

DIGEST OF INSURANCE LAW

FLORIDA

Courtesy of
Adorno & Yoss, L.L.P.
Miami, Florida

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

County Courts. Jurisdiction in all misdemeanor cases not cognizable in circuit courts; all violations of municipal and county ordinances; and of all actions at law up to \$15,000, except those within exclusive jurisdiction of Circuit Courts. F.S. 34.01. Exclusive jurisdiction over matters involving possession of real estate that fall within its jurisdictional limits. F.S. 34.011.

Circuit Courts. Exclusive original jurisdiction over all actions of law not cognizable by County Courts, probate and guardianship matters, cases in equity, all felonies and misdemeanors relating to felonies, cases involving legality of tax assessment, ejection, and real estate title matters. Fla. Const. Art. V §5; F.S. 26.012.

Appellate Courts

Circuit Court. Circuit Court appellate jurisdiction from County Courts appeals except in certain circumstances and from final orders of local government code enforcement boards. F.S. 26.012.

District Courts of Appeal. Florida is divided into five appellate districts. F.S. 35.01. District Courts of Appeal have appellate jurisdiction over all final orders not directly appealable to Florida Supreme Court or Circuit Court. Fla. Const. Art. V §4. May consider certain certified questions from County Court. F.S. 35.065.

Supreme Court. Supreme Court is state court of last resort, both civil and criminal. Supreme Court is required to hear appeals from trial courts imposing death penalty, district courts declaring invalid state statutes or state constitutional provisions, judgments entered in proceedings for the validation of bonds or certificate of indebtedness. Fla. Const. Art. V §3(b). Supreme Court, in its discretion, may review decisions of district courts of appeals expressly declaring statute valid, construing a provision of State or Federal Constitution, affecting class of constitutional or state officers, or conflicting directly with another district court of appeal or Supreme Court decision. Supreme Court may also hear questions which district courts of appeal certify to be of great public im-

portance or involve conflict with another district court of appeals decision and can review questions certified by U.S. Supreme Court or U.S. Courts of Appeals if no controlling Florida Supreme Court precedent. *Id.* The Florida Constitution presently requires the Supreme Court to consist of seven justices, five consisting a quorum and the concurrence of four justices necessary to reach a decision. Fla. Const. Art. V §3(a).

LAW

Abbreviations

- F. & F.2d – Federal Reporter, First and Second Series.
- F. Supp. & F. Supp. 2d – Federal Supplement, First and Second Series.
- F.S. – Florida Statutes (Florida Statutes Annotated, same citations).
- Fla. – Florida Reports.
- Fla. Const. – Florida Constitution.
- Fla. Jur. 2d – Florida Jurisprudence, Second Series.
- FLW – Florida Law Weekly.
- FRPC – Florida Rules of Professional Conduct.
- So. & So. 2d – Southern Reporter, First and Second Series.

ACCIDENT AND HEALTH INSURANCE

See “ACCIDENTAL MEANS” and “DISABILITY.”

Contract Law. Insurance contracts are construed in accordance with the plain language as bargained for by parties. F.S. 627.419. Ambiguities are interpreted liberally in favor of insured and strictly against insurer who prepared policy. *Prudential v. Swindal*, 622 So. 2d 467, (Fla. 1993). The terms and conditions in policy, as amplified, extended or modified by any application therefor or any rider or endorsement thereto constitutes insurance contract. F.S. 627.419(1). *Mathews v. Ranger Ins.*, 281 So. 2d 345 (Fla. 1973), and in the event of inconsistencies, the policy is construed taking into consideration those provisions. *State Farm v. Mallard*, 548 So. 2d 733 (Fla. 3d DCA 1989).



Cancellation. Insurer may discontinue health insurance coverage in limited circumstance. F.S. 627.6425 (individual coverage); 627.6571 (group coverage). Must give health insurance policyholder 45 days advance written notice of cancellation, nonrenewal or change in rates. F.S. 627.6043; 627.6645. For individual health policies if cancellation due to failure to pay premium, then 10 days written notice sufficient; however, notice not required where premiums paid monthly or more frequently and collected regularly by agent. F.S. 627.6043. For group health policies if cancellation due to failure to pay premium, no notice is required. F.S. 627.6645. Coverage at existing premium rate remains in effect until 45 days after notice is given or effective date replacement coverage is obtained by insured. F.S. 627.6043; 627.6645. Insured entitled to partial refund upon cancellation. *Id.*

Cancellation of health insurance due to diagnosis or treatment of human immune deficiency virus infection or acquired immune deficiency syndrome is prohibited. F.S. 627.6265; *see Parra v. John Alden Life Insurance Co.*, S.D. Fla. 1998, 22 F. Supp. 2d 1360 regarding ER-ISA preemption (627.6646). Health insurance issued to military person in active duty shall continue in effect or be reinstated upon return at policyholders choice. F.S. 250.341.

Renewal/Reinstatement. Policies may include guaranteed renewal or renewal at option of insurer. F.S. 627.608; *see also Time Ins. v. Williams*, 566 So. 2d 14 (Fla. 1st DCA 1990). Health insurance policy which lapsed will be reinstated upon insurer's acceptance of premium without issuing conditional receipt. *Bankers Life v. Vadra*, 563 So. 2d 200 (Fla. 3d DCA 1990). A health policy must include provision for reinstatement. F.S. 627.609.

Disease Induced by Accident. Health insurance policy excluded coverage for dental care or treatment unless due to accident. *Pilot Life Ins. Co. v. Rycek*, 498 So. 2d 458 (Fla. 3d DCA 1986). Heart attack suffered by insured after voluntary physical exertion did not constitute "bodily injury caused by an accident." *Benante v. Allstate*, 477 F.2d 553 (5th Cir. 1973).

Excepted Risks. A contract may except losses which result from the insured committing or attempting to commit a felony, engaging in an illegal occupation, being drunk or the influence of any narcotic unless taken on advice of physician. F.S. 627.628 and 627.629. Many policies make exceptions for when one subjects self to danger. Exceptions also exist for when one acts intentionally. *Prudential v. Swindal*, 622 So. 2d 467 (Fla. 1993). Person who shoots at armed officer knew or should have known that officer would shoot back, consequently the injury or death of aggressor is not covered. *J.C. Penney v. Moser*, 490 So. 2d 1275 (Fla. 5th DCA

1986). Death or injury as a result of crime could be excepted. *See Williams v. New England Mut.*, 419 So. 2d 766 (Fla. 1st DCA 1982). Policies commonly limit coverage to injury or death caused by external, violent and/or accident. *Rivers v. Conger Life Ins.*, 229 So. 2d 625 (Fla. 4th DCA 1969). Policies excluding pre-existing conditions are valid. *Edwards v. Bankers Life*, 381 So. 2d 761 (Fla. 1st DCA 1980). Excepted risks due to travel are also valid. *See Roblero v. American Gen.*, 629 So. 2d 251 (Fla. 3d DCA 1993); 18 Fla. L. Weekly D2641.

Notice and Proof of Loss. Notice must be given within 20 days after a covered loss or as soon as possible. F.S. 627.610. For a continuing disability, notice may be given every 6 months after notice of claim. *Id.* Proof of loss must be submitted within 90 days of loss or within 90 days of periodic payment for continuing loss. F.S. 627.612. Proof of loss must be furnished within one year unless claimant legally incapacitated. *Id.* Some health insurance policies require that medical expenses must be incurred within a fixed period of time of injury. *Reliance Mut. Life v. Booher*, 166 So. 2d 222 (Fla. 2d DCA 1964). Denial of additional death benefits where insured died 120 days after accident. *Haines v. S. Life*, 363 So. 2d 175 (Fla. 4th DCA 1978).

Damages. Policies include double indemnity for accidental death and burden is on person seeking to recover to establish death by accident under such policy. *Anderson v. New York Life*, 191 So. 307 (Fla. 1939). However, insurer has right to restrict double indemnity provision through exceptions and limitations. *Powell v. New York Life*, 120 So. 2d 33 (Fla. 2nd DCA 1960).

ACCIDENTAL MEANS

Defined. Abolished distinction between "accidental means" and "accidental results." *Gulf Life Ins. Co. v. Nash*, 97 So. 2d 4 (Fla. 1957). Insured has burden of proof to show loss and on insurer to show recovery should be defeated by an exclusion in policy. *Hudson v. Prudential*, 450 So. 2d 565, 568 (Fla. 2d DCA 1984). *See Weaver v. Lexington Ins. Co.*, 2006 WL 3147655 (M.D. Fla. 2006); *Castillo v. State Farm Florida Ins. Co.*, 971 So. 2d 820 (Fla. 3d DCA 2007).

Death of insured as a result of gun shot wound sustained when pistol in possession of another was discharged while insured, as aggressor, was attempting to take pistol from possessor was caused by "accidental means" within double indemnity provision of group life policy, *Harvey v. St. Paul Western*, 166 So. 2d 822 (Fla. 3d DCA 1964).

Presumption of death by accidental means created if death by external and violent means has been estab-

lished. *Metropolitan v. Jenkins*, 152 Fla. 486; 12 So. 2d 374 (1943).

Insurer held liable on policy covering insured who meets his death as “result of bodily injury caused solely by external violent and accidental means” where insured does not purposely shoot himself but deliberately places gun against his chest and pulls trigger three times knowing that not all chambers are empty but with intention for firing pin to strike three empty chambers instead of two. *Gulf Life v. Nash*, 97 So. 2d 4 (Fla. 1957). Where insured is aggressor and is injured by person defending himself, such injury was intended and is not accidental. *Brown v. State Farm Mut.*, 302 So. 2d 445 (Fla. 1st DCA 1974).

Heart attack resulting from strenuous activity not accidental. *Goldstein v. Paul Revere*, 164 So. 2d 576 (Fla. 3d DCA 1964).

Even though act is intentional, injury caused by act is not necessarily intentional. Where insured drove into crowd, his driving was intentional but injury of man’s hand was accidental. *Phoenix Ins. v. Helton*, 298 So. 2d 177 (Fla. 1st DCA 1974). Burden is on insurer to prove suicide where elderly man subject to dizzy spells fell eight floors from his balcony. *Weinstock v. Prudential Ins.*, 247 So. 2d 503 (Fla. 3d DCA 1971).

ADJUSTERS

An adjuster means a public adjuster, independent adjuster, or company adjuster. F.S. 626.015(1).

Public Adjuster. Defined. Any person who for value prepares or files an insurance claim for another person or acts or aids in any manner on behalf of an insured in negotiating settlement of claims or solicits, adjusts, or investigates such claims for another public adjuster or who solicits for employment as an adjuster of such claims. F.S. 626.854. Must be 18 years of age and resident of Florida; must provide proof of trustworthiness and experience, training, or instruction in adjusting damages or losses; must pass required written examination; must file fidelity \$50,000 bond with Department of Insurance. F.S. 626.865.

Independent Adjuster. Defined. Any person self employed or associated with an independent adjusting firm who determines amounts of claims payable or effects settlements of such claims on behalf of an insurer. F.S. 626.855. Must be 18 years of age and resident of Florida; must provide proof of trustworthiness and experience and must pass any required examinations. F.S. 626.866.

Company Employee Adjuster. Defined. Employee of insurer’s staff of adjusters who ascertains and deter-

mines amounts of any claims, loss or damage, or effects settlements of such claims F.S. 626.856. Must be 18 years old and resident of Florida; must provide proof of trustworthiness and experience and must pass any required examinations. F.S. 626.867.

Claims Investigator. Defined. Employee of independent adjuster, adjusting firm or insurer with same responsibilities as a company employee or independent adjuster; who operates as student under supervision of licensed adjuster and cannot negotiate settlements in excess of \$20,000. F.S. 626.857. *Repealed by laws 1998, c.98-199 §94, eff. 10/1/98.*

Non-Resident Adjuster. Defined. Non-resident licensed or authorized adjuster in foreign state who is employee of insurer authorized to do business in Florida and who does not maintain office in Florida. F.S. 626.858. In addition to requirements of F.S. 626.858, non-resident adjuster must provide signed authorization from home state’s insurance department indicating current status of license in that state and, if ever revoked or suspended, reasons for such action. F.S. 626.873.

“Catastrophe” or “Emergency” Adjuster. Defined. In event of emergency or catastrophe, department may license a person certified as qualified by insurer to adjust policies of such insurer who is not currently licensed as an adjuster in Florida. F.S. 626.859; 626.874.

Excepted from the licensing requirements are licensed attorneys at law, licensed insurance agents if authorized by insurer, officers or employees of insurer with respect to health insurance, attorneys and agents acting for subscribers to reciprocal insurers. However, licensed solicitors shall not complete adjustments unless licensed specifically to do so. *See* F.S. 626.860-862.

AGE

See “AUTOMOBILES,” “LIABILITY INSURANCE” and “NEGLIGENCE.”

In General – Age of Majority. The age of majority is 18. F.S. 743.07. A minor of at least age 15, however, can contract for annuities or for insurance on his own life, body, health, property, liabilities, or other interest or on another in whom the minor has an insurable interest. F.S. 627.406(2).

AGENTS AND BROKERS

“Agent” means general lines agent, title agent, health agent or life agent. F.S. 626.015(2). General lines agent is one transacting one or more kinds of property, casualty, surety, and marine insurance and health insurance under specified circumstances. F.S. 626.015(5). “Health agent” includes one representing an HMO. F.S.



626.015(6). "Life agent" includes one representing an insurer as to annuity contracts. F.S. 626.015(10). "Home State" is amended to include one's principal place of business as well as principal place of residence. F.S. 626.015(7). "Resident" simply means an individual whose home state is Florida. F.S. 626.015(16). "Brokers" are not employed by any special company and act as middlemen between insurer and insured; whom they represent depends on particular circumstances. *Almerico v. RLI Ins. Co.*, 716 So. 2d 774 (Fla. 1998); *AMI Ins. v. Elie*, 394 So. 2d 1061 (Fla. 3d DCA 1981). Ordinarily, brokers act on behalf of insured, rather than insurer. *Steele v. Jackson Nat'l Life Ins. Co.*, 691 So. 2d 525 (Fla. 5th DCA 1997); *T&R Store Fixtures v. Travelers*, 621 So. 2d 1388 (Fla. 3d DCA 1993); *Amstar Ins. Co. v. Cadet*, 862 So. 2d 736 (Fla. 5th DCA 2003).

Authority. Agents and brokers cannot contract insurance binding insurer without real or apparent authority; general laws of agency govern. *Russell v. Eckert*, 195 So. 2d 617 (Fla. 2d DCA 1967). Insurers are bound by acts of agents that are within scope of apparent authority and insured is not aware of any limitations thereon. *Warren v. Dept. of Admin.*, 554 So. 2d 568 (Fla. 5th DCA 1989). Insured need not make any special inquiry into agent's authority unless insured has reason to do so. *RLI Ins. Co. v. Collado*, 678 So. 2d 1313 (Fla. 2d DCA 1996), *rev'd on other grounds, Almerico v. RLI Ins. Co.*, (Fla. 1998); *Underwriters Ins. Co. v. Kirkland*, 490 So. 2d 149 (Fla. 1st DCA 1986). Once put on notice, third persons bound by limits on agent's authority. *Parsons v. Federal*, 105 Fla. 105, 143 So. 912 (Fla. 1931); 88 A.L.R. 275; *Brown v. Inter-Ocean Ins. Co.*, 438 F. Supp. 951 (N.D. Ga. 1977); *Almerico v. RLI Ins. Co.*, 716 So. 2d 781 (Fla. 1998).

Fraud by Agent. Agent engaged in fraudulent activity is subject to mandatory suspension, revocation or non-renewal of license. F.S. 626.611; *See Dyer v. Department of Ins.*, 585 So. 2d 1009 (Fla. 1st DCA 1991). Insurer is liable for fraudulent conduct of agents committed in scope and course of employment. *Sumpolec v. Pruco Life Ins. Co.*, 563 So. 2d 778 (Fla. 3d DCA 1990).

Knowledge of Agent. Agent's knowledge is imputable to insurer whether or not insurer is informed. *Johnson v. Life*, 52 So. 2d 813 (Fla. 1951) (agent's knowledge of insured's failing health imputed to insurer); *Poole v. Travelers*, 130 Fla. 806, 179 So. 138 (1937); *Eagle v. Lewallen*, 47 So. 947 (1908).

Liability of Agent. Misconduct, general lines agent who is officer, director or stockholder of insurance agency is personally liable for wrongful acts committed by persons under agent's supervision and control; agent is not criminally liable unless agent personally committed, knew or should have known of such acts. F.S.

626.734. Failure to procure insurance, agent or broker who agrees to procure insurance, and through own fault or neglect fails to do so, may become liable for damages. *Warehouse Foods Inc. v. Corp. Risk Mgt.*, 530 So. 2d 422 (Fla. 1st DCA 1988); *Neida's Boutique, Inc. v. Gabor & Co.*, 348 So. 2d 1196 (Fla. 3d DCA 1977). Agent has duty to obtain insurance within reasonable time and must notify putative insured of inability to do so. *DeMarlor v. Foley*, 386 So. 2d 22 (Fla. 2d DCA 1980). Measure of damages recoverable is amount of insurance that would have been received. *First Nat'l Ins. v. Leesburg Transfer & Storage, Inc.*, 139 So. 2d 476 (Fla. 2d DCA 1962). *See also, Mondesir v. Delva*, 851 So. 2d 187 (Fla. 3d DCA 2003) (insured sufficiently proved his measure of damages arising out of agent's negligent failure to procure property insurance for business subsequently destroyed by fire). Insolvency, upon insurer's insolvency, agent has duty to account and to pay over to receiver such premiums and unearned commissions collected by agent as may be due; duty to account extends to all who handle and transmit such funds; failure to comply is grounds for revocation of agent's license. F.S. 631.155. The insurer is responsible for the acts of affiliated administrators and is responsible for providing all of the administrator's books and records upon request of commissioner. F.S. 626.88(e).

Licensing and Regulation. Agents shall be licensed and appointed by insurer on whose behalf they transact business. F.S. 626.112(7)(a) requires all entities to comply with F.S. 626.172 (licensing requirements effective Oct. 1, 2005); except: Agencies engaged in business in Florida before January 1, 2003 may file an application for registration in lieu of licensure. Failing to file application for licensure or registration may result in fines. F.S. 626.112(7)(a). Sworn license application must be submitted to Department of Insurance and include advance payment of all applicable fees. F.S. 626.171. With few exceptions, Department of Insurance generally issues license as agent, adjuster, customer representative or solicitor upon satisfactory passage of written examination. F.S. 626.221. Continuing education requirements to maintain license are mandatory. F.S. 626.2815. License designates lines that licensee is authorized to transact. F.S. 626.301; *see also* F.S. 626.321 (issuance of limited licenses). The department may disapprove the use of any true or fictitious name, other than the bona fide natural name of an individual if the name: 1) Is similar to a name already in use; 2) Misleads the public in any respect; 3) Name implies that the agency is a motor club, hospital service plan, state or federal agency, charitably organization, or entity that primarily provides advice and counsel rather than sells insurance. F.S. 626.602.

Violation of licensing provisions does not invalidate otherwise valid insurance contract. F.S. 626.141. For renewal and termination of license, *see* F.S. 626.381 *et seq.*

Grounds for compulsory refusal, suspension, or revocation of insurance agency license. F.S. 626.6115(3) adds: denial, suspension, or revocation of a license to practice or conduct any regulated profession, business, or vocation relating to the business of insurance.

Grounds for discretionary refusal, suspension, or revocation of insurance agency license. F.S. 626.6215(6) adds: failure to take corrective action, report a violation within 30 days after an individual licensee's violation is known or should have been known.

ARBITRATION

Arbitration agreement in insurance contract is binding on parties and controlled by provisions of Florida Arbitration Code unless otherwise stipulated. *Intracoastal Ventures Corp. v. Safeco Ins. Co.*, 540 So. 2d 162 (Fla. 4th DCA 1989); F.S. 682.01 *et seq.* (specifically, F.S. 682.13). Provisions in insurance contract providing for arbitration must sufficiently identify matters and procedure for arbitration. *Intracoastal*, 540 So. 2d at 164. An appraisal provision may be construed as agreement to arbitrate. *Florida Farm Bureau Cas. Ins. Co. v. Sheaffer*, 687 So. 2d 1331 (Fla. 1st DCA 1997), *rev. denied*, 697 So. 2d 510 (Fla. 1997). *But see, Nationwide v. Schweitzer*, 872 So. 2d 278 (Fla. 4th DCA 2004) (appraisal was not arbitration for purposes of rule which authorizes appeals from non-final orders involving entitlement to arbitration). Coverage disputes are exclusively judicial questions. *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996). But arbitrator can look at policy language to determine issues relating to amount owed. *J.J.F. v. State Farm Fire*, 634 So. 2d 1089 (Fla. 4th DCA 1994). Arbitration is generally limited to issues agreed upon. *Miami Beach v. Turchin/CRS*, 641 So. 2d 471 (Fla. 3d DCA 1994); *Netherlands v. Moore*, 190 So. 2d 191 (Fla. 1st DCA 1966).

Underinsured Motorist Arbitration. Insured's agreement to arbitrate claim with insurer under automobile liability policy containing uninsured motorist coverage necessarily contemplates application of F.S. 627.727 (formerly 627.0851) governing extent of such coverage.

Parties to insurance contract which makes arbitration of amount of loss condition precedent to liability have duty to make good faith effort to carry out agreement and may waive right to arbitrate by failing to do so; waiver of right to arbitrate may be expressed in terms or be implied from acts, omissions and conduct of a party.

Hall v. Nationwide Mut., 189 So. 2d 224 (Fla. 4th DCA 1966).

Party to insurance contract named as defendant may waive contractual right to arbitrate by participating in lawsuit without demanding arbitration even though party asserts failure to arbitrate as affirmative defense. *U.S.F.&G. Co. v. Williams*, 177 So. 2d 47 (Fla. 3d DCA 1965). *But see Wieneke v. Raymond, James & Assocs., Inc.*, 495 So. 2d 869 (Fla. 2d DCA 1986).

Application to court under Florida Arbitration Code must be by motion. F.S. 682.17. *See, e.g., Nigaglioni v. Century Ins.*, 281 So. 2d 570 (Fla. 3d DCA 1973) (action for declaratory relief and appointment of arbitrator sufficed as motion to compel arbitration).

ATTORNEYS

All members of the Florida Bar must comply with the terms and intent of the Rules of Professional Conduct ("FRPC"). Rules regulating the Florida Bar, Rule 1-10.1.

Appointment and Authority. Attorney is agent for his client and his acts are construed to be those of principal. *Beasley v. Girtten*, 61 So. 2d 179 (Fla. 1952). Attorney has authority to control conduct of litigation and absent fraud attorney speaks for and as client. *Griffith v. Investment Co.*, 92 Fla. 781, 110 So. 271 (Fla. 1926); *see also Mendelsund v. Southern-Aire*, 210 So. 2d 229 (Fla. 3d DCA 1968); *Gutierrez v. Baker*, 276 So. 2d 470 (Fla. 1973). Authority is limited and attorney cannot, absent client approval, do any act which affects client's substantive rights. *Mungin v. Florida E.C.R. Co.*, 318 F. Supp. 720 (M.D. Fla. 1970). *See Allbritton v. Stahlman*, 683 So. 2d 536 (Fla. 2d DCA 1996) (attorney's purported appearance on behalf of client's wife did not subject her to court's jurisdiction where she never authorized and was unaware of attorney's representation). Client controls subject matter of litigation and client may in good faith settle or adjust claim without consulting attorney. *Harper v. Strong*, 135 Fla. 10, 184 So. 848 (Fla. 1938); *Milligan v. State*, 177 So. 2d 75 (Fla. 2d DCA 1965). Attorney may not compromise or settle a claim absent clear and unequivocal consent from client. *Weitzman v. Bergman*, 555 So. 2d 448 (Fla. 4th DCA 1990).

Conflict of Interest. The general rule is that an attorney should not represent a client if the representation will be directly adverse to that of another client; the attorney's exercise of professional judgment will be limited by his responsibility to other clients, a third person, or by his own interest unless he reasonably believes he can represent both without adverse affect and the clients consent. Also, if someone related to an attorney is repre-



senting a party adverse to attorney's client, he cannot represent unless client consents. FRPC 4-1.7. See 4-1.8 for certain prohibited transactions. Interest of former clients are protected under FRPC 4-1.9.

Legal Malpractice. Attorney may not execute an agreement prospectively limiting professional liability to client unless permitted by law and client is independently represented. FRPC 4-1.8(h). Malpractice claim is not assignable. *Washington v. Fireman's Fund*, 459 So. 2d 1148 (Fla. 4th DCA 1984). Specific causes of action include: 1) Negligence, *Weiner v. Moreno*, 271 So. 2d 217 (Fla. 3d DCA 1973); 2) Breach of contract, *Solomon v. Meyer*, 116 So. 2d 37 (Fla. 3d DCA 1959); and 3) Breach of fiduciary duty, see *Gerlach v. Donnelly*, 98 So. 2d 493 (Fla. 1957). Statute of limitations for a malpractice claim is two years and does not begin to run until existence of a harm has been established and injured party knew or should have known of either injury or negligent act. F.S. 95.11(4)(a). *Zitrin v. Glaser*, 621 So. 2d 748 (Fla. 4th DCA 1993). When a malpractice claim is predicated on errors or omissions committed in the course of litigation, and that litigation proceeds to judgment, the statute of limitations does not begin to run until the litigation is concluded by final judgment, rather than when verdict is rendered. *Silverstone v. Edell*, 721 So. 2d 1173 (Fla. 1998).

Fees. See FRPC 4-1.5 for rules concerning fees for legal services. Attorneys' fees may be awarded in favor of insured against insurer where insured successfully obtains judgment on their policy. F.S. 627.428(1).

AUTOMOBILES

See "NEGLIGENCE" and "NO-FAULT."

Age. License may not be issued to person under age 16, except learner's license may be issued to person who is age 15 and meets requirements; license may be issued to person under age 18 who meets requirements. F.S. 322.05; 322.091. Licensees under age 17 subject to certain driving restrictions. F.S. 322.16; 322.161. Application of person under age 18 for license must be signed by parent, guardian or, if none, responsible adult willing to accept responsibility for minor's negligence or willful misconduct. F.S. 322.09.

Agency. Under dangerous instrumentality doctrine, motor vehicle owner is generally liable for another's negligent misuse of owner's vehicle. *Michalek v. Shumate*, 524 So. 2d 426 (Fla. 1988). Title owner under agreement to lease motor vehicle for one year or longer is exempt from liability under doctrine so long as lessor or lessee obtains and maintains requisite insurance. F.S. 324.021(9)(b)(1). When control of vehicle voluntarily relinquished to another, conversion or theft will relieve

owner of responsibility for its misuse regardless of restrictions placed on use. *Susco v. Leonard*, 112 So. 2d 832 (Fla. 1959). *Commercial Carrier Corp. v. S.J.G. Corp.*, 409 So. 2d 50 (Fla. 2d DCA 1981) (company not liable under dangerous instrumentality doctrine for negligent operation of stolen rental car which had been left by renter unattended with keys in ignition). Cf. *Vining v. Avis*, 354 So. 2d 54 (Fla. 1977) (owner may be liable for negligence if car left unattended with keys in ignition). Other exceptions to doctrine set out in *Devlin v. Florida Rent-a-Car*, 454 So. 2d 787 (Fla. 5th DCA 1984).

Comparative and Contributory Negligence. Under Florida's "pure" comparative negligence doctrine, contributory fault does not bar recovery altogether but merely serves to reduce damages in proportion to fault. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). See generally *Y. H. Investments, Inc. v. Godales*, 690 So. 2d 1273 (Fla. 1997).

Compulsory Insurance Coverage. Motor vehicle owner must maintain personal injury protection insurance or equivalent security, of at least \$10,000. F.S. 627.736; see *Andriakos v. Cavanaugh*, 350 So. 2d 561 (Fla. 2d DCA 1977); see also F.S. 324.011 *et seq.* (financial responsibility law). PIP insurer shall not be charged more than 175% of allowable amount for MRI services under Medicare Part B. F.S. 627.736(5)(b).

Alcohol/DUI. Operating motor vehicle while "under the influence" of alcoholic beverages or any chemical or controlled substance is prohibited; person who has a blood or breath alcohol level of 0.08 or more is legally impaired. F.S. 316.193. Fines and penalties in F.S. 316.193. Unlawful for person under 21 having breath-alcohol level of 0.02 or higher to drive or be in actual physical control of vehicle. F.S. 322.2616. Any person who causes or contributes to the death of an "unborn quick child," while driving under the influence, commits DUI manslaughter. F.S. 316.193(3)(c)(3).

Damages. Measure of damages for total loss of automobile is property's value on date of loss. *Burtless v. Pallero*, 570 So. 2d 1140 (Fla. 4th DCA 1990) (automobile owner not entitled to remaining balance on car loan). Where car not totally destroyed, owner may recover difference in value before and after damage, or, at his election, reasonable cost of repair with allowance for loss in value after repair and compensation for loss of use. *Hillside Van Lines v. Matalon*, 297 So. 2d 848 (Fla. 3d DCA 1974).

Excess over Verdict. Responsibility of court upon motion to review jury award to determine whether amount is excessive or inadequate and upon such determination to order a remittitur or additur, or if adversely

affected party does not agree, a new trial on issue of damages. F.S. 768.74.

Punitive. Punitive award may be sustained if conduct which proximately caused personal injury was sufficiently offensive. *Miami v. McCorkle*, 145 Fla. 109, 199 So. 575 (Fla. 1940); *Ricci v. Thompson*, 548 So. 2d 1154 (Fla. 2d DCA 1989). Punitives can be awarded in certain civil actions involving willful, wanton, or gross misconduct, but generally may not exceed three times compensatory damages unless demonstrated by clear and convincing evidence that award not excessive. F.S. 768.73. See, e.g., *Wransky v. Dalfo*, 801 So. 2d 239 (Fla. 4th DCA 2001) (awarding \$7.5 million in punitive damages to victim of auto accident with intoxicated driver was excessive in light of driver's net worth). When insurance company fails to make payments as a general business practice, punitive damages may be sustained when no compensatory damages are alleged. *Scott v. Progressive Ins. Co.*, 932 So. 2d 475 (Fla. 4th DCA 2006).

Family Purpose Doctrine. Not applied in Florida.

Guests. Guest statute repealed. Need only ordinary negligence to be liable to guests. *Ingerson v. State Farm*, 272 So. 2d 862 (Fla. 3d DCA 1973).

Imputed Negligence/Joint Enterprise. Driver's negligence generally not imputed to passenger who has no authority or control over vehicle or driver. *Miami Coca Cola Bottling v. Mahlo*, 45 So. 2d 119 (Fla. 1950); *James A. Cummings, Inc. v. Larson*, 588 So. 2d 1066 (Fla. 4th DCA 1991). However, if driver and passenger have united in joint enterprise for common purpose under such circumstances that each has express or implied authority to act for all with respect to control of the means or agencies employed to execute such common purpose, then negligence of one shall be imputed to another. *Union Bus v. Smith*, 104 Fla. 569, 140 So. 631 (Fla. 1932). See also *Conner v. Southland Corp.*, 240 So. 2d 822 (Fla. 4th DCA 1970) (where several people rent an automobile for a trip and share expenses, joint enterprise doctrine applies). Elements of joint enterprise: joint operation or control of vehicle's movement; community of interests in objects and purposes to be accomplished; and equal right to control conduct of other. *Bryant v. Tampa*, 100 So. 2d 665 (Fla. 2d DCA 1958). See *Porter v. Jacksonville Elect.*, 64 Fla. 409, 60 So. 188 (Fla. 1912) (negligence of chauffeur not imputed to passengers without authority or control over vehicle or driver); *Bessett v. Hackett*, 66 So. 2d 694 (Fla. 1953) (mere relationship of husband and wife does not constitute sufficient basis on which to impute husband's negligence to wife). But see *Caliando v. Huck*, 84 F. Supp. 598 (N.D. Fla. 1949).

Last Clear Chance. Doctrine is inapplicable in pure comparative fault jurisdictions like Florida. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973); *Garcy v. Dupee*, 731 F. Supp. 1582 (S.D. Fla. 1990).

Military Personnel. Insurance Company may not raise premiums if sole reason insured's policy lapsed is transfer for military duty. F.S. 626.9541.

Motorized Bicycles. Term "moped" is defined in F.S. 316.003 and 320.01. All operators and passengers must wear protective headgear, unless the person is over 21 years of age and covered by an insurance policy providing at least \$10,000 in medical benefits. F.S. 316.211. Restrictions on use. F.S. 316.2085. License plate required. F.S. 320.0803. Must be at least 16 years of age to operate. F.S. 316.003(2). License required for moped operation. *Soto v. State*, 711 So. 2d 1275 (Fla. 4th DCA 1998).

Ownership/Title. Beneficial interest in automobile with control and authority over its use rather than mere naked legal title determines ownership in considering tort liability. *Cox Motor Co. v. Faber*, 113 So. 2d 771 (Fla. 1st DCA 1959). Certificate of title establishes rebuttable presumption of ownership. *In re forfeiture of 1989 Isuzu*, 612 So. 2d 695 (Fla. 1st DCA 1993). Common law governing sales of automobiles may apply in lieu of provisions governing title certificates in Ch. 319. *McAfee v. Killingsworth*, 98 So. 2d 738 (Fla. 1957).

Pedestrians. Driver required to exercise reasonable care toward pedestrians. *Baston v. Shelton*, 152 Fla. 879, 13 So. 2d 453 (Fla. 1943). Pedestrian and driver have equal right to use of streets. *Smith v. Johnson*, 187 So. 2d 655 (Fla. 2d DCA 1966).

Rental Company. Definition revised on July 1, 2005, for purposes of an exclusion from an exemption from application of limits of liability provisions, to include: related rental or leasing companies that are subsidiaries of the company that rents or leases vehicles; and holders of a motor vehicle title or equity interest in fleet of motor vehicles used for renting or leasing. F.S. 324.021(9)(c).

Seat Belts. Unlawful to operate motor vehicle unless driver and person seated in front passenger seat is restrained by safety belt. In addition, each passenger under age 18 must be restrained by a safety belt or child restraint device. F.S. 316.614. Violation of seat belt statute constitutes evidence of negligence. *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996). Comparative negligence may be raised as affirmative defense where failure to wear seat belt was a contributing cause of damages. *Id.*



Service of Process upon Non-Resident Motorists. Provision made for service of process on Sec. of State in action brought against owner or operator of foreign registered motor vehicle. F.S. 48.171. See F.S. 48.161 for procedure. An action in rem requires seizure or its equivalent of property and the giving of reasonable and fair notice of the action and date and place of hearing. *Harris v. Sarasota*, 132 Fla. 568, 181 So. 366 (1938).

Speed Limit. Speed must be reasonable and prudent under circumstances. F.S. 316.183. For specific speed limits, see F.S. 316.183-316.1895. Driver has duty to control vehicle so as to avoid reasonably foreseeable dangers. *Central Truck v. Rogers*, 140 So. 2d 130 (Fla. 1st DCA 1962). Excessive speed alone is insufficient to maintain an action based on gross negligence. *Myers v. Korbly*, 103 So. 2d 215 (Fla. 2d DCA 1958).

Trailers. Defined. Vehicle without motor power designed to be coupled to or drawn by motor vehicle and no part of its weight rests upon towing vehicle. F.S. 320.01(4). Weight Limits. See F.S. 320.01(10), (12), (25). For weight limits of motor vehicles, see F.S. 316.535.

Uninsured and Underinsured Endorsements. Uninsured motorist coverage is statutorily required to be provided for all persons insured under basic liability policy and exclusions from coverage are not permitted. *Auto-Owners Ins. Co. v. Bennett*, 466 So. 2d 242 (Fla. 2d DCA 1984). Uninsured motorist provision in policy is intended to provide coverage where injuries were caused by uninsured or underinsured motorist. *Salas v. Liberty Mut.*, 272 So. 2d 1 (Fla. 1972). Coverage not available unless claim has value in excess of defendant's liability coverage. F.S. 627.727.

Motor vehicle liability insurance policy covering bodily injury generally must provide for or be supplemented by uninsured motor vehicle coverage unless rejected in writing. *Id.* Burden on insurer to show informed, knowing consent. *Omar v. Allstate*, 632 So. 2d 214 (Fla. 5th DCA 1994). When motor vehicle leased for period of one year or longer and lessor by terms of lease provides liability coverage on vehicle, lessee has sole privilege to reject uninsured motorist coverage. F.S. 627.727. *Cf. Kohly v. Royal Indem.*, 190 So. 2d 819 (Fla. 3d DCA 1966) (lessee bound by car rental agency's rejection of uninsured motorist coverage). If rejected, uninsured motorist coverage need not be included in renewal policy. F.S. 627.727. Limits of uninsured motorist coverage cannot be less than limits of bodily injury liability insurance purchased by named insured, or such lower limit as selected by named insured. *Id.*

"Uninsured motor vehicle" includes insured motor vehicle where liability insurer thereof is unable to make

payment with respect to legal liability of its insured because of insolvency. F.S. 627.727(3). *Fredel v. Southern General Ins.*, 233 So. 2d 451 (Fla. 3d DCA 1970). Liability of uninsured motorist coverage insurer does not include tort damages for pain, suffering, mental anguish and inconvenience except in certain situations. F.S. 627.727(7). Uninsured motorist policy provision requiring actual physical contact in hit and run case held void as against public policy. *Brown v. Progressive Mut. Ins.*, 249 So. 2d 429 (Fla. 1971).

Insurers must be notified of settlements that do not fully satisfy claim. F.S. 627.727(6)(a). Clauses excluding coverage when insured, without consent of insurer, settle or prosecute to judgment claim against tort-feasor are valid. *Volkswagen Ins. v. Taylor*, 201 So. 2d 624 (Fla. 1st DCA 1967). See *Carter v. American Fire & Cas.*, 219 So. 2d 462 (Fla. 4th DCA 1969) (claim not "prosecuted to judgment" when judgment never entered on verdict). Breach of exclusion clause creates rebuttable presumption of prejudice to insurer. *McInnis v. State Farm Mut.*, 208 So. 2d 481 (Fla. 4th DCA 1968). See also *Barnes v. Travelers Ins.*, 342 So. 2d 1065 (Fla. 3d DCA 1977) (presumption of prejudice to insurer for failure to notify police promptly of accident not rebutted).

AVIATION

Uniform Act. Not adopted in Florida. *But see* F.S. 329.01 *et seq.*

Action for Wrongful Death. In wrongful death action against aviation company and its insurer, under clear and unambiguous language of the policy, flight engineer was employee of an assured and was thus excluded from coverage under employee exclusion clause and that, in any event, the policy neither named crew members as individuals entitled to coverage nor included them within definition of passengers entitled to benefits under the contract. *Torres v. Southeastern Aviation Inc.*, 472 So. 2d 541 (Fla. 3d DCA 1985).

Limits to Liability. Airline's alleged negligence in failing to properly care for passenger was, as matter of law, not legal cause of passenger's injuries when she fell on escalator at airport as she was about to board another airline's flight; airline's responsibilities to passenger terminated when she made her way to and checked in at other airline's counter, and effect of its negligence was therefore clearly superseded by series of intervening events which included lengthy period which passenger spent at airport without incident and, more importantly, other airline's own subsequent negligence. *Cortes v. Delta Airlines*, 638 So. 2d 108 (Fla. 3d DCA 1994). Airline passenger's action for damages could only be brought subject to conditions and limits set out in Warsaw Convention; passenger's flight was to begin and end



in signatory nation, Canada, with intermediate stops in two others, United States and Columbia, and she was injured in international transportation. *Id.* Duly filed tariff which limits liability for lost baggage is not only incorporated into the contract with the passenger, but also constitutes the law which governs the air carrier's liability for any loss or damage to property. *Wackenhut Corp. v. Lippert*, 609 So. 2d 1304 (Fla. 1992). The Warsaw Convention only limits the liability of air carriers but does not limit the liability of manufacturers, maintenance companies, airport operators, dispatching companies, or air traffic controllers. *See, e.g., Compania de Panamena de Aviacion v. Gerstein*, 645 So. 2d 55 (Fla. 3d DCA 1994).

Service of Process. Evidence that pilot told president of lessor corporation that he would be flying leased plane from the northeast to Florida, that corporation had entered into similar leases with same party, that corporation had entered into a long term lease for other aircraft with another party operating in Florida, and that corporation had previously advertised in Florida, was sufficient to support finding that corporation should have reasonably anticipated being haled into Florida court, thereby supporting conclusion that there was personal jurisdiction over corporation in suit alleging the airplane, which crashed in Haiti, was unairworthy. *Hernandez v. Bass Aviation, Inc.*, 453 So. 2d 447 (Fla. 4th DCA 1984). Under significant relationships test, Florida law applied to question of liability for wrongful death resulting from crash of airplane in North Carolina, where North Carolina maintained no significant relationship with occurrence or parties, decedents resided in Florida, plane was rented in Florida from Florida residents, plane was hangered and negligently maintained in Florida, flight began and was to end in Florida, and ancillary estates were opened in Florida and lawsuits were filed in Florida. *Proprietors Ins. Co. v. Valsecchi*, 435 So. 2d 290 (Fla. 3d DCA 1983).

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

Burglary and Theft Insurance Defined. Insurance against loss or damage by burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation, or wrongful conversion, disposal, or concealment, or from any attempt at any of the foregoing; including supplemental coverage for medical, hospital, surgical, and funeral expense incurred by the named insured or any other person as a result of bodily injury during the commission of a burglary, robbery, or theft by another; also insurance against loss of or damage to

moneys, coins, bullion, securities, notes, drafts, acceptances or any other valuable papers and documents, resulting from any cause. F.S. 624.605(1)(d).

Losses from multiple entries initially through use of tools and subsequently through opened window were both within policy including burglary coverage. *Hanover Ins. v. Spicola Appliance Co.*, 178 So. 2d 898 (Fla. 2d DCA 1965). Subsequent entries were proximately caused by initial breaking and entering even though no evidence of force. *Id.* Loss was covered in trailer burglary, where locks on trailer were missing and driver had only key; court concluded that only reasonable conclusion was that locks were forcibly removed. *Exhibitor, Inc. v. Nationwide Ins. Co.*, 494 So. 2d 288 (Fla. 1st DCA 1986).

Tractor trailer was "unattended" within meaning of policy exclusion for loss by theft of property when vehicle was left unattended in a parking lot not fenced in and there was no attendant. *U.S. Fire Ins. v. Century Ins.*, 580 So. 2d 799 (Fla. 3d DCA 1991).

Where insured delivered automobiles to be sold by salesperson, and proceeds were to be applied to down payment on new car but salesperson used proceeds to pay own debt, loss to insured was "theft" under terms of policy. *State Farm v. Pridgen*, 498 So. 2d 1245 (Fla. 1986).

Policy containing exclusion for mysterious disappearances deemed valid. *Saks v. National Cas.*, 623 So. 2d 853 (Fla. 3d DCA 1993).

CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Cancellation is provided for by statute, contract and conduct of parties. Statutory procedures for cancellation cover automobile policies, F.S. 627.728, premium finance company contracts, F.S. 627.848, health insurance policies, F.S. 627.6043, and property and casualty insurance, F.S. 627.4133. (This section excludes a policy for mortgage, guaranty, surety, marine insurance and automobiles). Statutory provisions prevail over contrary insurance policy provision relating to cancellation. *Martin v. Ritcheson*, 306 So. 2d 582 (Fla. 1st DCA 1975). An insurer may cancel the policy if, during the policy term, the named insured or any other operator, who resides in the same household or customarily operates an automobile insured under the policy, has his or her driver's license suspended or revoked. F.S. 627.7275(2)(d).

Insurers can cancel for any reason if policy allows it. *Winer v. New York Life Ins. Co.*, 177 So. 224 (Fla.

1937), *rev'd on other grounds*, 190 So. 2d 894 (Fla. 1938). Notice of cancellation of insurance policy given insured must clearly indicate intent to cancel policy. *Graves v. Iowa Mut.*, 132 So. 2d 393 (Fla. 1961). Purpose of notice is to allow insured to get other protection. *Frazier v. Standard Guar.*, 382 So. 2d 392 (Fla. 4th DCA 1980). Notice of cancellation sufficient where all terms of policy strictly complied with in mailing notice. *Bradley v. Associates Discount Corp.*, 58 So. 2d 857 (Fla. 1952). But type of mailing governed by statute. See *Boman v. State Farm*, 505 So. 2d 445 (Fla. 1st DCA 1987). Cancellation is effective by proof of compliance with requirements of notice without evidence of receipt of such notice. See F.S. 627.728(5). *But see Allstate Indem. Co. v. Mohan*, 764 So. 2d 901 (Fla. 5th DCA 2000), where procedures for canceling an automobile policy are inapplicable if insurer offers to renew and the insured fails to pay required premium.

Insurance policy provisions permitting written cancellation generally are considered to be for benefit of insurer, and subject to waiver by insurer. *Allstate Ins. v. Cipriani*, 629 So. 2d 183 (Fla. 4th DCA 1993). "Actual notice of insurance cancellation via telephone is insufficient to cancel the mortgagee's interest when a standard mortgage clause contained in the contract of insurance unambiguously requires written notice to the mortgagee." *Fidelity & Dep. Co. of MD v. First State Ins. Co.*, 677 So. 2d 266, 269 (Fla. 1996).

Declaration of Emergency. Upon a declaration of an emergency, an insurer may not cancel or nonrenew a personal residential or commercial residential property insurance policy covering property which has been damaged as a result of a hurricane or wind loss for a period of 90 days after the dwelling or residential property has been repaired. This does not apply if premiums have not been paid or in cases of fraud or misstatement related to claim. F.S. 627.4133(2)(d).

Parties through mutual consent can cancel by agreement even if policy provision about cancellation procedure not complied. *Merchants & Bankers Guaranty Co. v. Downs*, 175 So. 704 (Fla. 1937). Under agreement that cancellation effective only when other coverage procured, first insurer liable even though second insurer had issued policy under mistaken belief that first insurer had canceled its policy. *Continental Cas. v. Giller*, 116 F.2d 431 (5th Cir. 1940).

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONSTRUCTION OF POLICY

Ambiguity of Terms. Ambiguous, equivocal, or uncertain terms construed strictly and most strongly against insurer, and liberally in favor of insured. *Stuyvesant v. Butler*, 314 So. 2d 567 (Fla. 1975); *Fireman's Fund v. Boyd*, 45 So. 2d 499 (Fla. 1950); *Quality Imports v. St. Paul Fire*, 566 So. 2d 293 (Fla. 1st DCA 1990); *Time Ins. v. Neumann*, 634 So. 2d 726 (Fla. 4th DCA 1994). Where policy susceptible of two interpretations, policy providing greater indemnity or coverage prevails. *DaCosta v. General Guaranty*, 226 So. 2d 104 (Fla. 1969). *Quality Imports v. St. Paul Fire*, 566 So. 2d 293 (Fla. 1st DCA 1990); *Clough v. Government Employees*, 636 So. 2d 127 (Fla. 5th DCA 1994), *rev'd on other grounds*, *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995) - see Addendum XVI. If policy can be construed as either a liability or indemnity policy, the policy shall be interpreted as a liability policy to afford the insured the greater coverage. *Schuck v. Habicht*, 672 So. 2d 559, (Fla. 4th DCA 1996). However, rule that inconsistencies, uncertainty, or ambiguities must be construed in favor of insured only applies when a genuine inconsistency, uncertainty, or ambiguity remains after ordinary rules of construction applied; it does not allow courts to rewrite insurance contracts, add meaning not present, or reach results contrary to intentions of parties. *Excelsior Ins. v. Pomona Park Bar & Pkg. Store*, 369 So. 2d 938 (Fla. 1979); *Nugget Oil v. Universal Security Ins. Co.*, 584 So. 2d 1068 (Fla. 1st DCA 1991); *Thomas v. Prudential Prop. & Cas.*, 673 So. 2d 141 (Fla. 5th DCA 1996).

Conditional Receipt of Application. Insurance contract must meet requirements of law respecting offer and acceptance. *Bankers & Shippers Ins. v. Phoenix Assur.*, 210 So. 2d 715 (Fla. 1968). The application is not itself a contract, but a mere proposal of a contract for insurance; it is one step in the creation of the insurance contract, and it needs to be accepted by insurer for there to be a contractual relationship. *Liberty Mut. Ins. v. Scalise*, 627 So. 2d 87 (Fla. 1st DCA 1993).

Hurricane Deductibles/Inflation Guard. Beginning October 1, 2005, for any personal lines residential property insurance policy containing a separate hurricane deductible or inflation guard rider, the insurer must compute and prominently display the actual dollar value of the hurricane deductible on the declarations page of the policy. For policies containing the inflation guard rider, the insurer shall notify the policyholder of the possibility that the hurricane deductible may be higher than indicated when loss occurs due to application of the rider. F.S. 627.701(4)(d).

Inconsistent Policy terms and endorsements. In order to determine intentions of parties pursuant to insur-

ance policy, court should construe instrument as a whole; isolated sentence of policy should not be construed alone. *F.S. 627.419; Prudential Prop. & Cas. v. Bonnema*, 601 So. 2d 269 (Fla. 5th DCA 1992). See *Nautilus Ins. Co. v. S & S Indus. Services*, 2007 WL 951776 (S.D. Fla. 2007).

Conflict between clauses in automobile insurance policy would be resolved in favor of policyholder. *Dyer v. Nationwide Mut. Fire*, 276 So. 2d 6 (Fla. 1973); *Aromin v. State Farm*, 908 F.2d 812 (11th Cir. 1990) (liability insurance). Definitions used in one part of policy do not necessarily apply to other parts. See *Grant v. State Farm Fire*, 638 So. 2d 936 (Fla. 1994). When something is not defined, give it ordinary nonlegal dictionary definition. *Security Ins. Co. of Hartford v. Commercial Credit Equip. Corp.*, 399 So. 2d 31 (Fla. 3d DCA 1981).

Policy may not give right in one paragraph, and retract it another, unless limitation clearly expressed. *Moore v. Connecticut General Life*, 277 So. 2d 839 (Fla. 3d DCA 1973). See also *Tire Kingdom, Inc. v. First Southern Ins. Co.*, 573 So. 2d 885 (Fla. 3d DCA 1990) (policy cannot grant rights in one paragraph and then retract very same rights in another paragraph called "exclusion").

Conflicts between application and policy will be resolved in favor of policy unless application gives more coverage. *State Farm Mut. Auto Ins. Co. v. Mallard*, 548 So. 2d 733 (Fla. 3d DCA 1989).

Oral Binders. Oral insurance contract valid in Florida provided all elements of written contract proven to exist. *Florida Indus. Machinery, Inc. v. Executive Life*, 560 So. 2d 413 (Fla. 1st DCA 1990). "Binder" is not insurance policy but is contract, either written or oral, providing interim insurance from date of application until date of completion or rejection of principal policy. *F.S. 627.420; Frank v. Travelers Indem.*, 310 So. 2d 418 (Fla. 3d DCA 1975). Binders merge into the subsequently issued policy so that the terms and conditions of the policy, in case of conflict or ambiguity, are controlling. *King v. Allstate*, 906 F.2d 1537 (11th Cir. 1990).

DAMAGES

Appellate Review. Excessive Verdicts. Appellate court will not disturb jury verdict on ground of excessiveness absent showing that verdict imposes hardship disproportionate to injuries suffered and shocks judicial conscience. *Florida Power & Light Co. v. Robinson*, 68 So. 2d 406 (Fla. 1953); *Sinclair Refining Co. v. Butler*, 190 So. 2d 313 (Fla. 1966); *Schnedl v. Rich*, 137 So. 2d 1 (Fla. 2d DCA 1962). Trial court, upon proper motion, must review amount of jury's award to determine, by

considering statutory criteria, if award is excessive or inadequate and, if so, to order additur or remittitur or, if party adversely affected disagrees, to order a new trial. *F.S. 768.74* (statutory criteria).

Appellate court will not reverse trial court's order denying a new trial on issue of adequacy of verdict where jury, as reasonable men, could have fairly valued injuries at amount of damages awarded. *Harby v. Florida East Coast Hotel Co.*, 59 Fla. 280, 52 So. 193 (Fla. 1910); *Jennings v. Winter Park*, 250 So. 2d 900 (Fla. 4th DCA 1971); *Duquette v. Hindman*, 152 So. 2d 789 (Fla. 1st DCA 1963); *Altilio v. Gemperline*, 637 So. 2d 299 (Fla. 1st DCA 1994).

Arbitration Awards. It is well settled that in order to preserve integrity of arbitration process, courts will not review finding of fact contained in an arbitration award, and will never undertake to substitute their judgment for that of the arbitrators. *Merritt-Chapman & Scott Corp. v. State Road Dept.*, 98 So. 2d 85 (Fla. 1957); *Fraternal Order of Police v. Miami*, 598 So. 2d 89 (Fla. 3d DCA 1992); see Florida Arbitration Code, *F.S. Chapter 682 et seq.* In insurance, award has no effect on matters of liability not arbitrated. *Lumbermen's Mut. Cas. Co. v. Meade*, 404 So. 2d 1141 (Fla. 5th DCA 1981).

There are no clear cut guidelines for when court may set aside common law arbitration award. *Arnold's Restaurant, Inc. v. Larson*, 149 So. 2d 380 (Fla. 3d DCA 1963). Attack on common law award, unlike statutory award, may be based on arbitrator's erroneous application of rule of law. *National Hotel, Inc. v. Koretzky*, 96 So. 2d 774 (Fla. 1957).

Statutory arbitration award may not be vacated because of a mistake of fact. *Packard v. Ripple*, 531 So. 2d 991 (Fla. 3d DCA 1988). Insurance policy can allow parties to reject award without violating arbitration code or public policy. *Roe v. Amica Mut.*, 533 So. 2d 279 (Fla. 1988). If award is within scope of arbitration agreement, and arbitrator did not violate statutory acts of misconduct, award is a final and conclusive judgment. *Cassara v. Wofford*, 55 So. 2d 102 (Fla. 1951).

Collateral Estoppel. Party to arbitration proceedings estopped from arguing grounds for setting an award aside when such argument is not raised until after award is granted. *Harris v. Haught*, 435 So. 2d 926 (Fla. 1st DCA 1983); *Miami v. Fraternal Order of Police*, 368 So. 2d 56 (Fla. 3d DCA 1979); *Fernandez v. Grange Mut. Cas. Co.*, 224 So. 2d 724 (Fla. 3d DCA 1969); *Carter v. State Farm Mut. Auto. Ins. Co.*, 224 So. 2d 802 (Fla. 1st DCA 1969); *Arnold's Restaurant, Inc. v. Larson*, 149 So. 2d 380 (Fla. 3d DCA 1963); *Silveira v. Silveira*, 630 So. 2d 204 (Fla. 4th DCA 1993).



Comparative Negligence. Any contributory fault chargeable to claimant diminishes proportionately the amount awarded as economic and non-economic damages for injury attributable to claimant's contributory fault but does not bar recovery. F.S. 768.81 Where defendant has lower percentage of fault than plaintiff, defendant is not subject to joint and severable liability. *Id.*; *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

Joint and Several Liability. Abolished in Florida. For all causes of action arising after April 26, 2006, the court shall enter judgment against each party on the basis of such party's percentage of fault and not on the basis of joint and several liability. F.S. 768.81. For actions arising prior to April 26, 2006, joint and several liability still applies.

The doctrine of joint and several liability was applied when more than one defendant, acting in concert or through independent acts, produced a single injury. *Acadia Partners, L.P. v. Tompkins*, 759 So. 2d 732 (Fla. 5th DCA 2000). Joint and several liability allowed the claimant to recover damages from one of these multiple defendants, even though that particular defendant may have been the least responsible defendant involved. *Agency for Health Care Admin. v. Associated Industries of Florida, Inc.*, 678 So. 2d 1239 (Fla. 1996). Hence, a defendant who was only 1% responsible for an accident, but who was jointly liable with tortfeasor who was 99% responsible, could have been made to pay 100% of the economic damages of a plaintiff who was 0% at fault. In order to determine the applicable formula for assessing each party's percentages of responsibility, see F.S. 768.81 for computational methodology.

Pursuant to the decision in *Wells v. Tallahassee Mem. Reg. Med. Ctr.*, 659 So. 2d 249, 254 (Fla. 1995), settlement proceeds should be divided between economic and non-economic damages in the same proportion as the jury's award. Specifically, the percentage of the jury's award allocated to economic damages should be calculated by dividing the economic damages by the total jury award. *Id.* The set off for the non-settling defendant is determined by multiplying the amount of the settlements by that percentage of the jury's award allocated for economic damages. *Id.*

The amount of economic damages that the non-settling defendant is liable for is calculated by subtracting that portion of the settlements that the non-settling defendant is entitled to set off and any collateral source benefits or medical payments from the amount of economic damages. *Id.*

The non-economic damages that the non-settling defendant is liable for is determined by multiplying the

non-economic damages by the percentage of fault apportioned to the non-settling defendant. *Id.*

Lastly, the non-settling defendant's liability is determined totaling the economic damages for which the non-settling defendant is liable, the non-economic damages for which the defendant is liable and any costs awarded. *Id.*; *Wiggins v. Braman Cadillac, Inc.*, 669 So. 2d 332, 333-34 (Fla. 3d DCA 1996).

Also, principles of set off are inapplicable to contractual obligations of liability insurers pursuant to jury verdicts entered in comparative negligence action; each insurer must pay full amount owed by insured. *Stuyvesant Ins. Co. v. Bournazian*, 342 So. 2d 471 (Fla. 1976).

Indemnification. Indemnification usually arises as a result of contract, which can be express or implied. *Seaboard Coast Line R.R. v. Smith*, 359 So. 2d 427 (Fla. 1978); *Clearwater v. L.M. Duncan & Sons*, 466 So. 2d 1116 (Fla. 2d DCA 1985). Indemnification can arise from law or equity. *Barnett Bank v. Mutual of Omaha*, 354 So. 2d 114 (Fla. 3d DCA 1978). Indemnification can include costs and fees as well as damages. *Insurance Co. of N. America v. King*, 340 So. 2d 1175 (Fla. 4th DCA 1976). Damages are reduced by amount paid by collateral sources, except collateral sources for which subrogation right exists. F.S. 768.76; *Wells v. Tallahassee Mem. Reg. Med. Ctr.*, 659 So. 2d 249 (Fla. 1995). Judgments against insureds are binding on insurer/indemnitor when insurer has notice of claim and an opportunity to defend. *Coblentz v. American Sur.*, 416 F.2d 1059 (5th Cir. 1969). The duty to defend is distinct from and broader than duty to indemnify the insured against damages assessed, and if complaint alleges facts showing two or more grounds for liability, one being within coverage and the other not, the insurer is obligated to defend entire suit. *Baron Oil v. Nationwide Mut. Ins.*, 470 So. 2d 810 (Fla. 1st DCA 1985).

Psychic Injuries – Mental Pain and Suffering. Compensatory damages include not only actual pecuniary loss, but also bodily pain and suffering and mental anguish. *Florida E. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631 (Fla. 1933). For motor vehicle accidents, see threshold statutory standards which must be reached. F.S. 627.737. A psychically traumatized person must manifest a discernible injury before having a claim resulting from injuries inflicted on another. *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995).

"Impact rule" also bars recovery for mental pain and anguish in the absence of impact. *Herlong Aviation, Inc. v. Johnson*, 291 So. 2d 603 (Fla. 1974). *But see, Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995), which eliminates rigid hard fast impact rule, now courts would set general

parameters for recovery for psychic trauma, limits will include space, time, distance, nature of injury sustained and relationship of the parties. Actual impact is not required if injury was contemporaneous and a direct result of the negligent act. *Lowd v. Kovens Constr.*, 546 So. 2d 1087 (Fla. 3d DCA 1989). Plaintiff need not prove the existence of a physical injury in order to recover damages for emotional injuries caused by the consumption of a contaminated food beverage. *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234 (Fla. 2001). *Hagan* does not abolish the Impact Rule in Florida. Generally, impact rule does not apply to claims for intentional infliction of emotional distress. See *Eastern Airlines, Inc. v King*, 557 So. 2d 574 (Fla. 1990). Also, Impact Rule does not apply where emotional damages are a “consequence of conduct that itself is a freestanding tort apart from any emotional injury.” *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997) (allowing claim for emotional damages when doctor negligently caused stillbirth, but did not injure the mother). Florida courts will allow recovery for emotional distress when one person directly observes the death or significant physical injury of a close family member. See *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985).

Asbestos/Silica. Asbestos or silica related actions arising after July 1, 2005 will require physical impairment as an essential element of a claim. Provides criteria for prima facie evidence of physical impairment and required information. Specifies certain limitation periods for certain claims; limits damages under certain circumstances; prohibits award of punitive damages. F.S. 774.204.

The Legislature intends to limit the cumulative recovery by all asbestos claimants from innocent successors (corporations that assumes or incurs asbestos-related liabilities - F.S. 774.002) who became successors before January 1, 1972. F.S. 774.001; F.S. 774.003. Cumulative asbestos-related liabilities of corporation are limited to fair market value of total gross assets of transferor determined as of time of merger or consolidation. F.S. 774.004.

Two-Disease Rule. An asbestos or silica claim arising out of a nonmalignant condition shall be a distinct cause of action from a claim arising out of asbestos or silica related cancer. A settlement of a nonmalignant claim concluded after the effective date of this act, may not require the release of any future claim for asbestos/silica related cancer. F.S. 774.206.

Mental suffering in claims against insurers arising under F.S. 624.155 (bad faith insurance suits) are only allowed if insurer’s conduct would amount to an independent tort. *Dunn v. National Sec. Fire*, 631 So. 2d 1103 (Fla. 5th DCA 1993).

Punitive Damages. A defendant may only be held liable for punitive damages if plaintiff proves by clear and convincing evidence that defendant was personally guilty of intentional misconduct or gross negligence. F.S. 768.72; *Strasser v. Yalamanchi*, 677 So. 2d 22 (Fla. 4th DCA 1996). Civil actions based on negligence, strict liability, products liability, misconduct in commercial transactions or gross misconduct are limited to punitive damages to three times the amount of compensatory damages or \$500,000, whichever is greater. F.S. 768.73. Does not apply to class actions. *Id.* Liability insurance will not cover punitives as a result of insured’s misconduct. *U.S. Concrete Pipe v. Boulder*, 437 So. 2d 1061 (Fla. 1983). However, coverage for punitive damages may extend to an insured if he is not guilty of any active wrongdoing, and whose only basis of liability, if any exists, must necessarily be vicarious liability arising out of his ownership. *Travelers Ins. Co. v. Wilson*, 261 So. 2d 545 (Fla. 4th DCA 1972). Gross negligence alone will not justify punitive damages, rather, there must be willful and wanton disregard for rights of others. *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986). For breach of contract, usually no punitives allowed unless conduct would amount to independent tort. *Lewis v. Guthartz*, 428 So. 2d 222 (Fla. 1982). Employer cannot be assessed punitive damages for employee’s acts without employer having been guilty of at least simple negligence. *Mercury Motors Express v. Smith*, 393 So. 2d 545 (Fla. 1981). When insurance company fails to make payments as a general business practice constituting willful, wanton, malicious, and reckless disregard, punitive damages may be sustained when no compensatory damages are alleged. *Scott v. Progressive*, 932 So. 2d 475 (Fla. 4th DCA 2006).

Collateral Source Rule. Damages award is reduced by amount paid to claimant by collateral sources. The collateral source rule statute does not require admission of any collateral source evidence in a liability trial. *Gormley v. GTE Products*, 587 So. 2d 455 (Fla. 1991). The collateral source rule allows an injured party to collect full damages, irrespective of coverage or payment for any element of the damages by any source other than the tort-feasor. *Respass v. Carter*, 585 So. 2d 987 (Fla. 5th DCA 1991). For collateral source rule and automobiles, see *White v. Westlund*, 624 So. 2d 1148 (Fla. 4th DCA 1993). Future payments made by collateral source do not count. *Id.*

Asbestos/Silica. At the time a complaint is filed, plaintiff must file a verified written report, with the court, disclosing the total amount of any collateral source payments received. The court shall permit setoff. F.S. 774.207.

Statutory Caps on Awards. In most civil cases punitive damages are limited to three times compensatory damages or \$500,000, whichever is greater. Where defendant's wrongful conduct was motivated by desire for unreasonable financial gain and knew of unreasonably dangerous nature of conduct and high likelihood of injury, the cap is 4 times compensatory damages or \$2,000,000, whichever is greater. No cap on punitive damages where defendant had specific intent to harm and conduct actually harmed claimant. F.S. 768.73.

DEATH

See Law Digest Tables.

Abatement and Survival. For wrongful death, action for personal injury resulting in death does not survive and any such action pending at death abates. F.S. 768.20. No abatement for pending past judgment motions. *Variety Children's Hosp. v. Perkins*, 382 So. 2d 331 (Fla. 3d DCA 1980). No additional causes of action terminate with deceased. F.S. 46.021.

Action for Wrongful Death. See generally F.S. 768.16 *et seq.*, Florida Wrongful Death Act. Damages. Decedent's personal representative shall bring one action, for benefit of decedent's survivors and his estate, to recover damages covered by the injury resulting in death. F.S. 768.20. Elements of damages do not need to be specifically alleged. *Seaboard A.L.R. v. Moseley*, 60 Fla. 186, 53 So. 718 (1910).

Parties in Interest. Survivors may recover lost support and services. Spouse may get loss of companionship and protection and mental pain and suffering. Parents of minor child can get mental suffering and parents of adult child obtain mental suffering if no other survivors. Children can recover loss of parenting and mental pain if there is no surviving spouse. Medical and funeral expenses are recoverable. Personal representative can collect loss of earnings. F.S. 768.21.

Statute of Limitations. An action arising from an act causing a wrongful death must be brought within two years from the time when the cause of action accrued. F.S. 95.11(4)(d). Action against state or a state agency must be brought within four years after claim accrues. F.S. 768.28(14). See *Sandford v. Manatee County*, App. 2 Dist., 769 So. 2d 1084 (2000).

Unexplained Absence. Presumption of F.S. 731.103 provides continuous absence for five years or more from place of last domicile within this state may raise presumption that party is dead for purposes of estate administration. Administration may be had by filing application in Circuit Court and proving absence for specified period. See *Mutual Life Ins. Co. v. Hamilton*, 143 F.2d 726 (5th Cir. 1944) (sustaining statutory presumption).

F.S. 732.601 provides for disposition of insurance benefits when parties die simultaneously.

DISABILITY

Required provisions in disability insurance policies are found in F.S. 627.601 *et seq.*

Disabled has duty to avail himself of all reasonable means and remedies to remove disability. *Mutual Life Ins. Co. v. Ellison*, 223 F.2d 686 (5th Cir. 1955) (insured's failure to seek competent medical advice or pursue treatment barred disability claims). Employee suffering injuries because of his own willful actions not entitled to disability benefits. *391st Bomb Group v. Robbins*, 654 So. 2d 1200 (Fla. 1st DCA 1995).

Classifications. "Total disability" should be interpreted to mean that the insured is totally disabled when his condition is such that he is not able to perform the material and substantial duties of his particular occupation, or any other occupation for which he is fit or qualified by education, training, or experience. *Equitable Life v. Wiggins*, 115 Fla. 136, 155 So. 327 (Fla. 1934). See also *Berkshire Life Ins. Co. v. Adelberg*, 698 So. 2d 828 (Fla. 1997) (Where total disability is defined as the inability to engage in "your occupation" the term "your occupation" refers to the work in which the insured is engaged at the time of the injury.); *INA Life v. Davis*, 404 So. 2d 397 (Fla. 5th DCA 1981) (the insured need not be disabled from performing every kind of duty pertaining to her disability); *Sun Life Ins. v. Evans*, 340 So. 2d 957 (Fla. 3d DCA 1976) ("total disability" is a relative term which requires a factual determination of insured's occupation, and his ability to perform all substantial and material acts necessary to his usual occupation). See also *Groff v. Paul Revere Life Ins. Co.*, 887 F. Supp. 1515 (S.D. Fla. 1993). See F.S. 627.4233 for definition of total disability.

Proof of Condition. Default in notice or proof of condition excused where insured physically unable to advise insurance company of total and permanent disability. *Reliance v. Lynch*, 144 Fla. 50, 197 So. 723 (Fla. 1940). See also *Barco v. Pennsylvania Mut.*, 36 F. Supp. 932 (S.D. Fla. 1941), *aff'd*, 126 F.2d 56 (5th Cir. 1942), *cert. denied*, 317 U.S. 637 (1942); *Davis v. Equitable*, 149 Fla. 678, 6 So. 2d 842 (Fla. 1942).

To be totally and permanently disabled it is not necessary that insured be bedridden or reduced to condition of complete helplessness. *Equitable Life v. Neill*, 243 F.2d 193 (5th Cir. 1957) (Manual laborer having duodenal ulcer and lacking strength in right hand and joint in left elbow, held to be permanently disabled); *Equitable Life v. Wiggins*, 115 Fla. 136, 155 So. 327 (Fla. 1934); *New England Mut. Life v. Huckins*, 127 Fla.

540, 173 So. 696 (Fla. 1937) (farmer unable to do ordinary farm work, although not helpless, deemed disabled). Pharmacist blinded by cataracts in both eyes, was permanently and totally disabled. *New York Life v. Bird*, 152 Fla. 532, 12 So. 2d 454 (Fla. 1943). Right of permanently disabled insured to recover benefits under lapsed policy with cash surrender value, discussed in *Stossel v. Gulf Life*, 119 Fla. 715, 161 So. 835 (Fla. 1935). Insured who paid premiums during five years preceding his death while in possession of life policy containing disability provision under which policy might have become paid up, held charged with knowledge of policy provisions precluding his administrator from recovering such payments, since they were voluntarily made. *Stonebraker v. Reliance*, 123 Fla. 244, 166 So. 583 (Fla. 1936).

Executrix's action to recover disability benefits which accrued prior to death and prior to policy anniversary date. *New York Life v. Kincaid*, 136 Fla. 120, 186 So. 675 (Fla. 1939).

Exclusions. Exclusions are permitted for pre-existing conditions. F.S. 627.6561. Policy excluding coverage for insanity or mental disorders offers no coverage where insured declared schizophrenic. *Rakoff v. World Ins.*, 191 So. 2d 476 (Fla. 3d DCA 1966), cert. denied, 201 So. 2d 232 (Fla. 1967). Any policy exclusion or limitation for expenses related to AIDS (Acquired Immune Deficiency Syndrome) or ARC (AIDS Related Complex) must be disclosed in a conspicuous manner. *Gonzalez v. Associates Life Ins.*, 641 So. 2d 895 (Fla. 3d DCA 1994).

Garnishment. Disability income benefits not subject to garnishment or attachment by creditors. *Zuckerman v. Hofrichter & Quiat, P.A.*, 646 So. 2d 187 (Fla. 1994); *Parl v. Parl*, 699 So. 2d 765 (Fla. 4th DCA 1997).

Preemption. Insured's claims against insurer for fraudulent or negligent misrepresentation regarding coverage provided by disability policy are not preempted by ERISA. *Blum v. Pension Investors Corp.*, 671 So. 2d 164 (Fla. 3d DCA 1996), citing *Wiesenberg v. Paul Revere Life Ins. Co.*, 887 F. Supp. 1529 (S.D. Fla. 1995); *Barnet v. Wainman*, 830 F. Supp. 610 (S.D. Fla. 1993).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

See also "AUTOMOBILES, Compulsory Coverage."

FIRE INSURANCE

Arson. In order to establish prima facie case of arson for purposes of denying coverage under fire insurance policy, party bearing burden must prove motive,

opportunity and incendiary cause of fire which would cause reasonable people to conclude that insured was guilty of the burning. *Insurance Co. of N. America v. Valente*, 933 F.2d 921 (11th Cir. 1991). Arson by corporate agent which was performed without knowledge or consent of corporation is not imputed to owner. *Owl & Turtle Inc. v. Travelers Indem. Co.*, 554 F.2d 196 (5th Cir. 1977). Statutory provision which requires an insurance company to release available information to law enforcement officers regarding fire losses (F.S. 633.175), includes duty to release such information to an assistant state attorney. *Krischer v. D'Amato*, 674 So. 2d 909 (Fla. 4th DCA 1996).

Appraisal. Appraisal provisions in insurance policies have generally been treated as arbitration provisions. *Florida Farm Bur. Cas. v. Sheaffer*, 687 So. 2d 1331 (Fla. 1st DCA 1997). But see *Nationwide v. Schweitzer*, 872 So. 2d 278 (Fla. 4th DCA 2004) (appraisal was not arbitration for purposes of rule which authorizes appeals from non-final orders involving entitlement to arbitration). Appraisal clause not void for lack of mutuality of obligation simply because insurer retains right to dispute coverage issues. *State Farm Fire & Cas. Co. v. Licea*, 685 So. 2d 1285 (Fla. 1996). The right to appraisal may be waived where a party maintains a position inconsistent with the appraisal remedy, and the other party is prejudiced by an untimely request for appraisal (e.g., on the eve of trial). *Gray Mart, Inc. v. Fireman's Fund*, 703 So. 2d 1170 (Fla. 3d DCA 1997).

Assignment. As a general rule, fire insurance policies contain a clause forbidding assignment of the policy without the consent of the insurer. The purpose of this provision is to protect insurers against unbargained-for risks. *Lexington Ins. Co. v. Simkins Indust.*, 704 So. 2d 1384 (Fla. 1998).

Chattel Mortgage. *Jones v. American Eagle*, 91 Fla. 565, 108 So. 165 (Fla. 1926), holds that valid chattel mortgage on part of property insured would only have effect of making policy sued upon void as to that part of insured property which was covered by mortgage and would not have effect of forfeiting plaintiff's right to recover for loss of insured property which was not covered by mortgage.

Contract-Policy. Binders for temporary property insurance can be oral or written and are governed by F.S. 627.420.

Cancellation. Parties to contract of fire insurance may include provisions relative to the cancellation of the policy, and as a practical matter, most policies of property contain provisions permitting either party to cancel the policy on complying with certain conditions. See *Saskatchewan Gov't Ins. Office v. Padgett*, 245 F.2d 48

(5th Cir. 1957). *See* F.S. 627.728. Actual notice of insurance cancellation via telephone is insufficient to cancel mortgagee's interest where mortgage clause unambiguously requires written notice to the mortgagee. *Fidelity & Dep. Co. of MD v. First State Ins. Co.*, 677 So. 2d 266 (Fla. 1996).

Mortgage Clause. Mortgage clause operates as an independent contract of insurance between insurer and lender, thereby making notice to the mortgagee a prerequisite to cancellation when the insured (mortgagor) cancels the policy. *Fidelity & Dep. Co. of MD v. First State Ins. Co.*, 677 So. 2d 266 (Fla. 1996). Assignee of mortgage cannot recover on policy where mortgagor conveys premises without insurer's knowledge, in violation of terms of policy. *National Ben Franklin Fire v. Gasparilla Realty Corp.*, 98 Fla. 362, 123 So. 736 (Fla. 1929). Standard mortgagee clause held independent contract not subject to forfeiture by reason of any act or omission on part of original assured. *Martin v. Sun Ins.*, 83 Fla. 325, 91 So. 363 (Fla. 1922); *see* *Millers' Mut. Ins. v. La Pota*, 197 So. 2d 21 (Fla. 2d DCA 1967); *Federal Ins. v. Tamiami Trail Tours*, 117 F.2d 794 (5th Cir. 1941). Recovery under mortgagee clause held not to pass to assignee of mortgage where company had no notice of assignment. *Whitlock v. American Central Ins.*, 107 Fla. 13, 144 So. 412 (Fla. 1932).

Assignor of note and mortgage, against whom assignee procured judgment, held to have insurable interest in mortgaged property equal to value of entire note and mortgage. *American Central Ins. v. Whitlock*, 122 Fla. 363, 165 So. 380 (Fla. 1936). Institution of suit against insured resulting in adjudication that insured holds insured property as security for sums advanced on behalf of complainant; held, not to invalidate policy notwithstanding policy provision that commencement of foreclosure suit voids policy. *Springfield Fire & Marine v. Shea*, 124 Fla. 450, 168 So. 651 (Fla. 1936).

Reformation. Fire insurance policy may be reformed even after loss to express real agreement between parties. *Gibson v. American*, 146 Fla. 171, 200 So. 357 (Fla. 1941). *See* *Herr v. Underwriters at Lloyd's of London*, 97 F. Supp. 379 (D. Alaska 1951); *Royal v. Smith*, 158 Fla. 472, 29 So. 2d 244 (1947). Mistake must be mutual to be grounds for reformation. *Mustelier v. Consolidated Mut.*, 296 So. 2d 634 (Fla. 3d DCA 1974), *cert. denied*, 307 So. 2d 184 (Fla. 1975).

Severable Contract. Where property covered by policy of insurance consists of different kinds of property such as realty and personalty, or different articles of personal property, and different kinds or articles of property are separately valued or insured for separate amounts, and premium charged is aggregate of separate premiums to be charged whether in joint or several pol-

icy, contract is divisible and breach of warranty or condition as to one kind of class of property will not affect insurance on remainder of the property. *National Union Fire v. Cubberly*, 68 Fla. 253, 67 So. 133 (Fla. 1914).

If fire policy covers different classes of property each of which is separately valued and insured for distinct amount, contract is severable and whole policy is not void even though policy provides that entire policy shall be void if contract is violated in any one of several stated particulars. *Hartford Fire v. Hollis*, 64 Fla. 89, 59 So. 785 (Fla. 1912). *See also* *American Fire v. King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168 (Fla. 1917). *National Union Fire v. Cubberly*, 68 Fla. 253, 67 So. 133 (Fla. 1914).

Most policies limit coverage to actual cash value. 31 Fla. Jur. 2d, Insurance, §2396. Many policies contain iron safe clauses, requiring books and inventories to be put in fire proof safe. *Id.*

Damages. Expected Risks. A policy insuring against losses by fire covers every loss, damage or injury to the insured property of which fire is proximate cause. 31 Fla. Jur. 2d Insurance, §2374. Many fire insurance policies cover loss by explosion following the sudden production of great pressure. 31 Fla. Jur. 2d Insurance, §2381.

Fixture. *See* general discussion "What are 'Fixtures' Within Provision of Property Insurance Policy," 17 A.L.R.3d 1381.

Friendly Fire. A fire lighted and contained in usual place for fire, (furnace, stove, etc.) and for common and usual purpose (heating, cooking, etc.). Generally, if fire is friendly fire, insurer is not liable for consequences, so long as the fire is confined within the limits of the agencies employed. 31 Fla. Jur. 2d Insurance §2375.

Smoke and Soot. If provision for coverage in policy, then protected. If not in policy, unclear if smoke/soot is friendly fire. 31 Fla. Jur. 2d Insurance §2380.

Proof of Loss. Insurance policies usually provide time within which notice and proof of loss must be filed. Time begins to run from date of occurrence of event insured against. *Reliance Life v. Lynch*, 144 Fla. 50, 197 So. 723 (Fla. 1940). In absence of stipulation making policy void for failure to file proof of loss within specified time, filing of notice and proof of loss within certain time is merely condition precedent to right to sue, and failure to comply with such requirements within time specified does not avoid policy or work forfeiture. *Hartford Fire v. Redding*, 47 Fla. 228, 37 So. 62 (Fla. 1904); *Indian River State Bank v. Hartford Fire*, 46 Fla. 283, 35 So. 228 (Fla. 1903); *National Union Fire v. Cone*, 80

Fla. 265, 85 So. 913 (Fla. 1920). Insurer by admitting liability waives formal proof of loss; period to demand appraisal computed from date of admission of liability. *Bear v. New Jersey Ins.*, 138 Fla. 298, 189 So. 252 (Fla. 1939). Insurer waived proof of loss by denying liability during time for presentment of proof of loss, where basis of denial not related to proof of loss. *Keel v. Independent Life*, 99 So. 2d 225 (Fla. 1957). Any fraud or false statements in proof of loss can void policy. *Berkshire Mut. v. Moffett*, 378 F.2d 1007 (5th Cir. 1967). Trier of fact should examine every fact and circumstance (broad evidence rule) that logically tends to the formation of a correct estimate of loss, including original cost, cost of reproduction, opinions of qualified witnesses, declarations against interest, and gainful uses to which the building might have been put. *J&H Auto Trim v. Bellefonte*, 677 F.2d 1365 (11th Cir. 1982). Liability determined by valued policy law. For all causes of action arising after June 1, 2005, any loss caused, in part, by a covered peril and, in part, by a noncovered peril, the insurer's liability shall be limited to the amount of loss caused by the covered peril. F.S. 627.702. But if the covered peril, alone, would have caused the total loss, then insurance company shall pay the amount specified in the policy. *Id.*

Value. Value of property as written in policy is binding on company and insured. *Sumlin v. Colonial*, 158 Fla. 95, 27 So. 2d 730 (Fla. 1946). See also F.S. 627.702 and *Millers' Mut. Ins. v. La Pota*, 197 So. 2d 21 (Fla. 2d DCA 1967) pertaining to valued policy law.

Repair. It is customary in fire insurance policies to insert a provision giving the insurer the right, in the event of loss, to repair, replace or rebuild the damaged property. 31 Fla. Jur. 2d Insurance, §2391. If insurer does initiate repair, then may be liable for damages for any inadequate repairs if property is not restored to same condition prior to the loss. *Id.*

Replacement Value. Property insurer may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for difference between the insurable value of the insured property at the time loss or damage occurs, and the amount actually expended to repair, rebuild or replace. F.S. 627.702(8). For homeowner's policy, if a loss is repaired or replaced, must be done so on a replacement cost basis not to exceed policy limits. F.S. 627.7011.

Multiple Policies. Co-insurance. Florida allows property insurer to issue contract which contains co-insurer provision, subject to restrictions in F.S. 627.701. See also *United States Fire Ins. v. Roberts*, 541 So. 2d 1297 (Fla. 1st DCA 1989).

Concurrent Insurance. Insured under two fire policies was not entitled to recover under both for more than aggregate amount of 75% of insurance value of property. *Cone v. Phoenix*, 101 Fla. 622, 135 So. 142 (Fla. 1931). Each insurer liable to full amount of policy. *Springfield Fire v. Boswell*, 167 So. 2d 780 (Fla. 1st DCA 1964). Pro-rata liability clause preempted by statute. *Millers' Mut. v. LaPota*, 197 So. 2d 21 (Fla. 2d DCA 1967).

Contribution between Companies. Each insurer is liable for full amount of its policy when there are multiple policies. *Springfield Fire v. Boswell*, 167 So. 2d 780 (Fla. 1st DCA 1964).

Excessive Policies. If policy prohibits obtaining multiple coverage on same property then other insurance obtained by insureds. *Ray v. Allstate Ins.*, 479 So. 2d 835 (Fla. 1st DCA 1985). Generally, in order to collect from any excess insurer, insured must show he has used all other insurance. *Transit v. Ryder*, 384 So. 2d 896 (Fla. 5th DCA 1980).

Interpretation. Where two policy clauses deal with the same subject matter, but are in conflict, the clause affording greater coverage will prevail. *Stewart Petroleum Co. v. Certain Underwriters at Lloyd's*, 696 So. 2d 376 (Fla. 1st DCA 1997). To the extent an endorsement is inconsistent with the body of the policy, the endorsement controls. *Id.*

GUEST CASES

See "AUTOMOBILE, guests."

HOSPITALS

Evidence-Records. The general rules of evidence apply in actions by or against hospitals with regard to presumptions, burden of proof and admissibility. 41 C.J.S. Hospitals §28. See *Marks v. Mandel*, 477 So. 2d 1036 (Fla. 3d DCA 1985) (emergency room policy and manual admissible). But see *Metropolitan Dade Cty. v. Salwan*, 543 So. 2d 381 (Fla. 3d DCA 1989). When medical record entries are sought to be admitted under the business record exception to the hearsay rule and are properly challenged by an opponent with sufficient showing that relates to the accuracy, reliability, or trustworthiness of the entry, trial court may in its discretion decline to admit them unless the proponent of the evidence lays the proper predicate for entry; proper predicate includes evidence as to the drawing of blood, the chain of custody, the administration of the test, and the interpretation and reporting of test result. *Love v. Garcia*, 611 So. 2d 1270 (Fla. 4th DCA 1992). In order for hospital records pertaining to employee's psychiatric illness to be admissible in action for negligent hiring and retention brought by customer attacked by employee, it



was not necessary to show that employee would have signed written release with respect to records so as to allow employer to discover them. *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744 (Fla. 1st DCA 1991). Statements of slip and fall victim appearing in hospital medical records and relating to cause of fall were not statements made for purpose of medical diagnosis or treatment and, thus, were not admissible under hearsay exception for such statements. *Visconti v. Hollywood Rental Svc.*, 580 So. 2d 197 (Fla. 4th DCA 1991). Medical records, just as any other type of business records, cannot be admitted without a predicate demonstrating the authenticity of the records. *Kurynka v. Tamarac Hosp. Corp.*, 542 So. 2d 412 (Fla. 4th DCA 1989).

Liens. Hospital, which was privately owned by for-profit corporation, was not “public hospital” under hospital lien law, despite hospital’s relationship with local governments in terms of hospital’s contract with county healthcare district and its treatment of Medicare and Medicaid patients, and thus hospital was not entitled to lien on former patient’s recovery under his uninsured motorist (UM) policy. *Schwartz v. GEICO General Ins. Co.*, 712 So. 2d 773 (Fla. 4th DCA 1998). Hospital that did not intervene in negligence action against school board to enforce its lien as county code purported to authorize, and that was not otherwise made a party to the litigation, was not subject to jurisdiction of trial court in negligence action, and court’s order reducing hospital’s bill for cost of treatment was void *ab initio*. *Variety Children’s Hospital, Inc. v. Thomas*, 689 So. 2d 345 (Fla. 3d DCA 1997). Patient cannot complain that hospital lien was untimely filed. *Roster v. Public Health Trust of Dade Cty.*, 657 So. 2d 1274 (Fla. 4th DCA 1995).

Warranties. F.S. 672.316(5), limits liability for breach of implied warranty to cases of fault, where one can detect or remove the defective blood through reasonable measures. *Raskin v. Community Blood Ctrs. of So. Fla.*, 699 So. 2d 1014 (Fla. 4th DCA 1997); *Williamson v. Memorial Hosp.*, 307 So. 2d 199 (Fla. 1st DCA 1975). Statute not applicable to negligence actions. *Sicuranza v. Northwest Florida Blood Ctr., Inc.*, 582 So. 2d 54 (Fla. 1st DCA 1991). Florida statute providing that blood bank can be liable on breach of implied warranty theory, for supplying contaminated blood for use in medical procedure only if defect could have been detected or removed by reasonable scientific procedures or techniques applied only to warranty actions, and did not apply to suit sounding in negligence. *Id.* Breach of alleged oral warranty as to the effectiveness of the operation, if accepted by the jury, may properly rebut a finding of valid informed consent. *Public Health Trust of Dade Cty. v. Valcin*, 507 So. 2d 596 (Fla. 1987).

Immunity. Even though the waiver of sovereign immunity should be strictly construed, fraudulent concealment would toll the running of the statute of limitations contained in F.S. 768.28 despite the lack of a specific statutory provision for fraudulent concealment. *Fulton Cty. Adm’r. v. Sullivan*, 753 So. 2d 549 (Fla. 1999), citing *Vargas v. Glades Gen. Hosp.*, 566 So. 2d 282 (Fla. 4th DCA 1990). County-owned hospital is immune from liability for a willful, wanton or malicious conduct claim against one of its employees. *Gonzalez v. Metropolitan Dade Cty. Health Trust*, 651 So. 2d 673 (Fla. 1995). City could waive its sovereign immunity only to extent of any insurance it had purchased, and where excess hospital professional liability policy provided coverage only in excess of \$500,000, there was a gap between city’s \$200,000 legislatively mandated waiver of immunity and policy as to which there could be no waiver of immunity. *Evanston Ins. Co. v. City of Homestead*, 563 So. 2d 755 (Fla. 3d DCA 1990). Summary judgment precluded where factual issues exist as to whether surgeon was acting in his capacity as a state university medical school professor or whether he was acting as a staff member at a private hospital, for purposes of determining whether he was entitled to claim sovereign immunity. *Martin v. Drylie*, 560 So. 2d 1285 (Fla. 1st DCA 1990).

HUSBAND AND WIFE

Community Property. Florida is not a “community property” state. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1204 (Fla. 1980).

Interspousal Immunity. Doctrine of interspousal immunity is no longer part of Florida’s common law. *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993). Law is abrogated as to intentional torts of battery. F.S. 741.235.

Loss of Consortium. Because claim is derivative of injured party’s damages, liability limits for such injured party may preclude claim. *Jones v. Zagrodnik*, 600 So. 2d 1265 (Fla. 5th DCA 1992). Elements for loss of consortium are loss of companionship and fellowship and the right of each to the companionship cooperation, and conjugal relations. *Wills v. Snapper Creek*, 465 So. 2d 562 (Fla. 3d DCA 1985).

Husband may join suit for his damages with suit by wife for her damage. F.S. 46.031.

INFANTS

See “AUTOMOBILES, Age”; “NEGLIGENCE, Age.”

Liability. Infant, incapable of binding himself by contract, is not liable for torts so connected with contract of same transaction. However, infant is responsible for personal torts directly committed by him and uncon-

nected with contract. *Potter v. Florida Motor Lines*, 57 F.2d 313 (S.D. Fla. 1932).

INLAND MARINE

Marine insurance policy will be interpreted per general rule that where policy terms are susceptible to two interpretations, that which provides greater indemnity will prevail. *Perez v. Underwriters at Lloyds*, 448 So. 2d 1178 (Fla. 3d DCA 1984). Where marine insurance policy is ambiguous as to whether it is liability or indemnity policy and therefore subject to differing interpretations, policy should be interpreted to afford greater coverage. *Schuck v. Habicht*, 672 So. 2d 559 (Fla. 4th DCA 1996).

LIABILITY INSURANCE

Cancellation. Policy provisions permitting written cancellation are generally waivable by insurer. *Allstate v. Cipriani*, 629 So. 2d 183 (Fla. 4th DCA 1993); *Allstate Ins. Co. v. Doody*, 193 So. 2d 687 (Fla. 3d DCA 1967). Insured was not entitled to a refund of premiums where the clear and unambiguous language of policy required notice of cancellation sent directly to insurer and expressly provided that notice to an agent was not sufficient, and insured failed to send the insurer written notice of cancellation. *Underwriters at Lloyd's London v. A.I. Credit Corp.*, 478 So. 2d 887 (Fla. 3d DCA 1985). See also 11 A.L.R.4th 456. A request for cancellation of insurance policy must be unequivocal and absolute. *Saskatchewan Gov't Ins. v. Padgett*, 245 F.2d 48 (5th Cir. 1957).

Compromise of Claims. Insurer may be held in excess of coverage for negligence in settlement negotiations. *Auto Mut. Indem. Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (Fla. 1938). Insurer must act in good faith and be diligent in its efforts to negotiate settlement in actions by third party against insured; insurer breaches its duty if it fails to act in good faith and third party obtains judgment for amount exceeding policy coverage. *Anna Rue Camp v. St. Paul Fire & Marine Ins. Co.*, 616 So. 2d 12 (Fla. 1993).

Duty to Act in Good Faith. Insurer which assumes defense of insured also assumes duty to act in good faith and with due regard to insured's interests. *Id.* In handling defense of claims against its insured, insurer has duty to use some degree of care and diligence as person of ordinary care and prudence should exercise in the management of his own business. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980).

Bad Faith. Insurer's failure to settle third party claim against insured in good faith is actionable under Florida common law. See, e.g., *Camp*, 616 So. 2d 12;

Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971). First party "bad faith" cause of action authorized by statute. F.S. 624.155(1)(b); *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263 (Fla. 5th DCA 1987). Florida Statute §624.155 provides for recovery of damages in both first and third party actions. *McLeod v. Continental Ins. Co.*, 591 So. 2d 621 (Fla. 1992) (superseded by statute on other grounds as stated in *Time Ins. Co. v. Burger*, 712 So. 2d 389 (Fla. 1998)). Punitive damages may be awarded under certain circumstances. See *Butchikas v. Travelers Indem. Co.*, 343 So. 2d 816 (Fla. 1976) (common law actions); F.S. 624.155(5) (statutory actions).

Right of Insurer to Settle. Primary insurer must try to settle in good faith. *General v. American Cas.*, 390 So. 2d 761 (Fla. 3d DCA 1980). Policy may grant insurer discretion to settle cases for amounts within policy limits. *Shuster v. South Broward Hosp.*, 591 So. 2d 174 (Fla. 1992).

Contribution among Joint Tortfeasors. Florida joined the Uniform Contribution Among Tortfeasors Act in 1975. See F.S. 768.31. Liability is allocated according to degree of fault. *F.H.W.&C. v. American Hosp. of Miami*, 575 So. 2d 1300 (Fla. 3d DCA 1991). Cause of action only arises when person pays more than his share. *Hyster v. David*, 612 So. 2d 678 (Fla. 1st DCA 1993). Insurance company stands in shoes of insured in seeking contribution. *Sacred Heart Hosp. v. Frazier*, 621 So. 2d 491 (Fla. 1st DCA 1993).

Cooperation of Insured. The insured is bound by such a clause to cooperate with his insurer and to abide, both in letter and spirit, with the terms of the contract; or he should at least be held to reasonably strict compliance with the terms thereof. *American Fire & Cas. Co. v. Col-lura*, 163 So. 2d 784 (Fla. 2d DCA 1964). Before failure to cooperate results in loss of coverage, the failure must be shown to be material and it must substantially prejudice insurer. *Peerless Ins. v. Sheehan*, 194 So. 2d 285 (Fla. 2d DCA 1967). See also *Stewart v. Atlantic*, 860 F. Supp. 1514 (M.D. Fla. 1993).

Conditions Precedent to Coverage. If required by the terms of the policy, submission to an examination under oath, compliance with document requests and submission of a sworn statement in proof of loss are conditions precedent to filing suit against your insurer. *Goldman v. State Farm Fire Gen. Ins. Co.*, 660 So. 2d 300 (Fla. 4th DCA 1995), *rev. denied*, 670 So. 2d 938 (Fla. 1996).

Coverage. Whether a policy is a liability policy or an indemnity policy will be construed according to the doctrine that ambiguous terms should be construed in favor of insured. *Da Costa v. General Guaranty Ins. Co.*,



226 So. 2d 104 (Fla. 1969), *conformed to* 226 So. 2d 468 (Fla. 3d DCA 1969). Policies typically provide exceptions for certain risks and it will be valid unless against statute, public policy, or if waived. *See Newbern Distrib. v. Canal*, 124 So. 2d 721 (Fla. 2d DCA 1960). "Sudden" means abrupt and unexpected. *Dimmit v. Southeastern Fid.*, 636 So. 2d 700 (Fla. 1993). "Accident" is a typical word in most policies and can include negligence or breach of warranty. *Shelby Mut. Ins. Co. v. Ferber*, 156 So. 2d 748 (Fla. 1st DCA 1963). If the term "accident" is not defined in the policy, it encompasses not only accidental events, but also injuries or damage neither expected nor intended from the standpoint of the insured. *State Farm v. CTC Development*, 720 So. 2d 1072 (Fla. 1998). "Occurrence" was defined in the policy like this: "Occurrence" is an unexpected event or happening or a continuous or repeated exposure to conditions. *Escambia Chem v. USF&G*, 212 So. 2d 884 (Fla. 1st DCA 1968). No "collision with another object, moving or stationary" where roadbed of soft sand gave way under auto causing it to bog down to frame. *Aetna Cas. v. Cartmel*, 100 So. 802 (Fla. 1924). Where truck driver failed to return to terminal and truck was found parked in street, with keys there was "theft." *Fireman's Fund v. Boyd*, 45 So. 2d 499 (Fla. 1950); *New Amsterdam v. Hart*, 16 So. 2d 118 (Fla. 1943).

Automobile policies usually contain omnibus/extended coverage clauses. *See* 31 Fla. Jur. 2d, Ins. at §2786. These clauses extend the meaning of insured and use. *Id.*

Direct Action Against Insurer. Rights of Injured Party. *See* F.S. 624.155. An insured can maintain action for insurer's bad faith in refusing to pay. *United Guar. v. Alliance Mort. Corp.*, 644 F. Supp. 339 (M.D. Fla. 1986). Judgment creditor can maintain action against tort-feasor's carrier for recovery of judgment in excess of policy limits where insurer acted with bad faith. *Thompson v. Commercial Union*, 250 So. 2d 259 (Fla. 1971). Any person, including an insured as well as a judgment creditor may bring a civil action under F.S. 624.155(1)(a); *Auto-Owners Co. v. Conquest*, 658 So. 2d 928 (Fla. 1995). Under F.S. 624.155(1)(b), a judgment creditor can only bring an action against the tort-feasor's insurance company if the judgment creditor first obtains a judgment in excess of the policy limits. *State Farm Fire & Cas. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997). The duty owed under F.S. 624.155 "runs only to the insured." *Id.* at 277. *See Bridges v. Provident Life & Accident Co.*, 121 F. Supp. 2d 1369 (M.D. Fla. 2000), for preemption under ERISA.

Duty to Defend. Arises out of contract. *Budget Rent-A-Car v. Taylor*, 626 So. 2d 976 (Fla. 4th DCA 1993). Duty is separate from duty to pay. *Allstate v.*

Travers, 703 F. Supp. 911 (N.D. Fla. 1988). Duty determined based on facts alleged in complaint. *Id.* An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care, and prudence should exercise in the management of his business. *Boston v. Gutierrez*, 386 So. 2d 783 (Fla. 1980). Liability insurer can reserve its rights to claim policy does not cover a situation while defending the action. *Midland v. Watson*, 188 So. 2d 403 (Fla. 3d DCA 1966).

Liability between Insurers. Primary insurer obligated to pay first, up to its policy limits. *Fidelity & Cas. v. Cope*, 444 So. 2d 1041 (Fla. 2d DCA 1984), *quashed on other grounds*, 462 So. 2d 459. Where lessee of motor vehicle has true excess liability coverage, such as an umbrella coverage, but no primary coverage, F.S. 627.7263 does not require the excess insurer to "drop down" into the shoes of the primary carrier to provide defense and indemnification to its insured. *Grant v. New Hampshire Ins. Co.*, 613 So. 2d 466 (Fla. 1993). *See also* F.S. 627.7263 (Rental and leasing driver's insurance to be primary). Lessee's insurance owes rental agency no duty to defend. *Allstate Ins. Co. v. RJT Enterprises, Inc.*, 692 So. 2d 142 (Fla. 1997).

Exclusions - Construction of Exclusions. Exclusionary provisions which are ambiguous or otherwise susceptible to more than one meaning must be construed in favor of the insured, since it is the insurer who usually drafts the policy. *Deni v. State Farm*, 711 So. 2d 1135 (Fla. 1998). However, only when a genuine inconsistency, uncertainty, or ambiguity in meaning remains after resort to the ordinary rules of construction is the rule apposite. *Id.* at 1138. It does not allow courts to rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties. *Id.* An intentional act exclusion in liability policy excludes coverage for act of self-defense where insured intends to harm attacker. *Aetna Cas. & Surety Co. v. Griss*, 568 So. 2d 903 (Fla. 1990); *State Farm & Cas. Co. v. Marshall*, 554 So. 2d 504 (Fla. 1989). An intentional injury exclusion in a liability policy applies if the insured intended both to do a particular act and to do some harm, even if the harm actually done was radically different from that intended; however, such an exclusion will not apply if the insured intentionally acts but has no intent to commit harm, even if the act involves foreseeable consequences of great harm or amounts to gross or culpable negligence. *Allstate Ins. Co. v. Steinemer*, 723 F.2d 873 (11th Cir. 1984). An injury inflicted by an insured who is psychotic is not an "accident" and is an intentional act within the meaning of the policy provisions if the insured intends to cause the injury, even if the insured's conduct is the result of the insured's mental condition. *Prasad v. Allstate Ins. Co.*, 644 So. 2d 992 (Fla. 1994).

Usually, recovery is precluded for assault and battery. *Aromin v. State Farm*, 908 F.2d 812 (11th Cir. 1990). Unless coverage is excepted for violations of law, third parties can still recover benefits when there is a violation of law. *American Eastern v. Everglades Marina*, 608 F.2d 123 (5th Cir. 1979). Sometimes, coverage is excluded for damages to property, as in case of insured. *Harrison v. Liberty Mut.*, 290 F.2d 900 (5th Cir. 1961). Something can be excepted unless it has been waived by insurer. *Newbern v. Canal Ins.*, 124 So. 2d 721 (Fla. 2d DCA 1960).

Jury. Questions about whether damage was caused by "accident" i.e., whether damage was intended, are proper jury questions. *Bituminous v. Burns*, 200 So. 2d 612 (Fla. 3d DCA 1967). Coverage questions are matter of law. *Guarantee v. Gulf Ins.*, 811 F.2d 610 (11th Cir. 1987), *aff'g*, 628 F. Supp. 867 (S.D. Fla. 1986). Whether insured has substantially prejudiced insurer by failing to cooperate is for jury. *Diaz v. State Farm*, 293 F.2d 298 (5th Cir. 1961). Bad faith failure to settle questions are for jury too. *Powell v. Prudential*, 584 So. 2d 12 (Fla. 3d DCA 1991)

Notice. Where notice is required, it should be given where there is an occurrence that would lead a reasonable person to believe that a claim for damages would arise. *Ideal v. Waldrep*, 400 So. 2d 782 (Fla. 3d DCA 1981). Late notice will not preclude recovery or right to defense unless insurer was prejudiced. *Id.* But, there is a presumption of prejudice. *Id.*

Punitive Damages. Coverage for punitive damages is against public policy except when insured is not at fault but is only vicariously liable. *U.S. Concrete v. Bould*, 437 So. 2d 1061 (Fla. 1983).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Contract-Related. Five (5) years for legal or equitable action on a contract, obligation, or liability founded on a written instrument. F.S. 95.11(2)(b).

Medical Malpractice. Two (2) years from the time existence of harm is established and injured party knew or should have known of injury/negligent act. F.S. 95.11(4)(b). No later than (4) years from date incident accrued unless action brought by child younger than eight-years old. *Id.* See F.S. 766.104 and F.S. 766.106 for possible extensions and tollings under certain circumstances.

Negligence. Four (4) years for action founded on negligence. F.S. 95.11(3)(a).

Products Liability. Four (4) years. F.S. 95.11(3)(e). If defect causing injury is discovered beyond this period of time, on a case-by-case basis, the statute could be extended/tolled under limited circumstances. F.S. 95.031. If action is based on a warranty contained in a written instrument or contract - then Five (5) years. F.S. 95.11(2)(b).

Professional Liability. Two (2) years from the time litigation is concluded by final judgment, rather than when verdict is rendered. F.S. 95.11(4)(a). *Silverstone v. Edell*, 721 So. 2d 1173 (Fla. 1998).

Action against State or State Agency. Four (4) years from the time when claim accrued. F.S. 768.28(14).

Wrongful Death. Two (2) years from time when cause of action accrued. F.S. 95.11(4)(d).

Limitation in Contract. Stipulations in insurance policy which lessen period of limitation established by statute are void. F.S. 95.03. But policy can provide that another state's law would apply where transaction reasonably relates to other state and its limitations period is not less than one year. *Burroughs v. Suntogs*, 472 So. 2d 1166 (Fla. 1985). Contract can allow for provisions that delay action until a lapse of time has passed. See F.S. 627.616. The doctrine of *lex loci contractus* applies to actions arising out of an automobile insurance contract to determine applicable statute of limitations. *Lumberman's Mut. Cas. v. August*, 530 So. 2d 293 (Fla. 1988).

Accrual. Time begins to run from time cause of action accrues. F.S. 95.031. That time is when the last element of the cause of action occurs. *Id.*

Discovery Rule. Action for product liability and fraud begin to accrue when the facts have been or should have been discovered. *Id.* See also F.S. 95.11.

Fraud. In an action based on fraud the statutory limitation period is four years. Begins to run from the time facts giving rise to the cause of action were or should have been discovered with the exercise of due diligence. Outside limit is 12 years from date alleged fraud committed. F.S. 95.031(2)(a).

Tolling. For provisions on tolling, see F.S. 95.051. An insured's demand for arbitration of a claim will begin application of tolling statute, for example. *Glantzis v. State Auto*, 573 So. 2d 1049 (Fla. 4th DCA 1991). Running of time under our statute of limitations except F.S. 95.281, 95.35 and 95.36 is tolled by pendency of related arbitral proceeding. F.S. 95.051(1)(g).

Waiver. Statute of limitations is an affirmative defense that can be waived. *City of St. Petersburg v. S&E Cont.*, 697 So. 2d 1321 (Fla. 2d DCA 1997). Provision



in policy that suit could not be brought until after lapse of 60 days held waived by adjuster's admission of liability and offer to pay smaller sum. *Lincoln Fire v. Hurst*, 150 So. 722 (Fla. 1933).

For specific time limits, see F.S. 95.11 for actions other than real property, and F.S. 95.12, *et seq.* for actions on real property. Actions on contract, including insurance, must be filed within five years of breach. F.S. 95.11(2)(b). Statute of limitations for an action based on insurer's failure to pay PIP benefits begins to run when insurer breaches its obligation to pay, not from date of accident. *State Farm v. Lee*, 678 So. 2d 818 (Fla. 1996). Four year limitations period for actions by insurer to recover amounts paid under statutory liability. F.S. 95.11(3)(f). Suit filed by insured 4½ years after injury held barred by insured's failure to bring action within 3 years and 90 days as required by policy. *Guarantee Trust Life v. Fundora*, 343 So. 2d 71 (Fla. 3d DCA 1977). Where continuing or repeated wrongs, limitations period starts again with each successive act. *Seaboard v. Holt*, 92 So. 2d 169 (Fla. 1956). In the absence of legislative intent to the contrary, statutes of limitation are construed as prospective and not retrospective in their operation. *Singletary v. Van Meter*, 708 So. 2d 266 (Fla. 1998).

Health insurance policies must stipulate that no action at law or in equity shall be brought after expiration of the applicable statute of limitations from date written proof of loss is required, or within 60 days after filing written proof. F.S. 627.616.

Insurance Guaranty Associations. One year limitations period for an action against any insurance guaranty association and its insured, with period to commence running from the date of the deadline for filing claims in the order of liquidation. F.S. 95.11(5)(d).

MEDICAL MALPRACTICE

Medical. See F.S. Chapter 766, Medical Malpractice Reform Act. Act provides for medical review committees and internal risk management programs, and sets standard of care for negligence. F.S. 766.101 *et seq.* Act also provides pre-filing screening and notice requirements. *Id.* See *Hospital Corp. of Am. v. Lindberg*, 571 So. 2d 446 (Fla. 1990). Notice requirements held constitutional. *Williams v. Campagnulo*, 588 So. 2d 982 (Fla. 1991). Limitations period is two years from time accrued or discovered, but not to exceed four years, unless fraud. F.S. 95.11(4)(b). If fraud, not to exceed seven years from date of incident. *Id.* Claim against insurer does not accrue until underlying judgment. *Clemons v. Flagler Hosp., Inc.*, 385 So. 2d 1134 (Fla. 5th DCA 1980).

Expert Testimony. Expert must be similar health care provider or have sufficient training, experience and knowledge in defendant's specialty. F.S. 766.102. See *Fuentes v. Spierer*, 766 So. 2d 1081 (Fla. 3d DCA 2000), *rehearing denied* (qualifications of expert witness). Experts must corroborate that reasonable ground for negligence claim exists. See F.S. 766.205 for pre-suit discovery of medical negligence claims and defenses. Testimony not needed where only common sense was required. *Stepien v. Bay Mem. Medical*, 397 So. 2d 333 (Fla. 1st DCA 1981). Necessary for information on diagnosis and treatment. *Crovella v. Cochrane*, 102 So. 2d 307 (Fla. 1st DCA 1958). Required in informed consent cases. *Thomas v. Berrios*, 348 So. 2d 905 (Fla. 2d DCA 1977). Required for information on standard of care in a field. *Moisan v. Kriz, Jr.*, 531 So. 2d 398 (Fla. 2d DCA 1988). Useful for claim of punitive damages. See F.S. 768.72.

Informed Consent. See "Florida Medical Consent Law" F.S. 766.103. Act passed constitutional muster. *Parikh v. Cunningham*, 493 So. 2d 999 (Fla. 1986). Negligence or battery by trespass claim available where informed consent not obtained. *Brown v. Wood*, 202 So. 2d 125 (Fla. 2d DCA 1967).

Claims. Florida recognizes: Wrongful Death, see "Florida Wrongful Death Act" F.S. 768.16. *et seq.* Cause of action for wrongful death is created and limited by the Florida Wrongful Death Act, *Hess v. Hess*, 758 So. 2d 1203 (Fla. 4th DCA 2000); wrongful birth, even if infant is healthy. *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); torts and breach of contract express warranty (e.g., for blood). No implied warranty claim. F.S. 672.316(6).

"Good Samaritan Act" gives immunity for any person, including medical practitioners, who gratuitously and in good faith give emergency care when emergency declared or at scene of emergency, where person acts as ordinary reasonably prudent person. F.S. 768.13. Licensed medical professional immune from malpractice claim if no compensation sought during emergency, and person acts as ordinary reasonably prudent professional. F.S. 768.1345.

Hospital. See HOSPITALS.

Charitable Immunity/Limitations. Immunity arises under Florida Volunteer Protection Act, F.S. 768.1355. See also Good Samaritan Act, F.S. 768.13. Four year statute of limitations applies for a public hospital. *Whack v. Seminole Mem. Hosp.*, 456 So. 2d 561 (Fla. 5th DCA 1984), *approved in Public Health v. Menendez*, 584 So. 2d 567 (Fla. 1991).

Liability and Damages. See F.S. 768.28; 766.105 (The Florida Patient's Compensation Fund). Punitive damages are limited to three times compensatory dam-

ages or \$500,000, whichever is greater unless claimant demonstrates award not excessive in light of facts and circumstances by clear and convincing evidence. F.S. 768.73. Two physicians acting independently may have joint and several liability as co-tortfeasors. *See* 9 A.L.R.5th 746. Plaintiff has right to discover and join malpractice liability insurer. *Vilord v. Jenkins*, 240 So. 2d 68 (Fla. 2d DCA 1970). For collateral source rule, see F.S. 768.76. Comparative negligence and contribution recognized. F.S. 768.81, F.S. 768.31.

Standard of Care. See duties and liability of health care facilities, F.S. 766.110. Must use “prevailing professional standard of care,” which is level of care, skill and treatment recognized by reasonably prudent similar health care provider in light of all relevant surrounding circumstances. F.S. 766.102. Distinction between specialists and non-specialists. *Id.*

NEGLIGENCE

See Law Digest Tables.

Age. Age alone is not sufficient to determine whether child is capable of exercising care. Courts will look at what is reasonable for child of like age and intelligence under like circumstances. *Larnel Builders, Inc. v. Martin*, 110 So. 2d 649 (Fla. 1959); *Bermudez v. Jenkins*, 144 So. 2d 859 (Fla. 4th DCA 1962). Jury must determine whether person is capable, by reason of his mentality, intelligence, training, experience, alertness, and discretion, to appreciate and avoid dangers. *Turner v. Seegar*, 151 Fla. 643, 10 So. 2d 320 (Fla. 1942). Standard is somewhat subjective because it allows for consideration of intelligence and background of particular child whose conduct is being measured. *McGregor v. Marini*, 256 So. 2d 542 (Fla. 4th DCA 1972). Child under six is conclusively presumed to be incapable of committing contributory negligence. *Swindell v. Hellkamp*, 242 So. 2d 708 (Fla. 1970); *Metropolitan Dade Cty. v. Dillon*, 305 So. 2d 36 (Fla. 3d DCA 1974), *cert. denied*, 317 So. 2d 442 (Fla. 1975). This presumption may be superseded by statute. *Reed v. Bowen*, 512 So. 2d 198 (Fla. 1987). Whether 8 year old can be contributorily negligent is question of fact for jury. *McCain v. Bankers Life & Cas.*, 110 So. 2d 718 (Fla. 3d DCA 1959) *cert. denied*, 114 So. 2d 3 (Fla. 1959).

Attractive Nuisance. An “attractive nuisance” arises from a condition on property that poses an unreasonable risk of death or serious bodily harm to children, and that is likely to attract children too young to appreciate the danger. *Ed Rieke & Sons, Inc. v. Green*, 609 So. 2d 504 (Fla. 1992); *May v. Simmons*, 104 Fla. 707, 140 So. 780 (Fla. 1932); *Crutchfield v. Adams*, 152 So. 2d 808 (Fla. 1st DCA 1963) *cert. denied*, 155 So. 2d 693. The attractive nuisance doctrine is an exception to the general rule

that as to trespassers, a property owner is under a duty only to avoid willful and wanton harm to him. *Martiniello v. B&P USA, Inc.*, 566 So. 2d 761, 763 (Fla. 1990). Essential elements: 1) place where condition maintained is one possessor knows, or should know, children likely to trespass; 2) condition is one possessor knows, or should know, involves unreasonable risk of death or serious injury; 3) children, because of youth, do not discover condition or realize risk involved in intermeddling in it, or coming within area made dangerous by it; 4) utility to possessor of maintaining condition is slight as compared to risk to children; 5) possessor failed to exercise reasonable care to eliminate danger or otherwise protect children. *Id.* The Supreme Court has held that plaintiff suing for negligence grounded on attractive nuisance doctrine must plead and prove that child was lured or attracted onto premises by condition which ultimately injured him. *Johnson v. Bathey*, 376 So. 2d 848 (Fla. 1979). *But see In re Estate of Starling*, 451 So. 2d 516 (Fla. 5th DCA 1984). If jury determines that “child does realize the risk of intermeddling with the dangerous condition, then the attractive nuisance doctrine is inapplicable, the child is considered an ordinary trespasser, and the child is not entitled to any recovery under ordinary negligence principles.” *Martiniello*, 566 So. 2d at 763. Plaintiff has burden to show that child did not discover condition or realize the risk. *Id.* The *Starling* case makes clear that the requirement set forth by the Supreme Court should not be applied so literally as to abolish the to concealed attractive nuisance doctrine dangers. *Mueller v. South Florida Water Mgmt.*, 620 So. 2d 789 (Fla. 4th DCA 1993).

Assumption of Risk. Knowing and voluntary participation in contact sport constitutes an express assumption of risk that will protect other participants from unwarranted liability for injuries due to bodily contact inherent in the sport. *Mazzeo v. City of Sebastian*, 550 So. 2d 1113 (Fla. 1989). Assumption of risk requires appreciation of danger involved. *Propper v. Kesner*, 104 So. 2d 1 (Fla. 1958). It only completely bars recovery for those risks inherent in the sport itself. *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309 (Fla. 1986). This issue of whether softball field was improperly laid out (*LeNoble v. City of Fort Lauderdale*, 663 So. 2d 1351 (Fla. 4th DCA 1995)) or race course was negligently designed (*Ashcroft, supra*) is question for the jury. Doctrine does not bar action for negligent supervision of a minor engaged in a contact sport. *City of Miami v. Cisneros*, 662 So. 2d 1272 (Fla. 3d DCA 1995); *Zalkin v. American Learning Systems, Inc.*, 639 So. 2d 1020 (Fla. 3d DCA 1994). Florida has abolished implied assumption of risk. *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977). It has been merged into the defense of com-



parative negligence. *Id.* See also *Standard Havens Prods. v. Benitez*, 648 So. 2d 1192 (Fla. 1994).

Comparative Negligence. Prior to 1973, law in Florida was that a plaintiff's contributory negligence was an absolute bar to recovery in a negligence action. In *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973), Supreme Court of Florida abolished doctrine of contributory negligence as a defense and adopted comparative negligence view, requiring that liability be apportioned on basis of fault. *Id.* Doctrine of pure comparative negligence applies in all negligence cases. *Id.* Subsequent to *Hoffman*, the Florida Supreme Court extended fault apportionment to joint tort-feasors, allowing contribution among joint tort-feasors in *Licenberg v. Issen*, 318 So. 2d 386 (Fla. 1975). Later, the Florida legislature enacted Uniform Contribution Among Tortfeasors Act, which grants a joint tortfeasor right to seek damages in contribution from another tortfeasor according to relative degrees of fault. F.S. 768.31. Florida's comparative fault statute, F.S. 768.81 was enacted as part of Tort Reform and Insurance Act of 1986. F.S. 768.81 was modified in 1999 and, in 2006, the statute was amended to eliminate the doctrine of joint and severable liability altogether. Section 768.81 permits the consideration of the negligence of a non-party parent or guardian in determining the comparative fault of all persons in a negligence action against a third party tort-feasor. *Y.H. Investments, Inc. v. Godales*, 690 So. 2d 1273 (Fla. 1997). (See Joint and Several Liability Discussion, *supra*, under DAMAGES.)

Damages. Recovery allowed for compensatory and punitive damages. Compensatory not restricted to actual loss, may include bodily pain and suffering, mental anguish and suffering, disability, permanent disfigurement, and other injuries. *Florida R. & Nav. Co. v. Webster*, 25 Fla. 394, 5 So. 714 (Fla. 1889). For definition of economic damages for purposes of negligence, see F.S. 768.81(1). Compensatory damages that are foreseeable but that the law does not presume to actually and necessarily result from a wrong must be specifically plead. Punitive damages allowed for willful, wanton or gross misconduct, not to exceed three times compensatory damages, or \$500,000 whichever is greater, awarded unless claimant demonstrates by clear and convincing evidence award is not excessive in light of the facts. F.S. 768.73. Plaintiff may not plead punitive damages unless proffers evidence that demonstrates a reasonable basis for recovery of punitive damages. F.S. 768.72; *Simeon, Inc. v. Cox*, 671 So. 2d 158 (Fla. 1996). Statute creates a substantive right not to be subjected to a punitive damages claim and ensuing financial worth discovery until trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages. *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla.

1995). A defendant that fails to respond to a complaint and allows default to be entered against it waives the protection of the statute. *Fostock v. Lampasone*, 711 So. 2d 1154 (Fla. 4th DCA 1998), *rev. denied*, 718 So. 2d 167 (Fla. 1998).

Definition/Duty. It is automatic that the existence of a duty is the threshold inquiry in any negligence action. *Glazer v. Florida Power & Light Co.*, 689 So. 2d 308 (Fla. 3d DCA 1997), *rev. dismissed*, 695 So. 2d 699 (Fla. 1997). Negligence elements are legal duty owed by defendant, breach of that duty, and injury as a proximate result. *Foster v. United States*, 858 F. Supp. 1157 (M.D. Fla. 1994); see also *Humphreys v. General Motors*, 839 F. Supp. 822 (N.D. Fla. 1993), *aff'd*, 47 F.3d 430 (11th Cir. 1995). Standard of care is reasonable care. *Foster*, 858 F. Supp. at 1162 (M.D. Fla. 1994). Since negligence involves breach of a legal duty, plaintiff's complaint must contain proper averments showing a legal duty or obligation owing from defendant to the injured person, failure to perform that duty and injury caused by the failure to perform the duty. Failure to allege facts establishing a duty may be deemed fatally deficient and subject to dismissal. *Peninsular v. Pan American*, 450 So. 2d 1231 (Fla. 4th DCA 1984). Whether a duty exists is a question of law for the court's sole determination. *Glazer*, 689 So. 2d at 312. Foreseeability is the polestar in defining a scope of the general duty owed; a legal duty will be imposed whenever a human endeavor creates a generalized and foreseeable risk of harm to others. *Id.*

Duty to Warn. To state an action for failure to warn of a known dangerous condition against a governmental agency or municipality, plaintiff must allege: 1) the defendant created a dangerous condition, 2) condition was not readily apparent to someone who could get injured, and 3) defendant had knowledge of the condition and failed to take steps to warn the public of the danger. *Leonard v. Wakulla County*, 688 So. 2d 440 (Fla. 1st DCA 1997). Plaintiff must lack knowledge of the allegedly dangerous condition. *Id.* Duty includes duty to warn with sufficient intensity to warn reasonable man. *Ford Motor Co. v. Havlick*, 351 So. 2d 1050 (Fla. 4th DCA 1977), *cert. denied*, 358 So. 2d 138 (Fla. 1978). Homeowner with no superior knowledge has no duty to warn business invitee of dangerous condition. *Vermont Mut. Ins. Co. v. Conway Case*, 358 So. 2d 123 (Fla. 1st DCA 1978). Where plaintiff walked over sidewalk with dangerous condition many times, defendant does not owe plaintiff a duty to warn. *Lotto v. Point East Two Condo. Assoc.*, 702 So. 2d 1361 (Fla. 3d DCA 1997).

Governmental Immunity. Florida waives sovereign immunity for tort liability caused by acts of its employees for governmental and ministerial (but not discretion-



ary) activities. F.S. 768.28. The government will therefore be liable for torts of its employees to same extent as a private employer under respondeat superior doctrine. F.S. 768.28(5). This waiver is limited to \$100,000 for each person injured and \$200,000 for all claims arising from one accident. *Id.* When judgment exceeds these amounts, Florida legislature may pass a bill authorizing greater payment. *Id.* Florida is not liable for punitive damages or prejudgment interest. *Id.* See generally *Trianon Park v. Hialeah*, 468 So. 2d 912 (Fla. 1985); *Department of Health v. B.J.M.*, 656 So. 2d 906 (Fla. 1995). Once a governmental entity builds or takes control of property or improvement, it has the same common law duty as a private person to properly maintain and operate the property. *Department of Transp. v. Webb*, 438 So. 2d 780 (Fla. 1983); *Leonard v. Wakulla County*, 688 So. 2d 440 (Fla. 1st DCA 1997). In order to bring a claim against state, a plaintiff must first present a written claim to appropriate agency and, except in cases against a municipality, to Department of Insurance. Claim must be submitted within three years after accrual of cause of action. A written denial of claim by agency or Dept. of Insurance is a prerequisite to commencing litigation.

Imputed Negligence. Doctrine of imputed negligence rests upon maxim that he who acts through another acts himself. *Arline v. Brown*, 190 F.2d 180 (5th Cir. 1951). Mere relationship of husband and wife is not a sufficient basis upon which to impute to wife negligence of husband. *Bessett v. Hackett*, 66 So. 2d 694 (Fla. 1953). Negligence of driver is imputed to owner. *Acevedo v. Acosta*, 296 So. 2d 526 (Fla. 3d DCA 1974). If there is a joint enterprise, one's negligence will be imputed to the other. If, however, there is no joint enterprise or some element of an agency relationship, negligence of driver of an automobile is not imputed to a passenger therein. *Id.*

Liquor Liability/Dram Shop Act. Florida recognizes limited liability of furnishers of intoxicants for injuries or damages caused by or from an intoxicated person. F.S. 768.125. Liability only attaches when a person knowingly serves a habitually addicted person or willfully and unlawfully sells or furnishes alcoholic beverages to a minor. F.S. 768.125. "Knowledge" by vendor that person served was a habitual drunkard can be properly established by circumstantial evidence such as by showing that vendor served an individual a substantial number of drinks on multiple occasions. *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042 (Fla. 1991). Statute inapplicable to social hosts. *Bankston v. Brennan*, 507 So. 2d 1385 (Fla. 1987); *Kirkland v. Johnson*, 499 So. 2d 899 (Fla. 1st DCA 1986), *rev. denied*, 511 So. 2d 298 (Fla. 1987).

Joint and Several Liability. Abolished in Florida. See discussion under Damages, *supra*.

Last Clear Chance. Doctrine is inapplicable in pure comparative negligence settings. *Garcy v. Dupee*, 731 F. Supp. 1582 (S.D. Fla. 1990).

Negligence Per Se. Arises from a violation of any statute which establishes a duty to take precautions to protect particular classes of people from a particular injury or type of injury. *Torres v. Offshore Prof. Tour*, 629 So. 2d 192 (Fla. 3d DCA 1993). Must show membership in class and injury of the type protected by statute. *Id.* Violation of statutes establishing a duty to take precaution to protect particular classes of individuals from particular injury or type of injury is negligence per se. *Id.* Statutes designed to protect particular classes of individuals who are unable to protect themselves, impose strict liability standard for which plaintiff's own negligence is no defense. *DeJesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198 (Fla. 1973). Violation of all other types of statutes are prima facie evidence of negligence. *Id.* Violation of Florida's seat belt law does not constitute negligence per se and cannot be used as prima facie evidence of negligence. F.S. 316.614(10). A violation of the seat belt law may be considered as evidence of comparative negligence. *Id.* See *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934 (Fla. 1996) for applicable jury instructions in action regarding violation of seat belt statute. Plaintiff's violation of a statute does not relieve a defendant of its duty of care as a matter of law. *Id.* Rather, it is prima facie evidence of comparative negligence. *Florida Power & Light Co. v. Periera*, 705 So. 2d 1359 (Fla. 1998).

Physical Impact Rule. Generally, to state a claim for negligence, there must be some physical injury or physical impact. *Brown v. Cadillac Motor Car Div.*, 468 So. 2d 903 (Fla. 1985). Mere touching is insufficient to satisfy the impact rule. *Ruttger Hotel Corp. v. Wagner*, 691 So. 2d 1177 (Fla. 3d DCA 1997). No physical impact is required, however, if there are physical injuries caused by anxiety of safety of another if such injury is reasonably foreseeable. Plaintiffs may recover for psychological trauma and mental distress without direct physical impact in cases where a plaintiff was in sensory perception of physical injuries negligently imposed upon a close family member and where plaintiff suffered a discernible physical injury. *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985). The impact rule should not be applied to actions for wrongful birth. *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992); *Tanner v. Hartog*, 696 So. 2d 705 (Fla. 1997); *R.J. v. Humana of Florida, Inc.*, 652 So. 2d 360 (Fla. 1995) (Supreme Court reaffirmed impact rule and refused to carve out exception for negligent HIV diagnosis). See also *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995).



Negligent Infliction of Emotional Distress. Is recognized tort in Florida; *Champion v. Gray*, 478 So. 2d 17 (Fla. 1985); *Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995). See further discussion of Impact Rule under Damages, *supra*.

Permissive Use Rule. The owner of an automobile who consents to use of his automobile by another person is liable for damages caused by the negligent operation of automobile. *May v. Palm Beach Chemical Co.*, 77 So. 2d 468 (Fla. 1955); *Caetano v. Bridges*, 502 So. 2d 51 (Fla. 1st DCA 1987).

Premises Liability. Standard of care that applies to condition of premises differs depending on nature of premises. *Spodafora v. Corto*, 569 So. 2d 1329 (Fla. 2d DCA 1990). Florida recognizes duties owed to different groups of persons by owner or occupier of land. Landowner owes no duty to an undiscovered trespasser except to refrain from willful and wanton harm to him. *Martinello v. B&P USA, Inc.*, 566 So. 2d 761 (Fla. 1990), citing *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973). For discovered trespassers, landowner must warn of known concealed dangerous conditions. *Morris v. Florntes, Inc.*, 421 So. 2d 582 (Fla. 5th DCA 1982). A landowner owes no duty to a person who chooses to come onto premises for their own convenience without invitation, except to avoid willful and wanton injury to the person. *Florida East Coast v. Pickard*, 573 So. 2d 850 (Fla. 1st DCA 1990), *rev. denied*, 589 So. 2d 292 (Fla. 1991). Social guest and other persons who are on property through express or implied invitation "licensees by invitation" are owed a duty of reasonable care under the circumstances. *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973). An invitee on land is owed two duties: 1) a duty of reasonable care that premises will be maintained in a reasonably safe condition, and 2) a duty to be warned of concealed perils which are or should be known by person issuing invitation, which is unknown to invitee and cannot be discovered by him through use of ordinary care. *Regency Lake Apartments Assoc. Ltd. v. French*, 590 So. 2d 970 (Fla. 1st DCA 1991); *Smith v. Markowitz*, 486 So. 2d 11 (Fla. 3d DCA 1986), *rev. denied*, 494 So. 2d 1153 (Fla. 1986). Subject to exceptions set forth below, in cases involving transitory foreign objects or substances on a business premises, in order to recover for injuries incurred in a slip-and-fall case, the plaintiff must generally prove actual or constructive notice of the dangerous condition. *Winn-Dixie Stores, Inc. v. Mazzie*, 707 So. 2d 927 (Fla. 5th DCA 1998). Contractors may also share responsibility for injuries caused on or around a construction site even though the landowner retains some possession or control of the premises. *Worth v. Eugene Gentile Builders*, 697 So. 2d 945 (Fla. 4th DCA 1997). With regard to municipalities, "once a governmental entity creates a known dangerous condition

which may not be readily apparent to one who could be injured by condition and governmental entity has knowledge of presence of people likely to be injured, then governmental entity must take steps to avert danger or properly warn persons who may be injured by danger." *St. Petersburg v. Collum*, 419 So. 2d 1082, 1086 (Fla. 1982). Because the duty owed is a common law, it cannot be delegated.

Claims of Negligence due to Injury from Transitory Foreign Objects or Substances. A person or entity which owns or operates a business premises has a duty of reasonable care to maintain the business premises in a condition which is reasonably safe for business invitees. This duty includes undertaking reasonable efforts to maintain the business premises free from transitory foreign objects or substances which could foreseeably lead to a loss, injury or damage. F.S. 768.0710(1).

Where there is a claim for any loss, injury or damage by a business invitee due to the presence of a transitory foreign object or substance on a business premises, the claimant/plaintiff has the burden of proving: a) duty owed by the person or entity in control of the business premises; b) negligence by failure to exercise reasonable care in maintenance, inspection, repair, warning or mode of operation of business premises; and c) causal link to the damages. Actual or constructive notice is not an element of such a claim involving transitory foreign objects or substances, though evidence of lack of notice or notice may be considered as evidence. F.S. 768.0710(2). See also *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. 2001) (to the extent not inconsistent with F.S. 768.0710.)

Proximate Causation. Proximate cause is concerned with whether and to what extent a defendant's conduct foreseeably and substantially caused the plaintiff's injury. *Florida Power & Light v. Periera*, 705 So. 2d 1359 (Fla. 1998). The issue is generally an issue of fact. *Id.* Proximate cause is the natural and continuous sequence, unbroken by intervening cause which produces injury, without which the result would not have occurred. *Asgrow-Kilgore Co. v. Mulford Hickerson*, 301 So. 2d 441 (Fla. 1974); *Florida East Coast R.R. Co. v. Wade*, 53 Fla. 620, 43 So. 775 (Fla. 1907). Liability may arise when a person's negligence is not the sole cause of injury so long as the negligence so directly contributed to injury that it is reasonably certain that any other cause alone would not produce the injury. *De Funiak Springs v. Perdue*, 69 Fla. 326, 68 So. 234 (Fla. 1915); *Collum v. Holton*, 449 So. 2d 1003 (Fla. 2d DCA 1984). The injuries must be reasonably foreseeable. *Kolosky v. Winn-Dixie*, 472 So. 2d 891 (Fla. 4th DCA 1985), *rev. denied*, 482 So. 2d 350 (Fla. 1986). The issue of foreseeability as it pertains to proximate cause may be decided as a



matter of law if looking back after the event—appears to the court highly extraordinary that the conduct should have brought about the harm. *Springtree Properties, Inc. v. Hammond*, 692 So. 2d 164 (Fla. 1997). If there is conflicting evidence or if the evidence permits differing reasonable inference as to proximate cause, the issue must be left to the trier of fact. *Id.* See also *Graham v. Ryan Dwyer Langley, Steak N' Shake, Inc.*, 683 So. 2d 1147 (Fla. 5th DCA 1996) (driving a vehicle through the glass window of a commercial business is not reasonably foreseeable as a matter of law).

Res Ipsa Loquitur. Rule of evidence not of substantive law that permits finder of fact to draw inference of negligence when direct evidence of negligence unavailable: 1) instrumentality involved was in the exclusive control of the tort-feasor; 2) injury was not result of any voluntary action or contribution of injured party; 3) accident would not have occurred if due care had been used. *Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339 (Fla. 1978). Res ipsa loquitur alters the burden of proof of direct negligence by requiring the defendant to establish lack of negligence: 1) when the instrumentality causing the injury is under the exclusive control of the defendant; and, 2) the event which caused the injury ordinarily does not happen if the party having control of the instrumentality had used proper care. *Monforti v. K-Mart, Inc.*, 690 So. 2d 631 (Fla. 5th DCA 1997), *rev. denied*, 699 So. 2d 1374 (Fla. 1997) (Sharp, J., concurring in part, dissenting in part). The doctrine is “particularly applicable in wayward wheel cases.” *Cheung v. Ryder Truck Rental, Inc.*, 595 So. 2d 82 (Fla. 5th DCA 1992). The doctrine raises a permissible, not compulsory inference of negligence. *Magic Oriental Rugs, Inc. v. Komorowski*, 618 So. 2d 322 (Fla. 3d DCA 1993). The doctrine does not apply in medical malpractice cases. F.S. 766.102; *Marshall v. Stein*, 662 So. 2d 720 (Fla. 4th DCA 1995), *rev. denied*, 671 So. 2d 788 (Fla. 1996).

Spousal Immunity. Florida has abolished doctrine of spousal immunity. *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993).

Sudden Emergency. One confronted with sudden and unexpected danger only required to exercise such judgment as person of ordinary reason and prudence under similar extraordinary circumstances. *Midstate Hauling Co. v. Fowler*, 176 So. 2d 87 (Fla. 1965); *Loflin v. Wilson*, 67 So. 2d 185 (Fla. 1953). The presence of absence of a sudden emergency is a question of fact for the jury. *Yellow Cab Co. of St. Petersburg, Inc. v. Betsey*, 696 So. 2d 769 (Fla. 2d DCA 1996). Doctrine does not apply if emergency caused by person’s own negligence. *Bellere v. Madsen*, 114 So. 2d 619 (Fla. 1959); *Seitner v. Clevenger*, 68 So. 2d 396 (Fla. 1953). The doctrine does

not apply unless evidence clearly tends to establish a condition of such sudden and unexpected nature as to deprive actor of all reasonable opportunity for deliberation.

NO-FAULT

Under Florida’s modified no-fault automobile insurance system, out-of-pocket expenses of an injured person are paid by injured person’s own insurance carrier regardless of fault.

Florida Motor Vehicle No-Fault Law (F.S. 627.730-7405) requires that payment of personal injury protection benefits, including medical, disability, and funeral insurance benefits, be provided without regard to fault for motor vehicles registered in Florida. Owners of private passenger automobiles are required to obtain “no fault” insurance covering their vehicles under Motor Vehicle No-Fault law, formerly known as Automobile Repairs Reform Act. *Ward v. Nationwide Mut. Fire Ins. Co.*, 364 So. 2d 73 (Fla. 2d DCA 1978). A tort cause of action for recovery for pain, suffering, mental anguish and inconvenience is available only when injury or disease reaches a certain threshold level defined by the statute. F.S. 627.737(2); *Mansfield v. Rivero*, 620 So. 2d 987 (Fla. 1993). See *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974) (upholding no-fault statutory scheme).

Mediation. Any party may demand mediation prior to institution of litigation of any claim for \$10,000 or less for personal injury or any claim for property damage. F.S. 627.745(1)(a). Procedures governing the mediation are set forth in F.S. 627.745.

Benefits. Eighty percent of all reasonable expenses for necessary medical, surgical, X-ray, dental, and rehabilitative and remedial services; sixty percent of loss of gross income and loss of earning capacity plus all expenses reasonably incurred in obtaining necessary services in lieu of those which injured person would have performed without income for benefit of household; and death benefits of \$5,000 per individual. F.S. 627.736(1). All benefits are limited to \$10,000 per individual. F.S. 627.736(1). Expenses which exceed \$10,000 may be recovered under traditional tort theories. Recovery for pain, suffering, mental anguish, and inconvenience is permitted only if the injury or disease meets defined threshold level. See *supra*. F.S. 627.737(2). To recover future economic damages, a plaintiff must establish that such damages are “reasonably certain to occur.” *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89 (Fla. 1995). While proving a permanent injury is a significant factor in establishing the reasonable certainty of future economic damages, it is not a prerequisite. *Id.*



Insurer may exclude benefits for injury sustained by a person who inflicted injury on himself intentionally or who was injured while committing a felony. F.S. 627.736(2)(b). Insurer may exclude benefits for injury sustained while occupying a motor vehicle not insured by insurer or while occupying a motor vehicle without the express or implied consent of insured. F.S. 627.736(2)(a). The insurer may require an independent medical examination and the injured party's unreasonable refusal to submit to such an examination will relieve the insurer for liability for any subsequent PIP benefits. F.S. 627.736(7)(b). Subsequent benefits refers to medical bills incurred before termination of benefits, but received by insurer after termination. *U.S. Security Ins. Co. v. Silva*, 693 So. 2d 593 (Fla. 3d DCA 1997).

Compulsory. Every owner or registrant (collectively "owner") of motor vehicle required to be registered and licensed in Florida must maintain security. F.S. 627.733(1). Security may be provided by motor vehicle insurance or by other authorized means. F.S. 627.733(3). Personal liability for statutory benefits results from failure to provide security. F.S. 627.733(4). A motor vehicle is any self-propelled vehicle with four or more wheels. F.S. 627.732(3). A motorcycle is not a "motor vehicle" under no-fault law and is, therefore, excluded from requirement of security under F.S. 627.733. *Scherzer v. Beron*, 455 So. 2d 441 (Fla. 5th DCA 1984), *dismissed*, 459 So. 2d 1039 (Fla. 1984).

Injury threshold. For tort actions, a person may recover for pain, suffering, mental anguish, and inconvenience only if injury is a significant and permanent loss of an important bodily function, permanent injury within a reasonable degree of probability, significant scarring or disfigurement, or death. F.S. 627.737(2). "Permanency" may be proven by subjective evidence of pain provided that expert medical testimony is presented to establish its existence and permanent nature of pain within a reasonable degree of medical probability. *Tampa v. Long*, 638 So. 2d 35 (Fla. 1994). The issue of permanency is ordinarily a factual one. *Cohen v. Pollack*, 674 So. 2d 805 (Fla. 3d DCA 1996). Failure to reach threshold requirement bars further litigation on the matter. *Faulkner v. Allstate Ins. Co.*, 367 So. 2d 214 (Fla. 1979). Thus, failure to reach threshold deprives injured person's spouse from his or her claim for loss of consortium. *Id.* However, right to claim property damages exists regardless of threshold requirements. *Id.* (citing *Kluger v. White*, 281 So. 2d 1) (Fla. 1973)). Even if claimant does not reach threshold (in other words, establish "permanency") claimant may still be entitled to recover economic damages that exceed personal injury protection benefits. See Standard Jury Instructions-Civil Cases, 723 So. 2d 174, 179 (Fla. 1998), 613 So. 2d 1316 (Fla. 1993) (and cases cited therein). An injured party's recovery for unpaid

medical bills for a non-permanent injury must be reduced by amount of benefits recoverable under injured party's PIP policy (*Mansfield v. Rivero*, 620 So. 2d 987 (Fla. 1993)) and amount of injured party's elected PIP deductible. *Hannah v. NewKirk*, 675 So. 2d 112 (Fla. 1996); See also *Enriquez v. Clark*, 692 So. 2d 941 (Fla. 5th DCA 1997). F.S. 627.739 (1 & 2) which applies to policies issued or renewed on or after 7/1/00, precludes a successful plaintiff from recovering the PIP deductible from a tort-feasor. *Id.* Florida Courts follow "American Rule" that attorneys' fees may be awarded by a court only when authorized by statute or by agreement of parties. *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993); *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1148 (Fla. 1985). By statute, attorneys fees shall be awarded to an insured or beneficiary when that insured or beneficiary "prevails."

Types of Coverage. Insurer must pay PIP benefits for injuries sustained in Florida by owner of a Florida registered motor vehicle caused by physical contact with a vehicle regardless if owner occupied motor vehicle. F.S. 627.736(4)(e)(1). Benefits for injuries sustained outside of Florida but in United States, its territories or possessions, or Canada must be paid so long as owner occupied his motor vehicle. F.S. 627.736(4)(e)(2). Any relative who lives in same household as owner at time of injury and who does not own a motor vehicle required to be registered in Florida is entitled to same benefits as owner. F.S. 627.736(4)(e)(3). Any other person injured in Florida while occupying the owner's motor vehicle, or a resident of Florida injured by physical contact with such motor vehicle is entitled to benefits so long as such person is not an owner of a motor vehicle required to be registered in Florida. F.S. 627.736(4)(e)(4).

Financial Responsibility Laws. See F.S. Chapter 324.

PENALTY AND ATTORNEY FEES

Upon the rendition of a judgment or decree by any of the courts of Florida against an insurer and in favor of any of named or omnibus insured or the named beneficiary under any policy or contract executed by the insurer, the trial court or, in the event of an appeal in which insured or beneficiary prevails, appellate court shall adjudge and decree against insurer and in favor of insured or beneficiary a reasonable sum as attorney's fees for prosecution of suit against company. F.S. 627.428(1). "[T]he statute is a one-way street offering the potential for attorneys' fees only to the insured or beneficiary. The apparent public policy underlying this aspect of the statute is to discourage insurers from contesting valid claims and to reimburse successful policyholders forced to sue to enforce their policies." *Danis Industries Corp. v.*

Ground Improvement, 645 So. 2d 420 (Fla. 1994). Under F.S. 627.428(1) the insured or beneficiary who “prevails” is entitled to attorneys’ fees. *Id.* A “prevailing insured or beneficiary” is one who has obtained a judgment greater than any offer of settlement previously tendered by the insurer. *Id.* See also *Mendez v. Bankers Ins. Co.*, 696 So. 2d 1210 (Fla. 4th DCA 1997). “Any offer of settlement shall be construed to include all damages, attorneys’ fees, taxable costs, and prejudgment interest which would be included in a final judgment if the final judgment was entered on the date of the offer of settlement.” *Danis Indus. Corp. v. Ground Improvement*, 645 So. 2d 420 (Fla. 1994). Test for recovery of attorney fees is whether insurer did or did not wrongfully withhold payment of proceeds of policy. *New York Life Ins. Co. v. Shuster*, 373 So. 2d 916 (Fla. 1979). Under F.S. 627.428(1) attorneys’ fees may properly be awarded for litigating the issue of entitlement to attorneys fees but may not be awarded for litigating the amount of attorneys’ fees. *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993). It is error for a court to award attorneys’ fees without holding an evidentiary hearing on the issue. *Guyton v. Leonard Dewey Wilkinson Action Welding Supply, Inc.*, 707 So. 2d 885 (Fla. 1st DCA, March 6, 1998). The settlement of a disputed case is the functional equivalent of a confession of judgment and thus provides a basis for an award of attorney’s fees under F.S. 627.428. *USF&G v. Federal Ins. Co.*, 671 So. 2d 812 (Fla. 4th DCA 1996). Some courts interpreting 627.428 have permitted an award of attorney’s fees where the insurer settles the case prior to judgment (*Insurance Co. of North America v. Acousti Eng’r Co.*, 579 So. 2d 77 (Fla. 1991)) but not where the insured or beneficiary was paid prior to the initiation of litigation. *Florida Life v. Fickes*, 613 So. 2d 501 (Fla. 5th DCA 1993). When an insurer does not file the suit, the insured is not forced to retain counsel and incur attorney’s fees. *Basik Exp. & Imp., Inc. v. Preferred Nat’l Ins. Co.*, 911 So. 2d 291 (Fla. 4th DCA 2005) (holding that insurer’s settlement of third-party claim did not constitute a confession of judgment, and thus was not entitled to attorney fees).

Statute confers right to fees even if payment is contested in good faith, and undue delay in paying under policy, amounts to wrongful withholding and award of attorneys fees is proper. *Employers’ Liab. v. Royals Farm*, 186 So. 2d 317 (Fla. 2d DCA 1966). Statute not applicable if claim involves reinsurance or if policy or contract was not issued for delivery or was not delivered in Florida. F.S. 627.401; *Pan-American Life v. Diaz*, 322 So. 2d 549 (Fla. 1975); *Aetna Life v. Smith*, 345 So. 2d 784 (Fla. 4th DCA 1977). In addition, statute not applicable to any action brought under F.S. 627.727 (governing uninsured and underinsured motor vehicle coverage)

unless there is a dispute over whether policy provides coverage for uninsured motorist proven to be liable for accident. F.S. 627.727(8). See *State Farm v. Kambara*, 667 So. 2d 831 (Fla. 4th DCA 1996) for discussion of awarding attorneys’ fees to “omnibus insured.”

No attorney fees recoverable on suits on claims arising under life insurance policy or annuity contract commenced prior to expiration of 60 days of proof of claim was duly filed with insurer. F.S. 627.428(2); *State Farm v. Palma*, 629 So. 2d 830, 832 (Fla. 1993); *Great West Life Assurance Co. v. Greene*, 678 So. 2d 385 (Fla. 3d DCA 1996).

F.S. 627.428 applies to sureties issuing certain types of bonds. *Nichols v. Preferred Nat’l Ins. Co.*, 704 So. 2d 1371 (Fla. 1997). F.S. 627.428(1) does not provide for an award of attorneys’ fees in an action to foreclose on a mechanic’s lien secured by a transfer-of-lien bond. F.S. 713.29 provides for an award of attorneys’ fees to prevailing party in a mechanic’s lien enforcement action. Thus, no need to look to F.S. 627.428 for authority to award fees. *DiStefano Construction, Inc. v. Fid. & Deposit Co.*, 597 So. 2d 248 (Fla. 1992).

In action against unauthorized foreign insurer, alien insurer, or person representing or aiding such an insurer upon a contract of insurance issued or delivered in Florida to a Florida resident or Florida authorized corporation, if the insurer or person representing the insurer has failed for 30 days after demand prior to commencement of the action to make payment in accordance with the terms of the contract, the trial judge shall allow plaintiff reasonable attorney fees. F.S. 626.911. Statute not applicable to contracts: 1) covering reinsurance, wet marine and transportation, commercial aircraft, or railway insurance risks; 2) against legal liability arising out of ownership, operation, or maintenance of any property permanent situs outside Florida; 3) against loss of or damage to any property having permanent situs outside Florida; 4) issued under and in accordance with Surplus Lines Law. F.S. 626.912; *Chacin v. Generali*, 655 So. 2d 1162 (Fla. 3d DCA 1995).

An insurer may have its certificate of authority revoked for failure to satisfy a judgment or decree. “Every judgment or decree for the recovery of money entered in any of the courts of this state against any authorized insurer shall be fully satisfied within 60 days from and after the entry thereof...” F.S. 627.427(1). If it is not satisfied and proof of satisfaction filed with the department, the department shall revoke the insurer’s certificate of authority. F.S. 627.427(2). This statute does not authorize the award of attorneys’ fees and costs incurred by plaintiff’s attorney, subsequent to the rendition of a judgment, in implementing the procedures of 627.427. *Lee v. Government Empls. Ins. Co.*, 388 So. 2d 346 (Fla.



1st DCA 1980). Upon proof of such failure, the department shall revoke the insurer's certificate of authority. F.S. 627.427. Prejudgment interest may be awarded on attorneys' fees. Prejudgment interest accrues on an award of attorneys' fees from the date of the entitlement to attorneys' fees is fixed through agreement, arbitration award or court determination. *Quality Engineered v. Higley South, Inc.*, 670 So. 2d 929 (Fla. 1996).

F.S. 772.104 provides that a defendant shall be entitled to reasonable attorney's fees upon a finding that the claimant raised a civil RICO claim that was without substantial factual or legal support. The standard under §772.104 is less stringent than under F.S. 57.105, which is Florida's general attorneys' fee statute. *Hartford Ins. Co. of the Midwest v. Miller*, 681 So. 2d 301 (Fla. 3d DCA 1996).

F.S. 448.08 allows a court to award attorneys' fees to prevailing party in an action for unpaid wages. The statute applies to actions for accrued but unpaid wages and not for unaccrued wages. *Joseph v. Commonwealth Land Title Ins. Co.*, 23 FLWD 539, 707 So. 2d 376 (Fla. 5th DCA, Feb. 20, 1998).

PRIVILEGED COMMUNICATIONS

Attorney/Client. A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of legal services and those reasonably necessary for the transmission of the communication. F.S. 90.502(1). Client has privilege to refuse to disclose, and to prevent other persons from disclosing, the contents of confidential communications when such communications were made in the rendition of legal services to client. F.S. 90.502(2). For exception to what communications are privileged and who can claim, see F.S. 90.502(4); See also *Gerheiser v. Stephens*, 712 So. 2d 1252 (Fla. 4th DCA 1998).

Insurer/Insured. Report made by insured to insurer about an event that could be basis of claim is privileged under attorney/client privilege if policy requires insurer to defend insured through its attorney and the information was intended to assist attorney in defending. *Vann v. State*, 85 So. 2d 133 (Fla. 1956); see also *American States v. Kransco*, 641 So. 2d 175 (Fla. 5th DCA 1994). The department or office or its examiners or investigators may electronically scan accounts, records, documents, files, and information, relating to the subject of the examination or investigation, in the possession or control of the person being examined or investigated. F.S. 624.318(7)(a).

Accountant/Client. This privilege protects information and communications a certified public accountant

obtains from a client in furtherance of rendition of accounting services to the client. F.S. 90.5055; *Cone v. Culverhouse*, 687 So. 2d 888 (Fla. 2d DCA 1997); *Affiliated of Florida Inc. v. U-Need Sundries, Inc.*, 397 So. 2d 764 (Fla. 2d DCA 1981).

Clergy Privilege. Confidential communication between person and cleric made privately for purpose of seeking spiritual counsel and advice in usual course of practice is privileged. F.S. 90.505.

Doctor/Patient. Florida does not recognize general physician/patient privilege. *Florida Power & Light v. Bridgeman*, 133 Fla. 195, 182 So. 911 (Fla. 1938); *Fidelity & Cas. Co. v. Lopez*, 375 So. 2d 59 (Fla. 4th DCA 1979). However, Florida statute dealing with patient records creates physician/patient privilege for patient's medical information, unless physician must disclose information to defend himself in medical malpractice action. *Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996). Confidential communications between patient and psychotherapist for purpose of diagnosis or treatment of mental or emotional condition is recognized by statute. F.S. 90.503. Psychotherapist is defined as licensed or certified psychologist, person authorized to practice medicine, licensed or certified clinical social worker, marriage/family therapist or mental health counselor and personnel of specified treatment facilities, engaged in treatment of mental or emotional condition, including alcoholism or other addictions. *Id.* See also F.S. 456.059 (exceptions to psychotherapist/patient privilege).

Accident Report Privilege. Florida recognizes privilege for written reports made by persons involved in motor vehicle accidents. Pursuant to statute, each report made and any statement made to a law enforcement officer for purpose of completing report shall not be admissible at trial, civil or criminal, subject to statutory exceptions. F.S. 316.066(7).

Hurricane Loss Data. Public Records Exemption. Reports of hurricane loss data and associated exposure data that are specific to a particular insurance company (e.g. location of insured properties, wind mitigation features, amount and type of coverage, type of damage paid, amount of reserves) are exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. F.S. 627.06292.

Loss Projection. Within 30 days after written request for loss data and associated exposure data by the office or the Florida International University center established to study mitigation, insurers shall provide requested data in writing. F.S. 627.06281.

Spousal Privilege. Florida recognizes privilege for confidential communications made between spouses during course of valid marriage which were intended to



be made in confidence. However privilege does not apply to acts that one spouse witnesses other spouse perform. F.S. 90.504; *Bolin v. State*, 650 So. 2d 21 (Fla. 1995).

Sexual Assault Counselor/Victim. Florida recognizes privilege for confidential communications between sexual assault counselor and sexual assault victim. F.S. 90.5035.

Waiver. Person who has privilege against disclosure of confidential matters or communications waives privilege if person or person's predecessor while holder of privilege, voluntarily discloses or makes communication when he or she does not have reasonable expectation of privacy, or consents to disclosure of any significant part of matter or communication. F.S. 90.507. The party will also be deemed to have waived privilege if party injects into the case an issue that in fairness requires examination of otherwise protected communications. *In re Hillsborough*, 176 B.R. 223 (M.D. Fla. 1994).

PRODUCTS LIABILITY

Strict Liability. Manufacturers or sellers are strictly liable for injury caused by a defective product when there is: 1) a relationship between product and manufacturer, seller, or both; 2) defective and unreasonably dangerous product; 3) defective or dangerous condition existed at the time product left the hands of manufacturer or seller; 4) causal relationship between such condition and injury. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); adopting Restatement (Second) of Torts §402A. Supreme Court's adoption of strict liability abolished prior common law implied warranty claim for personal injury for cases where no privity. *Kramer v. Piper Aircraft Corp.*, 520 So. 2d 37 (Fla. 1988). Strict liability only applies to unreasonably dangerous or defective products. See Restatement (Second) of Torts §402(a). Comparative negligence is a defense. F.S. 768.81.

Warranty. Liability may be imposed under common-law principles or Uniform Commercial Code provisions relating to express or implied warranties. *Hartman v. Opelika Machine & Welding Co.*, 414 So. 2d 1105 (Fla. 1st DCA 1982). Elements for breach of implied warranty are: 1) sale of product occurred; 2) product defective before it left manufacturer's control; 3) defect caused injuries or damages; 4) injured party foreseeable user; and 5) product used in its intended manner at time of injury. *Favors v. Firestone Co.*, 309 So. 2d 69 (4th DCA 1975). Recovery on implied warranty of fitness dependent upon showing: 1) seller knew the purpose for which the product was required and 2) buyer relied on seller's skill or judgment to select or furnish a suitable product in addition to general elements for breach of

warranty. *Smith v. Burdine's, Inc.*, 144 Fla. 500, 198 So. 223 (Fla. 1940). Comparative negligence may be asserted as a defense when the injured party misused the product but cannot be asserted when the injured party failed to discover or guard against a defect. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

Asbestos/Silica. Product sellers other than manufacturers. F.S. 774.208 sets forth elements plaintiff must establish regarding asbestos or silica related claims.

Duty to Warn. A manufacturer or seller must warn when, to his actual or constructive knowledge, use of product involves danger. Manufacturer of inherently dangerous substance and a supplier who knows or has reasons to know that a product is dangerous in normal use must plainly warn of its propensities so that those handling it may take proper precautions. *Cohen v. Gen'l Motors Corp.*, 427 So. 2d 389 (Fla. 4th DCA 1983). A manufacturer or seller with actual knowledge of latent defects which is not discoverable by ordinary examination and which renders product dangerous must provide warning. *Walker v. National Gun Traders, Inc.*, 116 So. 2d 792 (Fla. 3d DCA 1960). If person injured knew of dangers, no liability for failure to warn. *Wickham v. Baltimore Paint Co.*, 327 So. 2d 826 (Fla. 3d DCA 1976). Sufficiency of warnings is question for jury unless warning is accurate, clear and unambiguous. *Upjohn Co. v. MacMurdo*, 562 So. 2d 680 (Fla. 1990). A manufacturer can satisfy its duty to warn by adequately warning a learned intermediary. *Felix v. Hoffman-LaRoche*, 540 So. 2d 102 (Fla. 1989). A manufacturer has a duty to warn of dangerous aspects of its product which could damage or injure even when the product is not used for its intended use. *High v. Westinghouse Elec. Corp.*, 610 So. 2d 1259 (Fla. 1992). However, a manufacturer has no duty to warn of potential dangers when they are open and obvious to the user. *Babine v. Gilley's Bronco Shop, Inc.*, 488 So. 2d 176 (Fla. 1st DCA 1986); *Thursby v. Reynolds Metals Co.*, 466 So. 2d 245 (Fla. 1st DCA 1984); *Sanders v. American Body Armor and Equip., Inc.*, 652 So. 2d 883 (Fla. 1st DCA 1995). There is no requirement for a manufacturer to provide all designed and recommended safety devices with its product. Warning of the need for additional equipment for safe operation of the product is sufficient unless the required safety equipment is an integral part of the product or is so costly or otherwise burdensome as to make its purchase and use by the consumer unlikely. *Babine*, 488 So. 2d at 178. A manufacturer has the duty to possess expert knowledge in the field of its product. *Advance Chemical Co. v. Harter*, 478 So. 2d 444 (Fla. 1st DCA 1985). If a particular injury from the product is reasonably foreseeable, however rare, the manufacturer or seller has the duty to warn about the danger. See *Id.* at 448.



Damages. Recovery allowed for compensatory and punitive damages. Punitive damages allowed for willful, wanton or gross misconduct, not to exceed three times compensatory damages awarded unless claimant demonstrates by clear and convincing evidence award is not excessive in light of facts. F.S. 768.73. Need physical injury to recover mental pain and suffering. *Herlong Aviation v. Johnson*, 291 So. 2d 603 (Fla. 1974). But can recover damages for fear of getting disease in future. *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985). Additionally, Florida's Uniform Commercial Code allows recovery of consequential damages for any injury to person or property resulting from breach of warranty. F.S. 672.715(2)(b). Indemnification not available to actively negligent party, but available under vicarious liability or similar doctrine. *Houdaille Indus. v. Edwards*, 374 So. 2d 490 (Fla. 1979). See also Uniform Contribution Among Tortfeasors Act, F.S. 768.31.

Defenses. Unforeseeable use of allegedly defective product bars recovery on strict liability claim against manufacturer; for strict liability to apply, product must have been used for purpose intended. *Benitez v. Standard Havens Products*, 7 F.3d 1561 (11th Cir. 1993). Whether product is unreasonably dangerous depends on several factors, one of which is ability to eliminate danger without impairing product or making it expensive. *Radiation Tech. v. Ware Constr.*, 445 So. 2d 329 (Fla. 1983). Defense that decedent assumed known risk and failed to exercise due care for own safety appropriate in strict liability context. *Alderman v. Wysong & Miles*, 486 So. 2d 673 (Fla. 1st DCA 1986). When finished product result of substantial work by more than one party, liability determined by three factors: trade custom, relative expertise and practical considerations. *Ford v. Int'l Harvester Co.*, 430 So. 2d 912 (Fla. 3d DCA 1983). Comparative negligence not defense if based on user's failure to discover defect or on user's failure to guard against existence of defect. *Gonzalez v. G.A. Braun*, 608 So. 2d 125 (Fla. 3d DCA 1992). But comparative negligence is valid defense if user assumed risk, misused product or failed to use ordinary care. *Id.* Strict liability does not require privity. *Amoroso v. Samuel Friedland*, 604 So. 2d 827 (Fla. 4th DCA 1992).

RELEASE

See Law Digest Tables.

Contract Law - General. See F.S. 46.015; 768.041. Release of one joint wrongdoer is not release to all judgment debtors. *Stephen Bodzo Realty, Inc. v. Willits Int'l Corp.*, 428 So. 2d 225 (Fla. 1983); *McNair v. Megabank, Inc.*, 547 So. 2d 207 (Fla. 3d DCA 1989); F.S. 46.015(1). Requirements for forming contract apply to written release. See 10 Fla. Jur. 2d, Compromise, Ac-

cord and Release, at §24. Thus, consideration is needed to support release agreement. *Shupnick v. Pershing Auto Leasing, Inc.*, 363 So. 2d 198 (Fla. 3d DCA 1978).

Covenant Not to Sue. Covenant not to sue recognizes that obligation or liability continues, but injured party agrees not to assert any rights grounded thereon against a particular covenantee. *Brunswick Corp. v. Concorde Yachts, Inc.*, 370 So. 2d 102 (Fla. 4th DCA 1979).

Fraud and Misrepresentation. Release procured through fraud is voidable as to innocent party, and void as to wrongdoer. *Florida East Coast Ry. Co. v. Thompson*, 93 Fla. 30, 111 So. 525 (Fla. 1927); *DiFigueredo v. Publix Super Mkts. Inc.*, 648 So. 2d 1256 (Fla. 4th DCA 1995). Written release for personal injuries may be avoided for fraud if there is: 1) false and fraudulent representation either as to nature or contents of release, or as to extent or nature of injuries used to induce signature, 2) false and fraudulent representation justifiably relied upon, and 3) no negligence in failing to ascertain true facts. *DiFigueredo*, 648 So. 2d at 1257.

Infants/Capacity. Releasor's incompetency is not a sufficient basis upon which to set aside release when parties cannot be returned to status quo. Rather, releasor must show that releasee had knowledge of incompetency. *Vasquez v. Simms*, 75 So. 2d 783 (Fla. 1954). Contracts by infants and insane persons are voidable. See 11 Fla. Jur. 2d, Contracts, at §10.

Joint tortfeasors. Releasing or granting covenant not to sue to one tortfeasor for injuries sustained does not operate to release or discharge liability of any other tortfeasor who may be liable. F.S. 768.041(1). Rather, amount of partial satisfaction is set off against amount of judgment rendered. F.S. 768.041(2). See also F.S. 46.015.

In a negligent security case, the criminal is not considered to be a joint tort-feasor, and thus is not a proper *Fabre* defendant. See *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12 (1st DCA 1996) (holding that omission of assailant from verdict form was proper, as comparison of negligent acts to intentional acts is not permitted under comparative fault statute).

Mistake. Release may be set aside on proof that it was executed pursuant to a mistake as to a past or present fact. *Broz v. Winn-Dixie Stores, Inc.*, 512 So. 2d 335 (Fla. 3d DCA 1987). Whether parties are mistaken as to existence of injury is jury question. *Id.*

REPRESENTATIONS AND WARRANTIES

Statutory Provisions. All statements and descriptions in any application for insurance policy or annuity

contract, or in negotiations therefor, by or in behalf of insured or annuitant, are deemed representations and not warranties. F.S. 627.409(1), *see also* F.S. 627.454 and 627.505; 627.561 for release of parties. Misrepresentations, omissions, concealment of facts, and incorrect statements will not prevent recovery under policy unless: 1) fraudulent; 2) material to the risk assumed; or 3) insurer would not have issued policy or done so only on different terms. F.S. 627.409(1). With respect to health insurance policies, after 2 years from issue date, only fraudulent misstatements may be used to void policy or deny any claim for losses incurred or disability. F.S. 627.607.

Misrepresentation. Unintentional misrepresentations or omission in application for insurance will prevent recovery on policy if insurer proves misrepresentation or omission material to risk taken or in good faith would not have issued policy had true facts been revealed. *Continental Assurance Co. v. Carroll*, 485 So. 2d 406 (Fla. 1986); *William Penn Life Ins. v. Sands*, 912 F.2d 1359 (11th Cir. 1990). *See* F.S. 627.409(1)(a), (b). *But see Green v. Life & Health of America*, 704 So. 2d 1386 (Fla. 1998) (where insured truthfully answered life insurance application to the best of insured's knowledge and belief, the answers did not constitute misstatements within the meaning of F.S. 627.409 and could not provide basis for insurer's rescission of the policy).

Materiality. Misrepresentation is material if it does not enable reasonable insurer to adequately estimate nature of risk in determining whether to assume risk. *Singer v. Nationwide Mut. Fire Ins.*, 512 So. 2d 1125 (Fla. 4th DCA 1987). Materiality of misrepresentation are questions of fact to be resolved by jury. *Bishop v. Franklin Life Ins.*, 412 F.2d 949 (5th Cir. 1969).

Rescission. Parties can cancel by mutual consent. *Midstate v. Reliable*, 437 F.2d 616 (Fla. 5th DCA 1971). Material misrepresentations are grounds for rescission. *State Farm v. Lee*, 343 F.2d 55 (5th Cir. 1965). If not a material misrepresentation, no rescission is available. *Wilmington Trust v. Manufacturer's Life*, 749 F.2d 694 (11th Cir. 1985).

Reformation. Policy can be reformed to correct mutual mistake. *Lighting Fixture v. Continental*, 420 F.2d 1211 (5th Cir. 1969). Misstatement in age or sex in application for life insurance and annuity contracts, fixed-dollar annuity contracts, variable annuity contracts, pure endowment contracts, industrial life policy does not preclude recovery. Rather, amount payable or benefits accruing under contract shall be such as payments would have purchased according to correct age or sex. F.S. 627.456; 627.468; 627.507. Misstatement of age in application for group life policy will cause equitable adjustment of premiums or benefits, or both. F.S. 627.563.

SERVICE OF PROCESS

See Law Digest Tables. Also see "AUTOMOBILES." Upon Corporations. Corporations within state of Florida are required to designate an agent and keep a registered office for purpose of service of process. F.S. 48.091. Agents of corporations may be served with process. F.S. 48.151. *See also* F.S. 48.181 (service of nonresident engaging in business in state).

Chief Financial Officer receives service of process for each insurer, whether domestic, foreign, alien or unauthorized. F.S. 624.422; 626.906. Each insurer, prior to its authorization to transact insurance in Florida, must file with the Department the name and address where service of process is to be forwarded. F.S. 624.422

Agents. Each licensed nonresident agent appoints Chief Financial Officer to receive service of process. F.S. 626.742; 626.836.

Chief Financial Officer. Service on Chief Financial Officer, as agent for insurer or nonresident alien, may be made by leaving with or mailing to the Chief Financial Officer two copies of service of process. F.S. 48.151.

Upon Non-Resident Motorists. For civil action commenced in Florida, arising out of accident in Florida, Secretary of State agent for service of process on nonresident motorist. F.S. 48.171. In addition, personal service outside of Florida must be made in same manner as service within Florida. F.S. 48.194.

Personal Service. Service on competent adult may be accomplished by 1) delivering to person, 2) leaving copy at usual place of abode, with any person residing therein at least 15 years old. F.S. 48.031. Additionally, service may be made by service on agent authorized by appointment or by law to receive service of process. F.S. 48.151.

SUBROGATION

In General. Insurer, after payment of loss incurred by insured, is entitled to be subrogated *pro tanto* to any right of action that insured has against third person whose negligence or wrongful act caused the loss. *Atlantic C. L. R. Co. v. Campbell*, 104 Fla. 274, 139 So. 886 (Fla. 1932); *Schwab v. Town of Davie*, 492 So. 2d 708 (Fla. 4th DCA 1986). Right of subrogation may be by convention subrogation, (agreement between insurer and insured) or by equitable subrogation (operation of law upon payment of the loss and without any formal assignment or any express stipulation to that effect). *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999). Insurer is subrogated only to such rights as insured possessed. *DeCespedes v. Prudence*, 193 So. 2d 224 (Fla. 3d DCA 1966), *aff'd*, 202 So. 2d 561 (Fla.

1967). Insurer cannot maintain subrogation against own insured. *Smith v. Ryan*, 142 So. 2d 139 (Fla. 2d DCA 1962). There is a split of authority as to whether an insurer may file a subrogation claim prior to making payment to its insured. The Third District Court of Appeal in *Indiana Ins. Co. v. Collins*, 359 So. 2d 916 (Fla. 3d DCA 1978) held that an insurer must first make payment to its insured prior to bringing an action for subrogation while the Second District Court of Appeal recognized conflict with *Collins* and held that an insurer's subrogation action is an appropriate controversy for expedited presentation under Fla. R. Civ. Proc. 1.180 and thus can be filed prior to payment to the insured.

Parties to Action. An insurer which has paid an insured's loss is a subrogee of the insured's cause of action against a tort-feasor; and said insured, as the real party in interest is permitted, but not required, to prosecute and maintain an action against the tort-feasor in its own name. *Holyoke Mut. Ins. Co., Salem v. Concrete Equip., Inc.*, 394 So. 2d 193, 197 (Fla. 3d DCA 1981). In the alternative, the subrogee may bring an action against the tort-feasor in the name of the insured for the use and benefit of the subrogee. *Id.*

Liability Insurance. Liability carrier is entitled to recover upon equitably subrogated claim for indemnity against actual tort-feasor for amounts paid on behalf of insured which is only vicariously liable. *Continental Cas. v. Godur*, 476 So. 2d 242 (Fla. 3d DCA 1985).

Collision Insurance. Automobile insurer is entitled to be subrogated to any right of action which insured has against tort-feasor. *Collins v. Wilcott*, 578 So. 2d 742 (Fla. 3d DCA 1991). Must pay claim in full. *National Sur. v. Bimonte*, 143 So. 2d 709 (Fla. 3d DCA 1962).

Fire Insurance. Insurer entitled to subrogation. *Pennsylvania Lumbermen's v. Nicholas*, 253 F.2d 504 (5th Cir. 1958), *appeal after remand*, 296 F.2d 905 (5th Cir. 1961).

Surety. Surety has right to subrogation only when it has performed its contractual obligations. *United States v. Continental*, 512 F.2d 475 (5th Cir. 1975).

Workers' Compensation. Subrogation rights provided by statute, F.S. 440.39.

WAIVER AND ESTOPPEL

In General. Courts apply waiver and estoppel when circumstances indicate that insurer's conduct induced insured to rely on that conduct to his detriment. *American States v. McGuire*, 510 So. 2d 1227 (Fla. 1st DCA 1987). Waiver requires express or implied knowledge of that which is waived. *Gulf Life v. Green*, 80 So. 2d 321 (Fla. 1955). Waiver and estoppel may prevent an insurer

from seeking a forfeiture of the policy but cannot create or extend coverage provided by policy. *Doe v. Allstate*, 653 So. 2d 371 (Fla. 1995); *Six L's v. Florida Farm Bureau*, 276 So. 2d 37 (Fla. 1973). However, promissory estoppel may be used to create or extend coverage where to refuse to do so would sanction fraud or injustice. *Crown Life v. McBride*, 517 So. 2d 660 (Fla. 1987). Where insurer, with full knowledge of facts out of which forfeiture of policy has arisen, recognizes validity of policy and induces insured to act on that belief, insurer's action is waiver of condition under which forfeiture arose. *Sovereign Camp v. Lee*, 125 Fla. 736, 171 So. 526 (Fla. 1936); *Queen Ins. Co. v. Patterson Drug*, 73 Fla. 665, 74 So. 807 (Fla. 1917). Likewise, insurer that accepts defense of suit with knowledge of facts permitting it to deny coverage is estopped from raising defense of non-coverage if insured has been prejudiced. *Doe v. Allstate*, 653 So. 2d 371 (Fla. 1995).

Waiver by Agent. Knowledge of, or notice to, insurance agent as to matter within scope of authority, and which was acquired while acting within scope of authority, is imputed to insurer. *Russell v. Eckert*, 195 So. 2d 617 (Fla. 2d DCA 1967). This is so even if agent did not disclose facts to insurer. *Johnson v. Life Ins. Co. of GA*, 52 So. 2d 813 (Fla. 1951). Agent's knowledge is not imputed when agent acts fraudulently or collusively, or if conduct is such as to raise presumption that agent would not communicate facts to insurer, or that agent acting adversely to insurer's interest. *Mutual Life v. Hilton-Green*, 241 U.S. 613 (1916); *Phillips-Morefield v. Southern States*, 66 F.2d 29 (5th Cir. 1933). Agent's knowledge also is not imputed to insurer for fidelity bond claims. *Dixie Nat'l Bank v. Employers Comm'l Union*, 463 So. 2d 1147 (Fla. 1985).

Non-waiver Agreements. Although valid, non-waiver agreements do not supersede doctrines of waiver and estoppel in all circumstances. *Bergh v. Canadian Universal*, 216 So. 2d 436 (Fla. 1968). Even if provision requires waivers in writing, an insured may be held to be relying on a subsequent parol waiver by an authorized agent. *Eagle Fire v. Lewallen*, 56 Fla. 246, 47 So. 947 (Fla. 1908). This is because the acts of agent performed within the scope of his role as apparent authority are binding upon insurer. *Fidelity & Cas. Co. v. Britt*, 393 So. 2d 41 (Fla. 3d DCA 1981).

Premiums. By words or conduct insurer may waive, or be estopped to invoke, policy provisions for forfeiture, lapse, or suspension of insurance coverage on grounds of nonpayment of premiums. *Reddick v. Globe*, 596 So. 2d 435 (Fla. 1992); *Pike v. National Fid. Life*, 377 So. 2d 973 (Fla. 3d DCA 1979); *Insurance Co. of PA v. Christian*, 224 So. 2d 343 (Fla. 1st DCA 1969). Insurer cannot retain past-due premium and claim forfei-



ture of policy by reason of its lapse for late payment. *Peninsular Life v. Howard*, 72 So. 2d 389 (Fla. 1954). Insurer is estopped from pursuing forfeiture where, with full knowledge of facts entitling forfeiture, insurer accepts premiums on policy. *Eagle Fire v. Lewallen*, 56 Fla. 246, 47 So. 947 (Fla. 1908). If insurer, or agent, accepts late payment of premiums, insurer may not thereafter deny coverage based upon late payments. *Pike v. National Fid. Life*, 377 So. 2d 973 (Fla. 3d DCA 1979).

Proof of Loss. When insurer admits or fails to deny liability, and offers to settle claim, it waives filing of proof of loss. *American Bankers v. Terry*, 277 So. 2d 563 (Fla. 3d DCA 1973). See *Southgate Gardens v. Aspen Specialty*, 2008 WL 2245866 (S.D. Fla. May 29, 2008). Subsequent filing of proof of loss by insured does not set aside previous waiver of proof of loss by insurer, which is irrevocable. *American*, 277 So. 2d at 563. This waiver may be made by any officer or agent with authority to accept proofs of loss and may be made orally. *Employer's Liab. Assur. v. Royals Farm*, 186 So. 2d 317 (Fla. 2d DCA 1966).

WORKERS' COMPENSATION

General. Workers' compensation is governed by Chapter 440 Florida Statutes. Section 440.45 creates the Office of Judges of Compensation Claims within the Dept. of Labor and Employment Security to hear claims. Appeals of orders shall be made to the First District Court of Appeals. F.S. 440.271.

Benefits. Compensation not permitted for first 7 days of disability, except, if injury results in disability of more than 21 days, wage-loss compensation allowed from commencement of injury. F.S. 440.12(1). Minimum amount of compensation is statutorily established; if employee's wages exceed statutory minimum, then compensation equals 100 percent of statewide average weekly wage. F.S. 440.12(2). Medical benefits for medically necessary remedial treatment, care, and attendance by health care provider for such period as nature of injury or process of recovery requires, including medicines, medical supplies, durable medical equipment, orthoses, prostheses, and other medically necessary apparatus, must be provided. F.S. 440.13(2)(a). Professional or nonprofessional attendant care must be provided at direction and control of physician when such care is medically necessary. F.S. 440.13(2)(b). Statute also provides compensation for nonprofessional attendant care by family member. *Id.* Disability compensation depends upon classification of disability suffered. Disabilities divided into five classifications: 1) permanent total disability, 2) temporary total disability, 3) permanent impairment and wage-loss benefits, 4) temporary partial disability, and 5) subsequent injury. F.S. 440.15. Death

benefits include funeral expenses not to exceed \$7,500 and payment of certain percentage of decedent's average weekly wage if death results from accident within one year or follows continuous disability within five years from accident. F.S. 440.16.

Employment Defined. No one other than employee, or, in case of death, employee's dependents, is entitled to compensation under F.S. 440. *Chamberlain v. Florida Power*, 144 Fla. 719, 198 So. 486 (Fla. 1940). Whether injured party is employee is generally a question of fact. *Rogers v. Barrett*, 46 So. 2d 490 (Fla. 1950); *Sagarino v. Marriott*, 644 So. 2d 162 (Fla. 4th DCA 1994). Direction and control over an individual is primary test in determining whether employer-employee relationship exists. *Patton Seafood v. Glisson*, 38 So. 2d 839 (Fla. 1949); *Stevens v. International Builders*, 207 So. 2d 287 (Fla. 3d DCA 1968). Exclusions from definition of employee include persons whose employment is both casual and not in ordinary course of trade, business, profession, or occupation of employer. F.S. 440.02(15)(d)(5). "Casual" is defined as employment not exceeding 10 working days, without regard to the number of persons employed, and when total labor cost of such work is less than \$500. F.S. 440.02(5). Definition of "Employee" redefined under Workers' Compensation Law to revise exemption relating to owner-operators of motor vehicles. F.S. 440.02(15).

Exclusive Remedy. Workers' compensation is the sole and exclusive remedy for injury or death that occurs during course and scope of employment, except where substantial certainty of injury proves an intentional tort. F.S. 440.11; *Turner v. PCR*, 754 So. 2d 683 (Fla. 2000). *But see Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779 (Fla. 2004) (superseded by statute on other grounds). Civil action barred even though some elements of damages may not be compensable under workers' compensation law. *Humana of Fla. v. McKaughan*, 652 So. 2d 852 (Fla. 2d DCA 1995); *Grice v. Suwannee Lumber*, 113 So. 2d 742 (Fla. 1st DCA 1959).

Arising out of and in the course and scope of employment. Benefits under workers' compensation law are recoverable when accidental injury or death arise out of work performed in the course and scope of employment. F.S. 440.09(1). Arising out of pertains to occupational causation. F.S. 440.02(36). An accidental injury or death arises out of employment if work performed in course and scope of employment is the major contributing cause of the injury or death. *Id.* Accident is found to be arising out of and in the course of employment when there is casual connection between injury and employment. *General Properties v. Greening*, 154 Fla. 814, 18 So. 2d 908 (Fla. 1944). "Arise out of" refers to origin of cause of accident, and "in course of" connotes time,



place, and circumstance. *Grenon v. Palm Harbor Fire Dist.*, 634 So. 2d 697 (Fla. 1st DCA 1994). Strength of one may make up for weakness of other. *Id.*

Occupational Disease. Disablement or death of employee resulting from occupational disease is subject to Workers' Compensation Law. F.S. 440.151(1)(a). Occupational disease is one which is due to causes and conditions which are characteristic of and peculiar to nature of particular employment or is an ordinary disease of life in which incidence of such disease is substantially higher in particular employment than for general public. F.S. 440.151(2). In occupational disease cases, it is disability and not the disease that determines compensability of a claim. *American Beryllium v. Stringer*, 392 So. 2d 1294 (Fla. 1980). Employer is not liable unless disease results from nature of employment in which employee was engaged and was actually contracted while so engaged. F.S. 440.151(1)(a); *Victor Wine & Liquor v. Beesley*, 141 So. 2d 581 (Fla. 1961).

Pre-existing Injury. Employee with pre-existing injury is not precluded from benefits for subsequent accident that results in aggravation or acceleration of pre-existing condition or death. F.S. 440.15(5)(a). Only aggravation or acceleration of pre-existing condition or death reasonably attributable to accident is compensable. F.S. 440.02(1). Disability and death benefits are not recoverable for aggravation or acceleration of pre-existing injury when: 1) pre-existing injury is venereal disease or disease due to habitual use of alcohol or controlled substances or narcotic drugs or 2) at time of entering employment, employee falsely represents, in writing, as not having previously been disabled or compensated because

of such previous injury and employer detrimentally relies on misrepresentation. F.S. 440.02(1), 440.15(5)(a).

Fellow-employee rule. Injuries sustained from accident caused by negligence of fellow-employee are compensable under Workers' Compensation Law, and fellow-employee receives same immunity from liability as the employer if fellow-employee was acting in furtherance of employer's business. F.S. 440.11(1). If fellow-employee acts with willful and wanton disregard or unprovoked physical aggression or with gross negligence, however, immunity is lost. F.S. 440.11(1).

Liens. Compensation has same preference of lien against assets of employer or carrier, without limit of amount as claim for unpaid wages. F.S. 440.23.

Third-parties. If an employee is injured or killed in course of employment by negligence or wrongful act of third party then employee or his dependents may recover under Workers' Compensation Law and also pursue claims against third party. F.S. 440.39(1). However, if benefits under Workers' Compensation Law are accepted then employer or employer's insurer is subrogated to extent of benefits paid. F.S. 440.39(2).

Attorneys' fee. Generally, employee responsible for own attorney's fees. F.S. 440.34(3). Such fees are a lien upon compensation payable. F.S. 440.34(4). Employee may recover attorney's fee when: 1) employee successfully asserts claim for medical benefits only; 2) employer files a notice of denial and employee succeeds in claim; 3) employee prevails on issue of compensability; or 4) employee prevails on claim for enforcement of compensation orders. F.S. 440.34(3).