corporation to consider the desirability of the prospective transferee as a criterion for approval. After plaintiffs explained to the lessor’s credentials committee that they were acquiring the apartment for investment purposes with a view toward renting it to others, it was determined by the committee that the assignment of the subject lease to a nonresident owner would not be compatible with the lifestyle of an apartment complex in which most of the owners were retirees. The trial court entered a judgment in favor of plaintiffs. The issue presented on appeal was “whether or not the defendant . . . may be held liable to the plaintiffs for intentional interference with contractual relations when the defendant is acting under a pre-existing contract between it and [the plaintiff].” Acknowledging that “a contracting party has a justification or privilege to interfere

421. Id. See also Dade Enterprises v. Wometco Theatres, Inc., 119 Fla. 70, 160 So. 2d 209 (1935).
422. 342 So. 2d at 986 (emphasis omitted). See also John B. Reid and Assocs. Inc. v. Jimenez, 181 So. 2d 575, 577 (Fla. 3d Dist. 1965).
423. 342 So. 2d at 986.
424. 343 So. 2d 851 (Fla. 2d Dist. 1976).
425. Id. at 852.
426. Id.
where necessary to protect [its] own contractual rights provided such interference is without malice," the District Court of Appeal, Second District, following the reasoning articulated by the Ohio courts, brought the subject matter of privilege into focus by stating:

One who purposefully causes a third person not to enter into or continue a business relation with another in order to influence the other's policy in the conduct of his business is privileged if (1) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other, (2) the desired policy does not illegally restrain competition or otherwise violate a defined public policy, and (3) the means employed are not improper.

In the instant case, the Second District reasoned that the lessor's interest under the contract was sufficient to give rise to a privilege to interfere. Thus, under the rule articulated by the court, it would have been necessary for the prospective transferee to have pleaded and proven that the lessor, as a third party, acted maliciously in order to have succeeded on a tortious interference theory.

XIX. TRESPASS

In Marine Midland Bank-Central v. Cote, the question before the District Court of Appeal, First District, was "whether the secured party's right to repossess collateral provided by the Florida UCC in section 679.503 of the Florida Statutes (1975) includes a right to enter upon private property, or whether the statute simply authorizes creditors to contract for that right." Simply stated, the

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427. Id.
429. 343 So. 2d at 853; Hunter Lyons, Inc. v. Walker, 152 Fla. 61, 11 So. 2d 176 (1942).
The Second District further indicated that since the defendant's actions were exercised for proper purposes, through appropriate means and without malice, the question of unreasonableness was a matter of contract between the lessor and the defendant. Even if the defendant's actions were unreasonable, they would not give rise to a tort action in favor of a third party since defendant was privileged to act by proper means to protect its own rights from being prejudiced by the plaintiffs. See also Babson Bros. Co. v. Allison, 337 So. 2d 848 (Fla. 1st Dist. 1976), discussed in Torts, 1976 Developments in Florida Law, 31 U. MIA L. REV. 1283, 1292 (1977); W. PROSSER, supra note 8, § 123 at 969.
430. 351 So. 2d 750 (Fla. 1st Dist. 1977).
431. Id. at 751. FLA. STAT. § 679.503 (1975) (current version of FLA. STAT. § 679.503 (1977)) reads, in pertinent part as follows:

Secured party's right to take possession after default. — Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security

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precise issue was whether a secured party's rights under the UCC includes a limited privilege to enter the property of another in order to repossess collateral. In *Marine Midland*, a person acting on behalf of the secured party sought to repossess a vehicle in which the bank had a security interest by entering the debtor's private property and removing the vehicle from an open carport.\(^{432}\)

Although many of the cases approving entry onto private property by a creditor or its agent have been based upon contractual clauses specifically authorizing entry, the First District noted that in no case was a creditor found liable in trespass because a security agreement failed to contain such a clause.\(^{433}\) The court emphasized that the Supreme Court of Florida had stated, in *Northside Motors, Inc. v. Brinkley*,\(^{434}\) that section 679.503 "is no more than a codification or restatement of a common law right and a contract right recognized long before the promulgation thereof and creates no new rights."\(^{435}\) Following the growing trend toward the establishment of a limited privilege for creditors suggested by the *Restatement (Second) of Torts*,\(^{436}\) as well as decisions from Florida\(^{437}\) and other jurisdictions,\(^{438}\) the First District concluded:

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agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under s. 679.504.

*Id.*

432. 351 So. 2d at 751.
433. *Id.*
434. 282 So. 2d 617 (Fla. 1973).
435. *Id.* at 622.
436. See *Restatement (Second) of Torts* § 183(1) (1965). The underlying rationale of the section as it pertains to secured parties reads:

c. Repossession by conditional vendor, chattel mortgagee, or lessor. In the absence of express agreement covering the matter, where goods are sold to a possessor of land under a conditional sale or are made subject to a chattel mortgage, the possessor's consent to an entry on his land for the purpose of retaking the goods upon default in payment of the purchase price or an installment thereof is inferred as one of the terms of the sale or mortgage. The transaction, having been made in reliance on such consent, creates a privilege to enter and remove the goods, irrespective of the subsequent withdrawal of the consent. The same is true where goods are leased and the lessor's right to resume possession of the goods has accrued.

*Id.* at Comment c.

437. See Percifield v. State, 93 Fla. 247, 111 So. 519 (1927); Bank of Jasper v. Tuten, 62 Fla. 423, 57 So. 238 (1911); Westchester Nat'l Bank v. Corey, 293 So. 2d 796 (Fla. 3d Dist. 1974).

Absent a contrary agreement, when a security agreement provides the secured party has on default the rights and remedies provided by the UCC, the right of repossession stated by § 679.503 implies, just as it did at common law, a limited privilege to enter on the debtor’s land. The privilege may be exercised only “without breach of the peace.”

XX. Conversion

In *Porco v. Love*, an action was brought for the conversion of land fill which had been deposited on plaintiffs’ property pursuant to an easement between plaintiffs’ predecessor and the Central and Southern Florida Flood Control District. Under the terms of the easement, plaintiffs’ predecessor was to keep all dredged or excavated materials placed upon the land that were not needed for the Flood Control District’s canal excavation project. Several years after the fill was excavated, a corporation contacted Porco in an effort to purchase land fill for a development project. Porco then contacted Werner who advised Porco that he was interested in selling fill which was located on property along the canal. As compensation for obtaining the fill, Porco was to collect a purchase price of twenty-two cents per cubic yard, out of which he and Werner were to receive six cents each for their labor and services with the balance going to various landowners on whose land the fill was located. Plaintiffs complained that Werner never obtained consent to remove the fill from their land. At trial, Porco and Werner were held liable for conversion of the fill. On appeal, the defendants asserted that the plaintiffs failed to show that they owned the fill.

Following *Skinner v. Pinney*, the District Court of Appeal, Third District, affirmed the judgment for the plaintiffs. The court noted that the question of ownership of the fill was not critical to the plaintiffs’ suit since the fill was in their possession while it was on their property. The Third District held that the plaintiffs

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439. 351 So. 2d at 752.
440. 340 So. 2d 1245 (Fla. 3d Dist. 1976).
441. *Id.* at 1246.
442. *Id.* at 1247.
443. 19 Fla. 42 (1882).
444. 340 So. 2d at 1247. The court also noted that the defendants could not assert ownership as a defense to the action. For a discussion of the nature of conversion, see W. Prosser, supra note 8, § 15, at 93-97. As Prosser points out, the gist of the action is the interference with one’s control of property. Possession rather than ownership is the key to conversion. This concept is well-settled in Florida. See Star Fruit Co. v. Eagle Lake Growers,
could, therefore, bring an action for conversion of the fill.445

XXI. TORT LAW UNDER THE CONSUMER COLLECTION PRACTICES ACT

A case of first impression under the Consumer Collection Practices Act446 was presented in Heard v. Mathis.447 The particular section of the Act involved prohibits a person from disclosing "to a person other than the debtor or his family information affecting the debtor's reputation, whether or not for credit worthiness, with knowledge or reason to know that the other person does not have a legitimate business need for the information or that the information is false."448

The issue presented in Heard was whether a debtor can recover damages from a creditor who disclosed the existence of a delinquent indebtedness to a close personal friend of the debtor. Under the facts presented, a University of Florida student borrowed $200 from Mathis, an assistant to the University Vice President of Student Affairs. The loan was oral, unsecured and without interest and was made with the understanding that the loan would be repaid by the student when she received an allotment check from her husband. When the student failed to repay the loan, Mathis contacted several persons, including one of the debtor's intimate personal friends and informed him of her indebtedness. Thereafter, Mathis filed a statement of claim against her in the county court. Heard then filed an answer and counterclaim alleging that Mathis had violated the Consumer Collection Practices Act. At the conclusion of trial, the court entered final judgment for Mathis, denied Heard's counterclaim and assessed attorney's fees against Heard in the amount of $400.449

On appeal, Heard alleged that the court erred in entering judgment against her on the counterclaim since the word "family" as used in the statute could not reasonably be construed to include an intimate friend with whom the debtor is not living. Additionally, Heard alleged that the court erred in assessing attorney's fees against her under the statute448 since her claim was neither ill-founded nor brought for the purposes of harrassment. In response,
Mathis reasoned that since the loan was made without interest, the disclosure of the debt to a person not a member of the debtor's family was not precluded by the language of the statute.451

Although the District Court of Appeal, First District, agreed that the creditor's disclosure of the debt to the debtor's friend was not privileged452 and rejected the contention that the Act did not apply to a private individual making an oral, noninterest bearing loan to a friend, the court, analogizing the debtor's purported cause of action to defamation, refused to award damages absent a showing that the debtor's reputation was adversely affected by the publication. In so holding, the First District reasoned:

We construe the statute as requiring the debtor to show the following elements necessary for a good cause of action against Mathis: (1) that there was a disclosure of information to a person other than a member of debtor's family, (2) that such person does not have a legitimate business need for the information, and (3) that such information affected the debtor's reputation.453

Turning to the question of attorney's fees, the court agreed that the legislature did not intend to make the award of attorney's fees contingent upon the outcome of the suit.454 Applying the test of probable cause as it is used in actions for malicious prosecution, the court noted that Heard established all elements of her cause of

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451. Fla. Stat. § 559.55(3) (1977) defines the term "creditor" as "any person to whom a consumer claim is owed, due, or alleged to be owed or due." The term "consumer claim" is defined in § 559.55(1) as "any obligation for the payment of money or its equivalent arising out of a transaction wherein credit has been offered or extended to a natural person, and the money, property, or service which was the subject of the transaction was primarily for personal, family, or household purposes." The First District refused to accept the interpretation of the statute urged by Mathis.

452. 344 So. 2d at 654.

453. Id. at 655. The court stated:

An analogy may be made to cases involving defamation which are actionable per se. General damages are allowed to a plaintiff upon proof of the publication without regard to any establishment of actual pecuniary loss since damages are conclusively presumed as a matter of law from the use of words actionable per se. . . . The reason for the allowance of such damages is that the immediate tendency of the words is to impair the plaintiff's reputation without regard to proof of loss. . . . While the Act does not require that plaintiff establish proof of actual damages less than $500.00, Section 559.77(1), it does require plaintiff to show the invasion of a legal right.

The court added the following in a footnote as a qualification to its analogy:

Parenthetically, unlike defamation in libel and slander causes which are actionable per se, and where the courts presume malice from the words used, no such presumption may be indulged here since the statute does not require the disclosure to be false if made to a person other than the debtor or his family when such person does not have a legitimate business need for the information.

454. Id. at 656.
action except a showing that the disclosure affected her reputation. As a result, the First District refused to find that she acted either unreasonably or that her claim was ill-founded under the statute and, therefore, reversed the award of attorney’s fees.

In another case decided under the Consumer Collection Practices Act, the District Court of Appeal, First District, in *Story v. J.M. Fields, Inc.*, addressed the question of how frequently a creditor must communicate with a debtor for the creditor’s action to constitute harassment. Under the facts in *Story*, the debtor advised Field’s credit manager that he would not make payments on merchandise until the store had repaired a defective air conditioner about which the debtor had complained. Thereafter, a representative telephoned Story almost daily, totaling at least 100 calls over a five month period. The court found that the calls were not inivective and were made without malice during normal business hours. Recognizing that the statutory standard is based upon the purpose as well as the frequency of a creditor’s communications, the First District held that the issue of punitive damages was properly withdrawn from the jury.

455. 343 So. 2d 675 (Fla. 1st Dist. 1977).
456. FLA. STAT. § 559.72(7) (1977) provides that, in collecting consumer claims, no person shall “[w]illfully communicate with the debtor or any member of his family with such frequency as can reasonably be expected to harass the debtor or his family, or willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of his family.”
457. Id. at 676.
458. Id. at 677-78.