FLORIDA
Tort Law Profile

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The Florida Tort Law Profile is not intended to provide specific legal advice or opinions, but rather to provide general information. If you need additional information regarding Florida law, or in relation to a specific claim, please do not hesitate to call upon us. (Revised November 2012)
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I. OVERVIEW OF THE FLORIDA COURT SYSTEM

A. Trial Courts

1. County Courts

The Florida County Courts are courts where smaller claims are heard. The jurisdiction of the County Courts is established by statute and includes civil actions at law and in equity in which the amount in controversy does not exceed $15,000. See, § 34.01, Florida Statutes. The court lacks the judicial power to enter judgments for damages in excess of the monetary limit of the court. White v. Marine Transport Lines, Inc., 372 So.2d. 81 (Fla. 1979). Discovery, including interrogatories, requests for production, requests for admissions, depositions etc., pursuant to the Florida Rules of Civil Procedure, is permitted.

The County Court also has exclusive original jurisdiction over small claims, which are defined as those in which the amount in controversy does not exceed $5,000. Small claim actions are intended to provide a speedy, simple and inexpensive way for litigants to resolve small disputes. Discovery may be limited and may only be directed to litigants who are represented by an attorney, unless an unrepresented litigant initiates discovery in the action. In such a case, the other party is entitled to pursue discovery in accordance with the Florida Rules of Procedure. At trial, however, the rules are relaxed for unrepresented parties and the judge may assist pro se litigants on rules of procedure, law and evidence. Testimony can be taken and attorneys may appear at trial by telephone.

For more information on the Florida County Court System please log onto http://www.flcourts.org/courts/county/county.shtml

2. Circuit Courts

The Florida Circuit Courts are the highest trial court of record exercising exclusive original jurisdiction within the State in all actions at law not cognizable by the County Courts. The original exclusive jurisdiction of the circuit courts also extends to proceedings related to the settlement of estates, juvenile offenses, except traffic offenses, and actions involving title and boundaries of real property, among others. The circuit court is empowered to issue injunctions and declaratory judgments.

The circuit courts also decide appeals from final administrative orders of local government code enforcement boards and appeals from the county court, except those declaring a state statute or constitutional provision invalid or those which are certified by the county court to be an appeal of great public importance and which have been accepted by the district court of appeal for review. The Circuit Courts are divided into twenty judicial
circuits, each of which is comprised of at least one or more than one county. A breakdown of the composition of each judicial circuit is attached as an Appendix to this Tort Profile.

In a civil action in which a jury trial is requested, the jury consists of six (6) jurors. See, § 69.071, Florida Statutes. A unanimous decision is required.

Full discovery is allowed in Circuit Court, including thirty (30) interrogatories per party, requests for production of documents and requests for admission of facts. See Fla. R. Civ. Proc. 1.340, 1.350, 1.370. The depositions of both parties and non-parties are allowed, in addition to the use of expert witnesses and independent medical examinations.

For more information on Florida’s Circuit Courts log onto http://www.flcourts.org/courts/circuit/circuit.shtml

3. Case Management Conferences

Upon notice filed by a party, or on the court’s own initiative, a case management conference may be convened pursuant to Rule 1.200 of the Florida Rules of Civil Procedure. Many issues may be addressed at the Case Management Conference, including, among others, setting a timetable for the service of pleadings and motions, scheduling or limiting the discovery process, setting expert witness disclosure deadlines, entering into stipulations, pursuing settlement, considering referrals to a magistrate judge, scheduling hearings on motions in limine, setting a trial date, and/or scheduling future case management conferences.

4. Mediation and Arbitration

Pursuant to Rules 1.710 and 1.810 of the Florida Rules of Civil Procedure, the court may refer a civil action to mediation or arbitration if all of the parties in the action, by written stipulation, request it. The court may also order a civil action to mediation or arbitration upon motion filed by a party or, on the court’s own initiative, if the court determines that the mediation or arbitration will benefit the litigants or the court in the prosecution of the case. Absent a stipulation, the mediation process does not suspend discovery.

5. Rules Applicable to Mediation

Absent a stipulation, a referral to mediation process does not suspend discovery. Generally, the parties or their representative with full authority to settle without further consultation, the party’s counsel of record, and, if applicable, a party’s insurance carrier with full authority to settle up to the Plaintiff’s last demand or within policy limits is required to physically
appear at the mediation conference unless there is a stipulation to the contrary or court order. Sanctions may be imposed if a party fails to appear at a properly noticed mediation. Unless otherwise stipulated by the parties, 10 days prior to the mediation conference, each party must file a certification with the court identifying the persons attending mediation and confirming that the person attending has settlement authority in compliance with the rules. See Fla. R. Civ. Proc. 1.710 and 1.720. At the conclusion of mediation, the mediator will report to the court whether an agreement has been reached. Agreements reached at mediation must be signed by the parties or their counsel. The court may impose sanctions if a party breaches the agreement reached at mediation.

6. **Rules Applicable to Arbitration**

A list of qualified arbitrators is maintained by the Chief Judge of each judicial circuit. If there is no agreement by the parties, the Chief Judge will assign an arbitrator or a panel of three arbitrators to hear the case in both Non-binding Arbitration and Voluntary Binding Arbitration cases. See Fla. R. Civ. Proc. 1.810.

a. **Non-Binding Arbitration**

With non-binding arbitration, the Chief Judge sets the time and procedure for the arbitration hearing. Generally, the hearing is conducted informally and the case is presented through statements of witnesses and arguments of counsel. Arbitration must be completed within 30 days after the first arbitration hearing, unless extended upon motion of the arbitrator or a party. In any event, the court may not extend the arbitration beyond 60 days of the first hearing date.

The arbitrator must issue a written decision within 10 days after the final adjournment of the arbitration proceeding. A party desiring trial, must file a Motion for Trial within 20 days of service of the arbitrator’s decision. Otherwise, the court may enter the appropriate order or judgment to effectuate the decision of the arbitrator. See Fla. R. Civ. Proc. 1.820.

b. **Voluntary Binding Arbitration**

With Voluntary Binding Arbitration and subject to non-conflicting rules of procedure or law, the parties to the arbitration are free to establish the hearing procedure. An application for Voluntary Binding Arbitration may be filed before or after a lawsuit is filed and will toll the applicable statute of limitation for the action. The agreement to arbitrate must be in writing. In the absence of a written agreement of the parties, the court will establish the
arbitration procedure. The arbitrator must issue a written decision within 10 days after the final adjournment of the arbitration proceeding. A Voluntary Binding Arbitration decision must be appealed within 30 days after service of the decision. Appellate review is limited to an appeal on the record and the grounds of appeal are further limited to the failure of the arbitrator to comply with the rules of procedure, his or her impartiality or misconduct, or entry of a decision that is contrary to the Constitution of the United States or of the State of Florida. If no appeal is taken, the court will enter an order or judgment in accordance with the arbitration result. See Fla. R. Civ. Proc. 1.830 and Sec.44.104, Florida Statutes.

B. Appellate Courts

1. The District Court of Appeals

The District Court of Appeals is Florida’s intermediate appellate court, which was created in 1957 in response to a rapidly growing caseload in the Florida Supreme Court. There are five contiguous appellate districts, each having a District Court of Appeal (DCA) headquartered respectively in Tallahassee, Lakeland/Tampa, Miami, West Palm Beach and Daytona Beach. The District Court of Appeals has exclusive initial appellate jurisdiction over any final judgment and some non-final orders of the Circuit Courts. The court may also review any order or judgment which has been certified by the county court to be an issue of great public importance. The District Court of Appeals also has the power to review final actions taken by state agencies in carrying out the duties of the executive branch. Finally, the District Court of Appeal has been granted constitutional authority to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to complete exercise of their jurisdiction.

The District Court of Appeals is usually the final appellate review for litigants because the Florida Supreme Court is not required to accept a case for further review. A Notice of Appeal from the Circuit Court must be filed within 30 days of the rendition of the order sought to be reviewed. A conformed copy of the order to be reviewed must be attached to the notice. For appeals of administrative matters, the original notice must be filed with the clerk of the administrative agency, and a copy filed with the clerk of the circuit court.

Some non-final orders of the Circuit Court are also appealable to the District Court of Appeals. In civil cases, appeals of non-final orders are generally limited to those concerning venue, jurisdiction over the person, injunctive relief, immediate possession of real property, lack of entitlement to worker’s compensation immunity, entitlement to arbitration,
class certification and non entitlement to qualified immunity in federal
civil rights cases as a matter of law. In addition, if a partial judgment
completely disposes of the action as to one party, a party wishing to appeal
that partial judgment must note his appeal within 30 days of the partial
judgment.

For more information on the District Court of Appeals, please log on to
http://www.flcourts.org/courts/dca/dca.shtml

2. The Florida Supreme Court

The Supreme Court is the highest tribunal in the State of Florida and is
composed of seven justices. Each year, the Supreme Court holds two
terms, beginning on the first day of January and July, respectively. Oral
arguments in the Supreme Court are heard by all seven justices.

In addition to certain non-civil matters over which the Florida Supreme
Court has exclusive appellate jurisdiction, the court has discretionary
jurisdiction over decisions of the district courts of appeals that, among
others, (a) expressly and directly conflict with a decision of another
district court of appeal or of the supreme court on the same question of
law; (b) pass upon a question certified to be of great public importance;
and (c) that are certified to be in direct conflict with decisions of other
district courts of appeal. In addition, the Supreme Court has discretionary
jurisdiction over orders and judgments of trial courts certified by the
district court of appeals to require immediate resolution by the Supreme
Court which are of great public importance or which have a great effect on
the proper administration of justice. Finally, the court has discretionary
jurisdiction over questions of law certified by the United States Supreme
Court or a United States Court of Appeals that are determinative of the
cause of action for which there is no controlling precedent of the Supreme
Court of Florida.

For more information on the Supreme Court of Florida, please log on to
http://www.floridasupremecourt.org

II. COMMENCEMENT OF ACTION

A. Venue

For residents of the State of Florida, a civil action must be brought in a county
where the defendant resides, where the cause of action accrued, or where the
property in litigation is located. If there is more than one defendant residing in
different counties, all may be sued in a county in which any one of them resides.
Actions against domestic corporations may be brought only in a county where the
domestic corporation usually keeps an office for its customary business, where the
cause of action accrued or where the property at issue is located. Foreign
corporations doing business in Florida may be sued where the foreign corporation has an agent or representative, as well as where the cause of action accrued or where the disputed property is located. See generally, §§ 47.011, 47.021, 47.041, 47.051, Florida Statutes. Contractual venue provisions involving a domestic contractor which establish venue out of state are void as a matter of public policy.

B. Time for Filing an Answer

1. County Court

Generally, an Answer to the Complaint must be filed within twenty (20) days after service of the summons, complaint, counterclaim, cross-claim, or third-party claim. In answering the complaint, the defending party must raise any applicable affirmative defense as set forth in Rule 1.140 of the Florida Rules of Civil Procedure, as well as any other matter constituting an avoidance or affirmative defense. With some exception, a party waives all defenses and objections that the pleader fails to raise in his answer or by optional pre-answer motion. The party bringing the action must file his or her Reply to the Answer and Affirmative Defenses within 20 days of service of the Answer. See Fla.R.Civ. Proc. 1.140.

A small claim action in the county court is initiated by the filing of the Statement of the Claim and service of the summons entitled “Notice to Appear,” which states the place and time for the Initial Appearance/Pre-trial Conference. Written pre-trial motions and defenses do not have to be filed. All that is required is that the parties appear at the Initial Pre-trial Conference. The pre-trial conference requirement may be waived provided that the parties to the litigation are represented by counsel and a stipulation, containing the matters set forth in the rules, is filed with the court prior to the initial appearance date. See Fla.R.Civ. Proc.7.080, et seq.

2. Circuit Court

An Answer to the Complaint must be filed within twenty (20) days after service of the summons, complaint, counterclaim, cross-claim, or third-party claim. In answering the complaint, the defending party must raise any applicable affirmative defense as set forth in Rule 1.140 of the Florida Rules of Civil Procedure, as well as any other matter constituting an avoidance or affirmative defense. With some exception, a party waives all defenses and objections that the pleader fails to raise in his answer or by optional pre-answer motion. The party bringing the action must file his or her Reply to the Answer and Affirmative defenses within 20 days of service of the Answer. Fla.R.Civ. Proc. 1.140.
C. Counterclaims, Cross-Claims and Third-Party Claims

1. Counterclaims

Florida follows the compulsory counterclaim rule. That is, if at the time the complaint is served, the defending party has a claim against the complaining party and the claim arises out of the same transaction which is the subject of the lawsuit, the defendant must initiate its counterclaim at the time the Answer is filed. However, the initiation of the counterclaim is not compulsory if, among other reasons, the defending party is already prosecuting its counterclaim in another pending action. Permissive counterclaims, i.e. those not arising out of the same transaction, may, but are not required to be initiated at the time of filing the answer to the complaint. See Fla.R.Civ. Proc. 1.170.

2. Cross-claims

A pleader may also bring a cross-claim against a co-party when the claim arises out of the same transaction as the complaint or counter-complaint alleged in the pleadings. The cross-claim may assert that the cross-defendant is liable for all or part of the claims asserted against the cross-plaintiff in the action.

3. Third Party Claims

After a lawsuit is initiated, a defendant may cause a Summons and Third-Party Complaint to be served on a non-party who the defendant alleges may be liable for all of part of the damages alleged against the defendant in the lawsuit. The third-party action may also allege against the non-party, any other claim that arises out of the lawsuit originally initiated by the Plaintiff. If the third-party complaint is filed more than 20 days after the filing defendant files its original answer, leave of court to pursue the third-party complaint is required. See Fla.R.Civ. Proc. 1.180.

III. COMMON CAUSES OF ACTION

A. Negligence

Generally, negligence is described as a wrongful act or omission of a duty by one that, as a consequence, causes damage or loss to another. The legal definition is the failure to use that degree of care which a reasonably careful person would use under like circumstances. Florida is a comparative fault state and responsibility for one’s own negligence applies to both the plaintiff and the defendant. Thus, any contributory fault charged to the plaintiff diminishes the plaintiff’s recovery by his own percentage of fault. However, the Plaintiff’s negligence will not completely bar his recovery.
A Plaintiff who is a child may also be charged with comparative fault. A child is held to that degree of care which a reasonably careful child of the same age, mental capacity, intelligence, training and experience would use under like circumstances. However, a child is held to this standard only if she were engaged in an activity appropriate to a child of his age, experience and wisdom.

B. Imputed or Vicarious Liability

1. Employer

An employer may be held responsible for the torts of his/her employee under three distinct theories: respondeat superior, negligent hiring, retention and supervision and negligent entrustment.

   a. Respondeat Superior

   Under the doctrine of respondeat superior, an employer may be vicariously liable to third parties for damages and injuries caused by its employee’s intentional or negligent acts that are committed by the employee during the course and scope of his employment. This is derivative liability of the employer and, in a true technical sense, the employer has an implied right of action for indemnification against its employee if found liable. American Home Assur. Co. v. City of Opa Locka, 368 So. 2d 416 (Fla 3rd DCA 1979). See also Iglesia Cristiana La Casa Del Senor, Inc. v. L.M., 783 So.2d 353 (Fla 3rd DCA 2001).

   b. Negligent Hiring, Retention and Supervision

   In the true legal sense, negligent hiring, retention and supervision claims seek to impose direct (as opposed to vicarious or imputed) liability on the employer for the tortious conduct of its employees. These claims are further distinguished from the employer’s vicarious liability because with negligent hiring, retention or supervision, the employer may still be liable when the employee’s negligent act occurs outside the scope of the employee's employment. Anderson Trucking Service, Inc. v. Gibson, 884 So. 2d 1046 (Fla. 5th DCA 2004). Each claim does, however, require the existence of an employment relationship. Behrman v. Allstate Ins. Co., 388 F. Supp. 2d 1346 (S.D. Fla. 2005).

   The elements of negligent hiring include a demonstration that: (1) an employer was required to make an appropriate investigation of an employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in
light of the information he or she knew or should have known. Malicki v. Doe, 814 So. 2d 347 (Fla. 2002).

The main difference between a claim for negligent hiring in comparison to claims for negligent supervision or retention is one of timing. With negligent hiring, the inquiry is whether the claimed danger could have been foreseen at the time of hiring the employee. A negligent supervision or retention claim arises when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicates his unfitness and the employer fails to take further action such as investigation, discharge, or reassignment. Martinez v. Pavex Corp., 422 F. Supp. 2d 1284 (M.D. Fla. 2006).

c. Negligent Entrustment and the Dangerous Instrumentality Doctrine

An employer may also be subject to direct liability to injured third parties when the employer negligently entrusts the use of dangerous instrumentalities to its employees.

While a negligent entrustment claim contemplates liability for the negligent entrustment of a dangerous instrumentality, Florida’s Dangerous Instrumentality Doctrine specifically addresses the negligent entrustment of a motor vehicle. Under this doctrine, an owner of a motor vehicle (including an employer) may be held vicariously liable for the negligence of the individual (including an employee) to whom the owner entrusted the vehicle. Toombs v. Alamo Rent-A-Car, Inc., 833 So.2d 109 (Fla. 2002). See also Saullo v. Douglas, 957 So.2d 80 (Fla. 5th DCA 2007).

2. Passengers

Generally the negligence of a driver over a motor vehicle will not be imputed to a passenger unless the passenger has authority or control over the driver, has an agency relationship with the driver, or attempts to impose his or her will over the driver of the vehicle. A passenger, however, may be negligent where he or she knows or should know that the operator is not exercising the requisite degree of care for his or her safety but fails to warn, protest, or otherwise to rectify the operator's conduct. Walker v. Loop Fish & Oyster Co., 211 F.2d 777 (5th Cir. 1954); James A. Cummings Inc. v. Larson, 588 So. 2d 1066 (Fla. 4th DCA 1991); Roos v. Morrison, 913 So.2d 59 (Fla. 1st DCA 2005).
3. **Parental Liability for Torts of Children**

Generally, a parent is not liable for the torts of his/her minor unemancipated child. The mere fact of parentage does not make a parent liable for the torts of a minor. *Snow v. Nelson*, 475 So. 2d 225 (Fla. 1985).

However, a parent, or one standing in loco parentis, may be held liable for the tort of a minor where the child, in the commission of a tortious act, occupies the relationship of servant or agent of its parents; where the parent knows of the child's wrongdoing and consents to it or directs or sanctions it; where the parent fails to exercise parental control over the child, although he knows or in the exercise of due care should have known that injury to another is a probable consequence; or, where the parent entrusts a dangerous instrumentality to the child which, because of the lack of age, judgment, or experience of the child, may become a source of danger to others. *See*, generally, *Snow v. Nelson*, 475 So. 2d 225 (Fla. 1985); *Wyatt v. McMullen*, 350 So. 2d 1115 (Fla. 1st DCA 1977); *Sykes v. St. Andrews School*, 625 So. 2d 1317, 18 (Fla. 4th DCA 1993).

4. **Spousal Liability and Immunity**

Generally, a spouse is not liable for the other spouse's tort, simply because of the marital relationship, unless the spouse has knowledge of the tortious conduct and authorizes or participates in the act. *Martinez v. Rodriguez*, 215 So. 2d 305 (Fla. 1968); *Schryburt v. Olesen*, 475 So. 2d 715 (Fla. 2nd DCA 1985); *Tout v. Hartford Acc. & Indem. Co.*, 390 So. 2d 155 (Fla. 3rd DCA 1980). A spouse who owns an automobile and entrusts it to the other spouse is responsible for the negligence of the other spouse where the automobile is operated in such fashion as to produce damage or injury. *Weber v. Porco*, 100 So. 2d 146 (Fla. 1958).

5. **Dangerous Instrumentality Doctrine**

Florida’s Dangerous Instrumentality Doctrine specifically addresses the negligent entrustment of a motor vehicle. Under the doctrine an owner of a motor vehicle is vicariously liable when he voluntarily entrusts a motor vehicle to an individual whose negligent operation causes damage to another. *Toombs v. Alamo Rent-A-Car, Inc.*, 833 So.2d 109 (Fla.2002).

6. **Dram Shop Liability**

Generally, Florida does not recognize a cause of action against a licensed vendor of alcoholic beverage for furnishing alcohol to a person of lawful drinking age who thereafter negligently injures himself or a third party. *Bennett v. Godfather’s Pizza, Inc.*, 570 So.2d 1351 (Fla. 3rd DCA 1990); *Reed v. Black Caesar's Forge Gourmet Restaurant, Inc.*, 165 So. 2d 787 (Fla. 3rd DCA 1964). However, liability may still be imposed if the
C. Intentional or Malicious Infliction of Emotional Distress Claims

The tort of intentional or malicious infliction of emotional distress is recognized in Florida and liability may be imposed when one, by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. LeGrande v. Emmanuel, 889 So. 2d 991 (Fla. 3rd DCA 2004); Gallogly v. Rodriguez, 970 So.2d 470 (Fla. 2nd DCA 2007). Recovery is allowed in only the most compelling of circumstances. That is, the conduct complained of must rise to the level of conduct that would support a claim for punitive damages. Donigan v. Nevins, 785 So. 2d 573 (Fla. 4th DCA 2001).

D. Wrongful Death

A wrongful death action is brought by the personal representative of an estate who pursues the action on behalf of the estate and statutorily defined surviving relatives of the decedent. Plaintiffs in a wrongful death action seek recovery (which was not available at common law) for the losses they sustained as a result of the death of the decedent. The Wrongful Death Act contemplates recovery when the death is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person. The focus on this type of action is not on the damages incurred by the deceased person, but on the losses incurred by the plaintiff or plaintiffs as defined in the Wrongful Death Act. Florida’s Wrongful Death Act is codified in §§ 768.16 - 768.26, Florida Statutes.

1. Plaintiffs

Florida’s Wrongful Death Act provides for two classes of plaintiffs: the decedent’s estate and statutorily defined survivors. Survivors include the decedent's spouse, children, parents, and (when partly or wholly dependent on the decedent for support or services), any blood relatives and adoptive brothers and sisters. It includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support. See § 768.18(1), Florida Statutes.

2. Defenses

Any defense which would have barred suit or reduced recovery by the deceased also bars or reduces recovery by a wrongful death plaintiff, e.g., comparative negligence by the decedent. See Section IV of this profile, Defenses to Claims.
3. Statute of Limitations

A wrongful death action must be filed within two years from the date of death. See 95.11(4), Florida Statutes.

4. Damages

a. Recovery of Survivors in Wrongful Death Action

Survivors under the statute may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death. Under the statute, future losses are reduced to present value.

The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. Minor children are statutorily defined as children under 25 years of age.

Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

Medical or funeral expenses incurred as a result of the decedent's injury or death may be recovered by a survivor who has paid them.

b. Recovery of Decedent’s Estate in Wrongful Death Action

Generally, the personal representative of the estate may recover the deceased person’s loss of earnings from the date of injury to the date of death and the loss of the prospective net accumulations of an estate (reduced to present value), which might reasonably have been expected but for the wrongful death.

Net accumulations are defined as that part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of her or his estate if the decedent had lived her or his normal life expectancy. Net business or salary income is defined as that part of the decedent's probable gross income after taxes,
exceeding income from investments continuing beyond death that remains after deducting expenses such as the decedent's personal expenses and support of survivors.

E. Abatement of Survival Action in Favor of Wrongful Death Action

In Florida, when a personal injury to the decedent results in his or her death, no action for the personal injury survives, and any such action pending at the time of death abates. All damages caused by the tortious injury from which the decedent suffered from the time of his or her injury until the time of his or her death must be recovered through the personal representative of the decedent’s estate in a wrongful death action. When a plaintiff dies as a result of his or her injuries during the pendency of a personal injury action, the plaintiff’s Estate cannot simply be substituted for deceased party. Instead, a separate action for wrongful death must be brought by the personal representative.

F. Loss of Consortium (Spouses, Parents and Children)

As a general rule in Florida, a spouse, parent or child may recover damages for the loss of consortium of their spouse, child or parent in a personal injury or wrongful death action. Loss of spousal consortium includes, for example, sexual relations, affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance. A loss of consortium claim is derivative in nature, is separate and distinct from the primary injury claim from which the consortium claim is derived and, must be pled separately. A spouse may join his or her consortium claim with the primary personal injury claim, or file a separate action. Rose v. Frederick, 31 So.2d 401 (Fla. 1947).

An unmarried dependent child may recover loss of parental consortium damages (permanent loss of services, comfort, companionship, and society) when the parent has suffered significant permanent injury resulting in permanent total disability. See § 768.0415, Florida Statutes.

Parents of minor children may have a loss of filial consortium claim in circumstances where the minor child’s injury is significant and involves a permanent disability. In such a case, parents may recover for the loss of companionship, society and love, affection and solace, and for services the child customarily would have performed but for the injury.

Generally, damages for past and future loss of consortium are recoverable. Platt v. Schwindt, 493 So.2d 520 (Fla. 2nd DCA 1986).

G. Premises Liability

An owner or occupier of land may become liable for injuries of third-parties sustained while on the landowner’s property. In causes of action for injuries arising out of conditions existing on the real property, the duty which is owed to
the third-party depends on the status the third-party has with the property at the
time the injury occurs. The landowner is not an insurer of its land and therefore
will not be held strictly liable for injuries that occur, unless the injury involves
abnormally dangerous activities that are recognized by statute or by common law.
It is the ownership or control of the land that determines whether one may be
liable under premise liability theories. Therefore, anyone who occupies or
controls the land, be it an owner, agent, contractor, lessee or other person with
authority to control the premises, may be liable.

In Florida, there are three different categories that can be applied to an individual
entering upon another’s premises. Children in Florida, depending on the
circumstances are given additional consideration under the state’s premise
liability law. However, regardless of the age of the claimant, the liability of one
who occupies or controls the premises differs depending on which of the
following three categories is applicable.

1. **Invitees**

There are three different types of invitees in Florida: business visitors,
public invitees and licensees by express or implied invitation. The status
of each class of invitee is a question of fact determined through use of the
“Invitation Test.” A person is an invitee under the test where the owner or
occupant of the premises, by arrangement of the premises or otherwise,
leads the entrant to believe that the premises are intended to be used by
visitors for the purpose pursued by the entrant and that such use is in
accordance with the owner's or occupant's intention. See, e.g. Iber v.

A business visitor is invited on the property for a purpose directly or
indirectly related to the business of the owner or occupier of the land. A
public invitee is invited on the property for a purpose for which the
property is held out for public use. A licensee by express invitation, such
as, for example, social guests, are also considered invitees when they are
explicitly (or implicitly) invited onto to the property by the owner or
occupant of the land. An implied invitation may also generally be found
where the circumstances would imply a proffer by the landowner of an
invitation to enter the premises.

An owner or occupier of premises owes an invitee the duty (1) to use
ordinary or reasonable care in keeping the premises in a reasonably safe
condition; and (2) to warn the invitee of latent or concealed perils that are
known or should be known to the owner or occupant, of which the invitee
is unaware and which the invitee cannot discover through the exercise of
reasonable care. See, e.g., Matuskas v. Kassam, 702 So.2d 543 (Fla. 5th
DCA 1997).
2. **Licensees**

A licensee enters another’s property for his own pleasure, convenience or benefit and not with the express or implied invitation of the owner. The owner of land owes a licensee the duty to refrain from wanton negligence or misconduct, to refrain from intentionally exposing the licensee to danger and the duty to warn the licensee of known dangerous conditions that would not be open and obvious to him. See generally *Lanza v. Polanin*, 581 So.2d 130 (Fla. 1991).

3. **Trespassers**

A trespasser is a person who is on the property of another without the consent of the owner or occupier of the property and otherwise without license, invitation or other right. *Louisville & N.R. RR Co. v. Wade*, 35 So. 863 (Fla 1903). The only duty of an owner or occupier of premises to a trespasser is to avoid willful and wanton injury. On the other hand, if the presence of the person is discovered, then there may also be a duty to warn the trespasser of known dangerous conditions not readily apparent through ordinary observation. *Wood v. Camp*, 284 So. 2d 691 (Fla. 1973); *Shumake v. Florida East Coast Ry. Co.*, 534 So.2d 1178 (Fla. 4th DCA 1988).

4. **Premise Liability for Transitory Foreign Substances in a Business Establishment**

Under 768.0755, Florida Statutes, if a patron slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business had actual or constructive notice of the dangerous condition and should have taken steps to correct it. Constructive notice may be proven by circumstantial evidence showing that: (a) the dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or, b) the condition occurred with regularity and was therefor foreseeable. See 768.0755, Florida Statutes.

Under the former statute, the injured party was not required to prove actual or constructive notice as an element of their claim.

5. **Premise Liability and Children**

Children who enter another’s premises are subject to the same classifications as adults: invitee, licensee or trespasser. Landowners, therefore, are held to the same duties of care established for adults, however, with additional considerations depending on the circumstances.
Generally, a landowner will owe a child invitee a higher duty of care, in that reasonable precautions taken for an adult may not be sufficient for the child invitee, and greater care may be required, depending on the circumstances. Similarly, a child invitee may be held to a lower standard of care to protect his or her own safety.

However, a landowner owes the child licensee or trespasser the same duty of care as is established for adults unless, with respect to trespassers, the dangerous condition may be recognized as an attractive nuisance under Florida’s Attractive Nuisance Doctrine.

6. **The Attractive Nuisance Doctrine**

The Attractive Nuisance Doctrine may impose liability on a landowner when (1) the property owner knows or has reason to know that the place where the dangerous condition exists is one where children will likely trespass; (2) the condition is known or should be known to cause an unreasonable risk of bodily harm to a trespassing child; (3) the child because of his or her age does not discover the condition or realize the risk involved in interfering with it or in coming within the area made dangerous by it; (4) the burden of eliminating the danger is slight compared to the risk posed to children; and, (5) the property owner fails to exercise reasonable care in removing the danger or protecting the child. *Matinellos v. B.P. USA, Inc.*, 566 So.2d 761 (Fla. 1990).

This theory of liability contemplates that the landowner, or the presence of the condition on the property, enticed the child onto the premises and therefore, the condition constitutes a trap.

7. **Special Defenses and Limitations to Premises Liability Actions**

The Florida legislature has created some special defenses or limitations to premises liability actions in the state.

a. **Recreational Use Defense**

This statute provides a defense to a premise liability claim when a private, non-governmental, owner or occupier of land gratuitously permits the public to use its land for outdoor recreational purposes. The statute will not immunize the owner if the condition or act complained of is deliberate, willful or malicious or, if any portion of the property is used for a commercial purpose. See § 375.251, Florida Statutes.
b. Limitation on Farmer’s Liability

Florida law limits the liability of farmers who gratuitously permit persons to enter their land to remove farm produce after harvest. Under the statute, these farmers will not be held liable for injuries occurring on the land, or for injuries sustained as a result of consumption of the produce gratuitously offered. The limitation will not apply if the injury or death was caused by gross negligence, an intentional act or an undisclosed known danger. **See § 768.137, Florida Statutes.**

c. Convenience Store Liability Act Defense

The owner or operator of a convenience business that substantially implements the applicable security measures listed in the Convenience Store Liability Act is entitled to a presumption against liability in connection with criminal acts that occur on the premises that are committed by third parties who are not employees or agents of the owner or operator of the business. The Act outlines numerous security measures a convenience store must follow to fall within its protection and the definition of convenience store is limited. **See §§ 812.171 - 812.176 and § 768.0705, Florida Statutes.**

H. Products Liability

1. Strict Liability (Products)

Florida has adopted the Strict Liability in Tort Doctrine which may impose strict liability on a manufacturer and others in the chain of the product’s distribution if the product causes injury to persons or property when the product is used for its intended purpose. **West v. Caterpillar Tractor Co., Inc.,** 336 So.2d 80 (Fla. 1976). In order to hold a manufacturer strictly liable in a products action, the plaintiff must prove that (1) that the item in question was a product; (2) that the defendant has a relationship to the product (i.e. manufacturer, designer, distributor, etc.); (3) that the product was in a defective and unreasonably dangerous condition at the time it left the defendant’s control and when the accident occurred; and, (4) that the defect in question was the proximate cause of the plaintiff’s injuries or damages.

A commercial lessor of a product may be held strictly liable in a products liability action if the lessor is engaged in the business of leasing the allegedly defective product. **Samuel Friedl and Family Enterprises v. Amoroso,** 630 So. 2d 1067 (Fla. 1994).
2. Liability for Breach of Warranty (Products)

Breach of **express warranty** claims are governed by Florida’s Uniform Commercial Code, Sales. See § 672.101, et. seq., Florida Statutes. An express warranty is created when the seller makes any affirmation of fact or promise, or tenders any sample or model, which is made part of the basis of the bargain between the seller and buyer, which represents that the product will conform to the affirmation, promise or model. See § 672.313., Florida Statutes.

When products are sold to the public, there is an **implied warranty of merchantability**, or a promise that the products are fit for the ordinary purposes for which such products are used. McLeod v. W.S. Merrell Co., 174 So. 2d. 736 (Fla. 1965). In addition to proving the sale of the product which was manufactured or sold by the defendant and the existence of a product defect which caused the plaintiff’s injury, in order to prevail under an implied warranty theory, the plaintiff must also show (1) that he was a foreseeable user of the product or, unless it is a in a case subject to Florida’s Uniform Commercial Code, that he was in privity with the defendant; and, (2) that the product was being used in its intended manner. McCarthy v. Florida Ladder Co., 295 So. 2d 707 (Fla. 2nd DCA 1974).

Liability may also be imposed against a manufacturer or seller of a product for **breach of the implied warranty of fitness for a particular purpose**. In such a case, the plaintiff must prove that the seller knew the purpose for which the product was intended at the time it was sold and that the plaintiff relied upon the seller’s judgment in selecting the product for the intended purpose. Smith v. Burdine’s, Inc., 144 Fla. 500 (1940).

Under Florida’s Uniform Commercial Code, an express or implied warranty extends to the buyer of the product and any natural person who is in his family or household, who is a guest of his household or who is an employee, servant or agent of the buyer, provided that it is reasonable to expect that such persons would use, consume or be affected by the product. See § 672.318, Florida Statutes.

a. Notice of Breach of Warranty

Once a buyer discovers the **breach of warranty**, the buyer must notify the seller within a “reasonable” period of time, or may be barred from any remedy for the breach. See §672.607, Florida Statutes.
3. Liability for Negligence (Products)

a. Design, Manufacturing, Testing and Inspection

The manufacturer of a product has a duty to use reasonable care in the design, manufacture, testing and inspection of the product to see that the product is safe for its intended use and for other uses which are reasonably foreseeable. Light v. Weldarc., Inc., 569 So.2d 1302 (Fla. 5th DCA 1990); Vincent v. C.R. Bard, Inc., 944 So.2d 1083 (Fla. 2nd DCA 2006). A failure to fulfill that duty is negligence. A manufacturer generally, however, is not required to conduct tests that are impractical or economically infeasible. Also, a distributor in the chain of supply normally will have no duty to test products that were manufactured or packaged by others.

b. Duty of Manufacturer to Warn

If despite exercising reasonable care in the design, manufacture, testing and inspection of the product, the manufacturer has reason to know that the product still cannot be made safe for its reasonably intended use, the manufacturer has a duty to provide an adequate warning of dangers that would not be well known or obvious to the user of the product. A failure to fulfill that duty is negligence.

c. Duty of Manufacturer for Material or Part Supplied by Another

A manufacturer who uses in a product any material or component part manufactured by another has an obligation beyond the mere duty to make reasonable inspections and tests of the material or component part necessary to manufacture a finished product reasonably safe for its reasonably foreseeable use. In these circumstances, the manufacturer who incorporates a component part of another is considered to be the manufacturer of the entire product for product liability purposes. Favors v. Fire Tire & Rubber Co., 309 So. 2d 69 (Fla. 4th DCA 1975); Starkey v. Miami Aviation Corp., 214 So.2d 738 (Fla. 3rd DCA 1968).

d. Duty of Component Maker or Material Processor

The maker of a component part or processor of materials used in a product finished or assembled by another normally will not be held liable for injuries caused by a defective product, so long as the maker simply follows the plans and specifications of the manufacturer of the product. However, liability may still be imposed when (a) the component is defective in itself and the
defect causes harm; or, (b) the seller or distributor of the component substantially participates in the integration of the component into the design of the product; and, (c) the integration of the component causes the product to be defective; and (d) the defect in the product causes the harm. Scheman-Gonzalez v. Saber Mfg. Co., 816 So. 2d 1133 (Fla. 4th DCA 2002).

e. Duty of Seller Assuming Role of Manufacturer

Persons who sell products manufactured by others as their own products have the same duty of care as the manufacturer.

4. Defenses to Product Liability Claims, Generally

a. Comparative Negligence

If the plaintiff fails to use ordinary care in the use of the product, his comparative fault can be raised as a defense to reduce the defendant’s percentage of fault in a products liability action. However, with respect to a strict liability claim, comparative fault is not a defense if raised to show that the plaintiff failed to discover the defect or failed to guard against the possibility that a defect existed. Gonzalez v. G.A. Braun, Inc., 608 So.2d 125 (Fla. 3rd DCA 1992). See also § 768.81, Florida Statutes.

b. Assumption of the Risk

In Florida, the assumption of the risk defense is utilized as a facet of comparative negligence to reduce a plaintiff’s recovery in a strict liability, breach of warranty and product liability action based on negligence.

c. Product Misuse

The plaintiff’s misuse of a product is another facet of comparative negligence and may be raised in circumstances where the plaintiff knowingly misuses a product in a manner that is not intended or foreseeable to the defendant. This defense may apply in strict product liability, breach of warranty and products actions based on negligence.

d. Patent or Obvious Danger

Similarly, while the obvious nature of a defect or hazard will not bar a plaintiff’s recover in a products action, it may be raised to support the comparative negligence defense.
e. **Unavoidably Unsafe Products and the Risk Benefit Analysis Defense**

There are certain beneficial products (usually drugs) which, because of their nature, ingredients or characteristics, cannot be made totally safe for their intended or ordinary use. These products are called Unavoidably Unsafe Products and the maker or seller is not liable for injuries resulting from their use if the benefits from their use outweigh the risk of injury and the products are properly prepared and contain adequate warnings of the risks involved. The defense will not apply, however, to prior designs of unavoidably unsafe products which are distributed after the manufacturer learns that a more safely designed alternative is available. *Adams v. G.D. Searle & Co., Inc.*, 576 So.2d 728 (Fla. 2nd DCA 1991).

f. **Product Alteration**

A product manufacturer may escape liability in a products action when it can show that the defect in the product has been created by a subsequent alteration not of the manufacturer’s doing. *High v. Westinghouse Elec. Corp.*, 610 So.2d 1259 (Fla. 1992). However, the defense will not be available if the alteration is insubstantial or does not directly impact the defect claimed in the action. *Martinez v. Clark Equipment Co.*, 382 So.2d 878 (Fla. 3rd DCA 1980).

g. **Government Rules Defense**

The Government Rules Defense provides the manufacturer or seller of a product a rebuttable presumption that the product is not defective or unreasonably dangerous. Under this defense, the manufacturer or seller is not liable if, at the time it was sold (1) the product complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the injury or death; (2) the relevant codes etc., were designed to prevent the type of harm that is alleged to have occurred; and, (3) compliance with the codes etc. was required as a condition for selling or distributing the product. See § 768.1256, Florida Statutes.

The converse is also true however. The plaintiff may rely on a rebuttable presumption that the product was defective or unreasonably dangerous if the manufacturer or seller failed to comply with federal or state codes etc. that were in effect for the product at issue at the time the product was sold.
h. **State-of-the-Art Defense**

In a products liability action based on negligent design, the manufacturer may raise as a defense the state-of-the-art of scientific and technical knowledge that existed at the time the product was manufactured. The state-of-the-art at the time of the injury or loss must not be considered by the jury. See § 768.1257, Florida Statutes.

i. **Government Contractor Defense**

The Government or Military Contractor defense is available when a contractor proves that it did not participate (or participated only minimally) in the design of a product proven to be defective or timely warned the government or military of the risks of the design and provided the government with alternative designs. The defense only applies where the government clearly authorized the contractor to proceed with the dangerous design despite the warning and alternatives provided. *Dorse v. Armstrong World Industries, Inc.*, 513 So. 2d 1265 (Fla. 1987). Naturally, this defense is limited to situations involving government or military contracts.

j. **Hypersensitivity or Allergy**

In a product liability action based upon a failure to warn, a manufacturer may not be held liable where the product is harmless to normal persons, but the injury from its use is caused by the plaintiff’s hypersensitivity or allergy. For this defense to apply, it must be shown that the manufacturer did not have knowledge that the product might cause injury to some persons. In other words, if the reaction was foreseeable to the manufacturer, the manufacturer still has a duty to warn users of the risk. *Advance Chemical Co. v. Harter*, 478 So. 2d 444 (Fla. 1st DCA 1985).

k. **Long-Term Consumption of Food or Non-Alcoholic Beverages**

Generally, a manufacturer, distributor or seller of food or nonalcoholic beverage is not liable for personal injury or wrongful death of persons whose claim is based on their long-term consumption of food or non-alcoholic beverages which is alleged to have caused weight gain or obesity or other medical condition related to weight gain or obesity. See § 768.37, Florida Statutes.
I. Consumer Protection Actions

Florida statutes provide retail consumers and borrowers certain protections against unfair or deceptive trade practices. In addition to administrative actions where civil penalties may be imposed, most of Florida’s consumer protection statutes provide for a private cause of action, in addition to any other common law civil remedies, that may be available. Attorney’s fees may be recoverable if provided for in the statutes. Some of the most common statutory consumer protection actions are:

1. Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act is intended to protect both the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. By statute, the courts are guided by the interpretations of the Federal Trade Commission and the federal courts relating to violations under the Federal Trade Commission Act.

Consumers may bring a private cause of action for violations of the Florida Deceptive and Unfair Trade Practices Act and may recover their actual damages. Reasonable attorney’s fees may be awarded to the prevailing party. See § 501.201, et. seq., Florida Statutes.

2. Aftermarket Crash Parts Act

This consumer protection statute requires insurers and automobile repair facilities to disclose, using statutorily proscribed language and type, that non-original equipment manufactured aftermarket crash parts are used in preparing an estimate for repairs. Failure to provide the notice is deemed a violation of Florida’s Insurance Trade and the Deceptive and Unfair Trade Practices Acts, under which actual damages, as well as attorneys fees can be recovered by the prevailing party. See § 501.30, et. seq., Florida Statutes.

3. Florida Telemarketing Act

The Florida Telemarketing Act requires certain businesses (including their employees) that engage in the sale of consumer goods or services by telephone to be licensed. The Act covers telemarketing representatives who solicit sales from locations within the state of Florida, as well as out-of-state telemarketers who direct their sales efforts toward consumers in the state. Under the Telemarketing Act, representatives must disclose their true identity and the name of the company for whom they are selling products or services within the first 30 seconds of the call and must clearly disclose the consumer’s right to cancel the sale. The Act, among other things, also prohibits calls during certain hours and requiring payment by credit card only.
Consumers may pursue a private cause of action to recover their actual damages incurred as a result of violations of Florida’s Telemarketing Act. By statute, consumers may also be awarded punitive damages in appropriate cases. The prevailing party may also recover his reasonable attorney’s fees. See § 501.601, et. seq., Florida Statutes.

4. Unfair and Deceptive Trade Practices - Vehicles

A motor vehicle dealer may be held liable for violations of Florida’s Deceptive and Unfair Trade Practices act when, among other things, the dealer, directly or indirectly, misrepresents that a vehicle is a factory executive vehicle or a demonstrator; misrepresents the previous usage or status of a vehicle, including its quality of care, regularity of servicing or general condition; or, misrepresents that the vehicle has not sustained structural or other substantial damage. A dealer may also be liable when he fails to disclose or misrepresents warranty items or coverage. The statute also provides the consumer with additional protections related to incomplete signatures, accepting deposits, price increases, alteration of odometer readings, among others. As with other Deceptive and Unfair Trade Practice Act violations, actual damages, and attorneys fees are recoverable. See § 501.976, Florida Statutes.

J. Bailment

Generally, in Florida, a bailment is a contractual relationship whereby there is temporary delivery and acceptance, or obtaining of, possession of property for a particular purpose without transfer of ownership. The bailor is the party from whom the property is received. The bailee is the person who received the possession or custody of the property. In a bailment relationship, the bailor retains ownership of the property, while the bailee receives lawful possession for a designated purpose and promises to return the property after that purpose has been achieved. These relationships are generally classified as bailments for:

1. **The Sole Benefit of the Bailor**, also known as a “gratuitous bailments.” This arises when the bailee does not receive (either directly or indirectly) any compensation as a result of the bailee’s receipt, possession or custody of the property and any services provided by the bailee are solely gratuitous in nature. This typically arises when one finds lost property, or receives it by mistake or other fortuitous circumstance under which the law imposes a constructive bailment.

2. **The Sole Benefit of the Bailee**. This arises, for example when property is loaned to another without compensation.

3. **The Mutual Benefit of the Bailor and Bailee**, also known as a “bailment for hire.” This arises when one person, for compensation, takes another’s property into his care, or when a person permits another to
use his property for compensation. The key ingredient for a mutual benefit bailment is the compensation conferred.

4. **General Duties of Care Owed by Bailors of Property**

   a. **Bailor Cannot Hide Defects**

       The Bailor has an obligation to refrain from knowingly delivering property to the bailee which may imperil the bailee and which the bailee will not likely discover using ordinary care in the course of the bailment relationship. When the bailor is aware of such information, he must disclose the condition to the bailee giving him the opportunity to decline the bailment.

   b. **Implied Warranties of Bailor**

       In a bailment for hire, the bailor impliedly warrants that the subject property is of a character and in a condition to be used as contemplated by the contract, and he may be liable for damages for breach of the implied warranty.

   c. **Limited Duty Owed by Bailor for Gratuitous Bailments**

       In a gratuitous bailment, the bailor's only duty is to inform the bailee of any defects of which the bailor is aware and which might make use of the loaned property dangerous. The bailor has no duty to inspect property that is gratuitously loaned solely for the benefit of the bailee without recompense. A duty may be imposed however, if the property loaned is inherently dangerous.

5. **General Duties of Care Owed by Bailees of Property**

   a. **Bailee’s Duty to Return Property in Good Condition**

       The bailee in a bailment for hire situation has the obligation to return the property in good condition. In other words, the bailee has a duty to use ordinary care in safeguarding the property which is the subject of the bailment.

   b. **Bailee’s Duty When Bailment Benefits Only One Party**

       In a gratuitous bailment, such as one where the bailor loans property to the bailee without compensation, the bailee may be liable for merely slight negligence. In such a case, the bailee must show that he used extraordinary care to avoid liability. Where, however, the bailment is solely for the benefit of the bailor, such as in the case of lost property, the bailee’s duty is only to refrain from gross negligence with respect to the care of the property.
c. **Bailee Not Liable in Absence of Fault**

Generally, a bailee of property will not be liable for damage to the property that was caused by circumstances under which the bailee has no fault. An example is when the bailed property is stolen by a third party despite the bailee’s reasonable efforts to safeguard the property.

d. **Bailee’s Liability for Conversion**

A bailee may be held liable for his failure to return the property which is the subject of the bailment, or by doing any other act, including destroying the property, which affects the bailor’s possessory or ownership interest in the property.

**IV. DEFENSES TO CLAIMS, PRESUMPTIONS AGAINST LIABILITY AND IMMUNITIES**

A. **Limitations**

1. **Generally**

   Florida law requires that a statute of limitations defense be specifically pled or it is deemed waived, absent a properly supported Motion to Amend an Answer. See Florida Rule Civ. Proc. 1.140.

2. **Computing Time of Statute of Limitations**

   Generally, the time within which an action must begin under any statute of limitations runs from the time the cause of action accrues. That is, the limitations period begins to run when the last element constituting a cause of action occurs. See § 95.031, Florida Statutes.

3. **Limitations Period for Particular Actions**

   a. **Negligence Actions**

      A plaintiff must file an action founded on negligence within four (4) years of when the cause of action accrues. See § 95.11(3)(a), Florida Statutes. A cause of action accrues when the last element constituting the cause of action occurs. § 95.031(1), Florida Statutes.

   b. **Wrongful Death**

      The limitation period for wrongful death actions is two (2) years. § 95.11(4)(d), Florida Statutes.
c. **Product Liability Actions**

A plaintiff must file a products liability action (based on negligence, strict liability, failure to warn or breach of warranty), within four (4) years of when the cause of action accrues. See § 95.11(3), Florida Statutes. A cause of action accrues when the last element constituting the cause of action occurs. § 95.031(1), Florida Statutes.

The limitation period begins to run from the date that the facts giving rise to the cause of action were discovered, or should have been discovered with the exercise of due diligence. However, under no circumstances may a claimant commence an action for products liability, including a wrongful death action or any other claim arising from personal injury or property damage caused by a product, to recover for harm allegedly caused by a product with an expected useful life of 10 years or less, if the harm was caused by exposure to or use of the product more than 12 years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product. See § 95.031(2)(b).

d. **Contract Actions**

An action for breach of contract or another equitable claim related to a contract (except claims related to payment bonds), must be filed within five (5) years. § 95.11(2)(b).

e. **Fraud Actions (legal or equitable)**

Fraud actions must be filed within four (4) years of the date the facts giving rise to the cause of action were discovered, or should have been discovered, with the exercise of due diligence. Despite the application of the discovery rule for determining when the cause of action accrued, such a case must be filed, in any event, within twelve years (12) regardless of the date the fraud was or should have been discovered. See § 95.11(3)(j) and 95.031(2), Florida Statutes.

f. **Real Property Design, Planning and Construction Claims**

Except in cases involving latent defects where the discovery rule applies, claims founded on the design, planning or construction of an improvement to real property generally must be filed within four (4) of the date of actual possession of the owner, the date of issuance of a certificate of occupancy, the date of abandonment of
construction, if applicable, or the date of the completion or termination of the contract between the professional engineer, registered architect or licensed contractor, whichever is latest. In any event, such an action must be filed within ten (10) years of events set forth in the statute. § 95.11(3)(c), Florida Statutes.

g. **Intentional Torts: Assault, Battery, False Arrest, Malicious Prosecution, Malicious Interference, False Imprisonment and Other Intentional Torts**

Intentional torts, including, but not limited to claims for assault, battery, malicious prosecution or interference and false imprisonment must be filed within four (4) years. See § 95.11(3)(o), Florida Statutes. There are exceptions to this four year limitation period, such as when the intentional tort claim is based on a claim for abuse or incest, in which case a longer limitations period applies.

h. **Actions Based on Statutory Liability (e.g. Consumer Protection, Statutory Insurance Bad Faith)**

Actions based on statutory liability must be filed within four (4) years. § 95.11(3)(f), Florida Statutes.

i. **Professional Malpractice (Other than Medical Malpractice) by Claimants in Privity**

Plaintiffs in privity with a professional must file a professional malpractice claim against the professional within two (2) years from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. See § 95.11(4)(a), Florida Statutes.

j. **Medical Malpractice by Claimants in Privity**

Medical malpractice claims, defined as a claim in tort or in contract for damages because of the death, injury or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment or care by any provider of health care, must be filed within two (2) years from the time the incident giving rise to the action occurred or within two (2) years from the time it is discovered or should have been discovered. This limitation period is extended in certain cases, such as those involving minors or concealment or fraud as set forth in the statute. See § 95.11(4)(b), Florida Statutes.
This medical malpractice limitation statute does not apply to claims involving birth related neurological injury because such claims are subject to Florida’s Birth Related Neurological Injury Compensation Fund. See Generally, § 766.301 - 766.316, Florida Statutes.

k. Libel and Slander Claims

Plaintiffs must file any claim for libel or slander within two (2) years from when the cause of action accrued. See § 95.11(4)(g), Florida Statutes.

l. Specific Performance

Claims for Specific Performance on a contract must be filed within one (1) year. See § 95.11(5)(a), Florida Statutes.

m. Payment Bond Enforcement Actions

Generally, a contractor’s claim against a payment bond must be filed within one (1) year from the last furnishing of labor, services or materials. See § 95.11(5)(e), Florida Statutes.

n. Insurance Bad Faith Claims

Statutory insurance bad faith claims must be filed within four (4) years of when the cause of action accrues. Pursuant to statute, a statutory bad faith action does not accrue until the underlying action concerning coverage for first-party or third party insurance benefits is resolved favorably to the insured in a first party action; or, until after a verdict in excess of policy limits in a third-party bad faith action. See §§ 624.155 and 95.11, Florida Statutes.

4. Tolling of Limitations

Section 95.051 of the Florida Statutes sets forth the circumstances under which a statute of limitation may be tolled. Generally, the absence of the defendant from the state, the minority or adjudicated incapacity of the person entitled to sue, among others, are some of the circumstances under which the limitations period may be tolled. § 95.051, Florida Statutes.

Other Florida Statutes, for example, the medical malpractice statutes, set forth other situations where a limitation period may be tolled. See, e.g. § 766.306, Florida Statutes.
5. **Miscellaneous Provisions**

Contractual clauses shortening the limitations period that an action arising out of a contract may be initiated are void. See § 95.03, Florida Statutes.

**B. Comparative Negligence**

Florida’s Comparative Fault Statute has undergone a significant revision in the past two decades. As the law stands today, Florida is a pure comparative fault state. This means that even if the Plaintiff is adjudged to be 99% at fault, he will not be barred from recovery. Changes to the Comparative Fault statute since the late 1990's; however, may affect how the doctrine of comparative fault and joint and several liability will be applied in a particular case depending on the date the cause of action accrued. See Section X (Miscellaneous Rules). A. (Joint and Several Liability) for an explanation of Florida's Uniform Contribution Among Tortfeasors Act.

1. **Causes of Action Accruing on or after April 26, 2006**

The Florida Comparative Statute was amended in the 2006 legislative session and became law on April 26, 2006. The current version of the statute provides that any contributory fault chargeable to the plaintiff diminishes proportionately the amount awarded as economic and non-economic damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery. See § 768.81(2), Florida Statutes. This apportionment applies to all negligence actions defined as civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice, breach of warranty and similar theories. § 768.81(4)(a), Florida Statutes.

2. **Causes of Action Accruing before April 26, 2006**

The prior comparative fault statute, which still applies to actions accruing before April 26, 2006, drew a distinction between economic and non-economic damages when applying joint and several liability among joint tortfeasors. With respect to non-economic damages, the statute dispensed with joint and several liability in favor of adopting a pure comparative fault apportionment approach. At the same time, with respect to economic damages, the prior version of the statute employed a modified version of joint and several liability. The modified form of joint and several liability for economic damages still applies to causes of actions accruing prior to April 26, 2006, the effective date of the current comparative fault law. In such cases, joint and several liability is applied under the comparative fault statute as follows:
a. **Apportionment When Plaintiff at Fault, and**

(1) Defendant is adjudged 10% or less at fault, joint and several liability does not apply to the award of economic damages;

(2) Defendant is adjudged more than 10% but less than 25% at fault, then joint and several liability is limited to $200,000 of economic damages;

(3) Defendant is adjudged at least 25% but not more than 50% at fault, then joint and several liability is limited to $500,000 of economic damages;

(4) Defendant is adjudged more than 50% at fault, then joint and several liability is limited to $1 million of economic damages.

b. **Apportionment when Plaintiff is Not at Fault, and**

(1) Defendant is adjudged 10% or less at fault, joint and several liability does not apply to the award of economic damages;

(2) Defendant is adjudged more than 10% but less than 25% at fault, then joint and several liability is limited to $500,000 of economic damages;

(3) Defendant is adjudged at least 25% but not more than 50% at fault, then joint and several liability is limited to $1 Million of economic damages;

(4) Defendant is adjudged more than 50% at fault, then joint and several liability is limited to $2 million of economic damages.

c. **Calculation of Damages When Defendant Is 10% or More at Fault**

When a defendant is adjudged 10% or more at fault under the prior statute, the statute provided that the amount of economic damages calculated under joint and several liability are in addition to the amount of economic and non-economic damages apportioned to that defendant based on that defendant’s percentage of fault.
d. Joint and Several Liability When Defendant’s Fault Less Than Plaintiff

Finally, the prior comparative fault statute provided that joint and several liability would not be applied to a defendant if the defendant’s fault is less than the Plaintiff’s.

3. Pleading Requirements

A defendant must affirmatively plead contributory fault of the Plaintiff, any other parties, as well as persons who are not parties to the action. In order to include a non-party on the verdict sheet for apportionment of fault, the defendant must identify and plead that non-party’s negligence. The defendant also has the burden of proving at trial that the non-party’s fault contributed to the accident or injury. See Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993); Nash v. Wells Fargo Guard Services, Inc., 678 So. 2d 1262 (Fla. 1996). See also 768.81, Florida Statutes.

4. Not Applicable to Intentional Torts

The Comparative Fault Statute and Fabre defenses do not apply to intentional torts such as assault, battery, false imprisonment, fraud etc. See e.g. §768.81(4) and Merrill Crossing Associates v. McDonald, 705 So. 2d 560 (Fla. 1997)(held not error to exclude a non-party criminal assailant from verdict sheet since non-party’s acts were intentional criminal torts not contemplated by comparative fault statute).

5. Defenses Subsumed in Comparative Fault Analysis

Because of the adoption of comparative fault in Florida, many defenses are now subsumed in the comparative fault analysis. Such defenses include:

a. Implied Assumption of Risk

An Implied Assumption of the Risk defense can be raised when the plaintiff voluntarily, with full knowledge, understanding and appreciation, exposes himself to a known or obvious danger which causes the plaintiff injury. Implied Assumption of the risk does not bar a plaintiff’s recovery, but will be analyzed in the context of apportionment of fault under the comparative negligence statute.

b. Alcohol or Drug Defense May Bar Recovery

A Plaintiff may not recover for his own loss or injury if the plaintiff was under the influence of any alcoholic beverage or drug to the extent that his normal faculties were impaired or he had a
blood or breath alcohol level of 0.08 percent or higher and as a result of the intoxication or drug use, the plaintiff is adjudged more than 50% at fault at trial. See 768.36, Florida Statutes.

c. **Seatbelt Statute Defense**

A violation of the Florida Safety Belt Law, which requires (with limited exception) occupants of motor vehicles to be restrained by a safety belt while in a moving motor vehicle, may be considered as evidence of comparative negligence in any civil action in Florida. See § 316.614, Florida Statutes.

d. **Products Liability Actions Defenses**

Defenses in product liability actions, including: product misuse, patent or obvious danger, unavoidably unsafe products and the risk benefit analysis defense, product alteration, government rules defense, state-of-the-art defense, government contractor defense, hypersensitivity or allergy, and misuse of Product. See *Product Liability Defenses, Generally*, supra, pp. 19-21.

C. **Express Assumption of the Risk.**

Express assumption of the risk still appears to be a viable defense which may completely bar a plaintiff’s recovery in Florida. Express assumption of the risk occurs in two situations: (1) where one enters into an express contract not to sue for injury or loss which may thereafter accrue due to the covenantee’s negligence and (2) situations in which actual consent exists, such as where one voluntarily participates in a contact sport. *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977). However, in any case involving express assumption of the risk, the plaintiff’s recovery will not be barred unless the plaintiff actually knows, or in law, is deemed to know that a particular risk was present, and understood nature of that risk. *Donaldson v. Cenac*, 675 So. 2d 228 (Fla. 1st DCA 1996).

D. **Sudden Emergency Doctrine**

The Sudden Emergency Doctrine contemplates that a person who is confronted with a sudden and unexpected danger which requires instinctive action will not be held to the same standard of care as a person who has time to think and choose alternative courses of action. A person faced with a sudden emergency can raise the doctrine as a defense when he shows that he exercised that degree of care an ordinarily prudent person would have used under the same or similar circumstances.

For the defense to apply, the defendant must show (1) that the claimed emergency actually or apparently existed; (2) that the perilous situation was not created or contributed by the defendant; (3) that alternative courses of action in meeting...
emergency were open to the defendant; and (4) that the action or course taken by the defendant was such as would or might have been taken by a person of reasonable prudence in same or similar situation. Scott v. City of Opa Locka, 311 So.2d 825 (Fla. 3rd DCA 1975); Vantran Industries, Inc. v. Ryder Truck Rental, Inc., 955 So.2d 1118 (Fla. 1st DCA 2006).

E. Sudden Brake or Mechanical Failure Defense

This defense is raised in automobile accident cases where the defendant asserts that he is not responsible because a sudden mechanical failure caused the accident. Ironman v. Rhoades, 493 So. 2d 1097 (Fla. 4th DCA 1986).

F. Compliance With Florida’s Convenience Store Liability Act

Convenience stores who substantially comply with the security measures contained in Florida’s Convenience Store Liability Act acquire a presumption against liability in premise liability actions involving claims of third party criminal conduct. See § 768.0705, Florida Statutes.

G. Trespassers Under the Influence of Alcohol or Controlled Substance

Owners and occupiers of land are not liable for personal injury damages or wrongful death of a person who trespasses on their property when the trespasser (1) was under the influence of alcoholic beverages with a blood-alcohol level of 0.08 percent or higher; (2) when such trespasser was under the influence of any chemical substance set forth in Florida Statutes; (3) when such trespasser was illegally under the influence of any controlled substance, or (4) if the trespasser is affected by any of these substances to the extent that her or his normal faculties are impaired. This immunity does not apply; however, if the owner or occupier’s conduct with respect to the property constituted gross negligence or intentional misconduct which was the proximate cause of the trespasser’s injury or death. See § 768.075, Florida Statutes.

F. Pre-Employment Background Investigation Defense

A defendant-employer who is sued by a third party for the intentional tort of a person employed by the defendant, is presumed not to be liable for negligent hiring if before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general. See § 768.096, Florida Statutes. The statute further provides what steps must be taken by the employer to qualify as a qualified background investigation.

H. Good Samaritan Act Immunity

Generally, any person (including a licensed health care practitioner) who gratuitously and in good faith renders emergency care to a person outside of a health care facility in direct response to emergency situations and without
objection of the injured victim is immune from liability for any damages arising as a result of the treatment given or the failure to provide further medical treatment. See § 768.13, Florida Statutes.

I. Cardiac Arrest Survival Act Immunity

Generally, any person who uses or attempts to use an automated external defibrillator device on a victim of a perceived medical emergency, without objection of the victim of the perceived medical emergency, is immune from civil liability for any harm resulting from the use or attempted use of such device. See § 768.1325, Florida Statutes.

J. Immunity

1. Interspousal

Florida no longer recognizes spousal immunity. Therefore, for all torts, spouses are permitted to sue one another for damages from tortious acts. Waite v. Waite, 618 So.2d 1360 (Fla.1993).

2. Parent-Child Immunity

The Parent-Child Immunity doctrine, which prevents both a minor child from recovering in tort from a parent and a parent from his or her child, is still viable in Florida with exceptions. The Parental immunity doctrine does not apply in negligence actions brought by a minor against a parent who was protected by liability insurance for the incident giving rise to the action. Ard v. Ard, 414 So. 2d 1066 (Fla. 1982). The doctrine also is not applicable to intentional sexual tort claims filed against the parents. Herzfeld v. Herzfeld, 781 So. 2d. 1070 (Fla. 2001).

3. Waiver of Sovereign Immunity for Torts

To the extent set forth in the waiver of sovereign immunity statute, the sovereign immunity of the state is waived for tort actions seeking recovery of money damages against the state, its agencies or subdivisions, for property damage, personal injury, or death caused by the negligent or wrongful act of any employee of the state under circumstances where a private person would be liable. The statute provides that the state shall not be liable to pay a claim or a judgment by any one person which exceeds the sum of $200,00 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state arising out of the same incident or occurrence, exceeds the sum of $300,000. Further, the state cannot be liable for punitive damages or pre-judgment interest. The state's waiver of sovereign immunity in the amounts of $200,000/$300,000, respectively, applies to causes of action that accrue on after October 1, 2011, the effective date of the most recent amendment.
of the statute. Sovereign immunity for causes of action which accrued prior to that date remains at the pre-amendment level of $100,000/$200,000. See § 768.28, Florida Statutes.

As a condition precedent to filing suit, the claimant must (within three years or within two years in the case of wrongful death) provide written notice of the claim and the state must deny the claim in writing. The failure of the state to respond within the prescribed time frame is considered a denial of the claim.

K. Exclusivity of Workers’ Compensation

In Florida, for employer’s who have the statutory obligation to secure worker’s compensation benefits for its employees, workers' compensation is the sole remedy for an injured worker as against his or her employer. This immunity applies unless the employer fails to secure compensation for the injured worker or the plaintiff proves by clear and convincing evidence that the employer committed an intentional tort which caused the employee’s injury or death. Generally, the worker’s compensation immunity also applies to fellow employees of the injured worker, unless the fellow employee acts with willful and wanton disregard or unprovoked physical aggression, or with gross negligence which causes the injury. See § 440.11, Florida Statutes.

V. DISCOVERY

A. Generally

A party may obtain discovery regarding any matter, not privileged, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A discovery request otherwise proper is not objectionable merely because the response involves an opinion or contention that relates to fact or the application of law to fact.

A party may also obtain discovery of the existence and contents of any indemnity agreement under which any person may be liable to satisfy all or part of a judgment or to reimburse a party for payments made to satisfy a judgment.

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter obtained.
Generally, except in small claims cases in the County Courts where discovery may be limited, all discovery devices permitted under the Florida Rules of Civil Procedure are available to litigants. See Fla. R. Civ. Proc. 1.280.

B. Interrogatories

1. Generally

Interrogatories are written questions formally propounded by any party to an action upon any other party to an action. The responding party must answer each interrogatory separately and fully in writing under oath, unless it is objected to, in which case, the ground for objection must be stated and signed by the attorney making it. Interrogatories, including subparts, cannot exceed 30 unless the Court permits a larger or smaller number. The party to whom the interrogatories are directed shall serve a response within thirty (30) days after service of the interrogatories or, if the interrogatories are served with the initial service of process and initial pleading on the defendant, responses must be served within 45 days of service of the initial pleading. See Fla. R. Civ. Proc. 1.340.

C. Request for Production of Documents and Property

1. Generally

Any party may serve at any time one or more requests to any other party as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, recordings, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of discovery; or to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of discovery. The party to whom the Request is directed shall serve a response within thirty (30) days after service of the Request or, if the Request is served with the initial service of process and initial pleading on the defendant, a response must be served within 45 days of service of the initial pleading stating that the inspection and related activities will be permitted, unless objected to, in which case the grounds for objection shall be stated and signed by the attorney making it. See Fla. R. Civ. Proc. 1.350.

A request shall set forth the items to be inspected, either by individual item or by category, and shall describe each item and category with reasonable particularity.
A party who produces documents for inspection must produce them as they are kept in the usual course of business or must identify them to correspond with the categories in the request.

D. Requests for Admission of Facts and Genuineness of Documents.

1. Generally

A party may serve at any time one or more written requests to any other party for the admission of the genuineness of any relevant documents described in or exhibited with the request, or the truth of any relevant matters of fact set forth in the request. Copies of documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. A party is limited to a total of 30 Requests, including subparts, unless the Court allows a greater or smaller number. Each matter of which an admission is requested must be separately set forth. The matter will be deemed admitted, unless, within 30 days after service of the Request, the Party to whom the Request is directed serves a written answer, admitting, denying or objecting to each request.

Any matter admitted through this discovery procedure is conclusively established unless the court on motion permits withdrawal or amendment of the admissions and the party who sought the admission fails to establish that it will suffer prejudice if the court permits a withdrawal or amendment. If a party fails to admit the genuineness of any document or the truth of any matter as requested under this Rule and if the party requesting the admissions later proves the genuineness of the document or the truth of the matter, the party may move for an order requiring the other party to pay the reasonable expenses incurred in making the proof, which may include attorney’s fees. See Fla. R. Civ. Proc. 1.370 and 1.380(c).

E. Depositions

1. Generally

Any party to an action may cause the testimony of any person, including a party, to be taken by deposition for the purpose of discovery or for use as evidence in the action or for both purposes. Leave of court must be obtained to take a deposition only if the plaintiff seeks to take the deposition of any defendant within 30 days after service of process and the initial pleading unless the defendant has served a notice of taking deposition or otherwise sought discovery. Leave of court is also required to take the deposition of any person confined in prison.
A party desiring to take a deposition shall give *reasonable* notice in writing to every other party in the action, and may attach or include in the notice a request for the production of documents and tangible things. Any party may record the deposition by videotape without leave of court or stipulation of the parties, provided that the party’s intent to do so is included in the deposition notice. On motion, the court may order that deposition testimony be taken by telephone. Fla.R.Civ.Proc. 1.310.

Witnesses subpoenaed for deposition are entitled to be paid their attendance and travel costs incurred as a result of the appearance. Such witnesses are entitled to $5.00 per day for attendance and $0.06 per mile for the actual distance traveled to and from the proceeding. See § 92.142, Florida Statutes.

F. Examination of Persons by Qualified Experts, i.e. Independent Medical Examinations (“IME”)

1. Generally

When the physical condition of a party or of a person in the custody or under the legal control of a party is in controversy, without leave of court, another party may request that the person submit to an examination by a qualified expert. At any hearing necessitated by the request, the party requesting the physical examination has the burden of establishing good cause for the examination.

In cases where the condition in controversy is not physical, the party requesting the examination may move for an examination by a qualified expert, in which case, the requesting party will have to show, at any hearing on the issue, good cause for requesting the non-physical examination. Upon the request for any examination under the rule, the court may establish protective rules governing the examination. See Fla.R.Civ.Proc. 1.360.

In practice, in personal injury cases, examinations are regularly conducted without the requirement of filing a motion to do so.

2. Reports

Upon Request, the party requesting the examination shall deliver a detailed report of the examiner which should set out the examiner’s findings, including results of all tests made, diagnosis and conclusions. After delivery of the detailed report, the party who requested the examination, upon request, is entitled to receive any other similar report of any examination of the same condition previously or thereafter made.
The rules concerning Examination of Persons also apply to examinations conducted by agreement of the parties, unless the agreement provides otherwise.

Either party may call the examiner as a witness at trial. See Fla. R. Civ. Proc. 1.360.

G. Claims of Privilege or Work Product

1. Generally

Discovery is generally constrained only by questions of relevance. However, some materials, such as confidential communication with counsel (subject to attorney-client privilege) and material prepared in anticipation of litigation (work product privilege), are protected from discovery.

2. Attorney/Client Privilege

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client. Generally, a communication between a lawyer and a client is confidential if it is not intended to be disclosed to third persons.

3. Work Product Privilege

Generally, the work product privilege applies to materials prepared in anticipation of litigation. Currently, at least with respect to cases other than insurance bad-faith litigation, there is a conflict in the Florida District Courts of Appeals as to the standard to be applied in determining whether material qualifies for work product protection. A foreseeability standard is applied in the First, Second, Third and Fifth Appellate Districts. In these districts, the inquiry is whether the document was prepared in response to some event which foreseeably could be the basis of a claim in the future. Marshalls of Ma, Inc. v. Minsal, 932 So.2d 444 (Fla. 3rd DCA 2006). The Fourth Appellate District applies a stricter standard that states that documents are not work product unless they are prepared when the probability of litigation is “substantial and imminent.” Liberty Mut. Fire Ins. Co. v. Bennett, 883 So.2d 373 (Fla. 4th DCA 2004). This conflict has not been addressed by the Florida Supreme Court, therefore, adjusters and legal practitioners should be cognizant of the venue where the action is pending.
4. **Insurance Bad Faith Litigation - No Work Product Privilege Attaches**

The Florida Supreme Court has held that the Work Product Privilege does not apply to Statutory First-Party or Common-Law Third Party Insurance Bad Faith Claims. The Court held that in connection with evaluation of the obligation to process claims in good faith, all materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should be produced. Documents created after the resolution of the underlying claim may also be produced upon a showing of good cause. This rule favoring disclosure may not apply in situations where the claimant files a coverage and bad faith action simultaneously, in which case discovery of claim file material may be abated until the resolution of the coverage matter. *Allstate Indemnity Co., v. Ruiz*, 899 So.2d 1121 (Fla. 2005).

5. **Method of Asserting Privilege**

When a party withholds otherwise discoverable information on a claim of privilege or work product, the party claiming the privilege must expressly assert the privilege and must describe the nature of the documents, communication, or things not produced or disclosed in a manner (without disclosing the privileged information) that will enable the other parties to assess the applicability of the privilege. Fla.R.Civ. Proc. 1.280(b)(5).

H. **Discovery of Policy Limits and Contents**

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business might be liable to satisfy part or all of a judgment that might be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. See Fla.R.Civ. Proc. 1.280(b)(2). Information concerning the insurance agreement is not, by reason of disclosure, admissible as evidence at trial.

I. **Collateral Sources of Indemnity**

Generally, litigants are entitled to discovery of collateral sources of indemnity available to the claimant in tort actions. In actions where liability is admitted or is determined by the trier of fact, the court must reduce the amount of any award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources. However, there is no right to a reduction if the provider of collateral sources has a right of subrogation. See § 768.76, Florida Statutes.
VI. MOTIONS PRACTICE

A. Generally

Applications to the court for an order are to be made by motion, are required to be in writing, unless made during a hearing or trial, and shall state with particularity the grounds for the relief being sought. The movant must give the party against whom the motion is directed a “reasonable time” to prepare and respond prior to any hearing on the motion, although a specific time of notice is not set forth in the Rules. Florida courts have held that 1 or 2 days notice for a hearing on a motion is unreasonable, but that a 5 day notice is acceptable. In addition, except with respect to motions for summary judgment or other motions provided for in the Rules, there is no requirement that the party against whom a motion is directed file and serve a written response to the motion. See Fla.R.Civ.Proc. 1.100(b) and 1.090(d).

At the trial court level, most judicial circuits have local procedures in place which set forth its requirements for setting motions to be heard on the Uniform Motions Calendar. As a general rule, when it is anticipated that argument on the motion will be lengthy or complicated, litigants should request that the matter be specially set before the judge assigned to the case.

B. Optional Pre-Answer Motions

At the pleader’s option, Florida Rule 1.140 allow parties to raise the following as defenses in the party’s responsive pleading or by motion prior to filing a responsive pleading: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a cause of action; and (7) failure to join indispensable parties. See Fla.R.Civ. Proc. 1.140(b). Although the rules do not refer to any particular type of motion, the usual method of raising the defense of failure to state a cause of action or a jurisdictional defenses is made by motion to dismiss; the defense of insufficiency of process is made by motion to quash; the defense of improper venue is made by motion to abate or transfer; and, failure to join indispensable parties is made by motion to abate and dismiss.

In addition to being raised by optional pre-answer motion or as a defense in the responsive pleading, the defenses of failure to state a cause of action and to join an indispensable party may also be made by motion for judgment on the pleadings or at trial. A motion for lack of jurisdiction over the subject matter can be raised at any time. If a party fails to raise the other defenses contained in Rule 1.140(b), they are deemed waived. See Fla.R.Civ.Proc. 1.140(h)

C. Motion for Judgment on the Pleadings

After the pleadings are closed, a party may file a motion for judgment on the pleadings. This is appropriate when all facts properly pleaded in the complaint
have been pled and have been admitted by the responding party, leaving only a question of law for the court to determine. See Fla.R.Civ.Proc. 1.140(c).

D. Motion for a More Definite Statement

If a pleading to which an answer is permitted is so vague or ambiguous that a party cannot reasonably frame an answer, the party may move for a more definite statement before answering. The motion points out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten (10) days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. See Fla.R.Civ.Proc. 1.140(e).

E. Motion to Dismiss

In addition to Motions to Dismiss filed at the option of the pleader before the answer, any party may move for dismissal of an action for failure of an adverse party to comply with the Rules of Procedure or any order of the court. In addition, after the close of the plaintiff’s evidence in a bench trial, the defendant may move for dismissal on the grounds that the facts and the law show that the plaintiff has no right to relief. Fla.R.Civ.Proc. 1.420(b).

F. Motion for Summary Judgment

Florida Rule 1.510 provides for a Motion for Summary Judgment. This rule is substantially similar to its Federal counterpart, Federal Rule of Civil Procedure 56. Summary Judgment may be granted when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant must identify any affidavits, answers to interrogatories, admissions, depositions and other materials (“the summary judgment evidence”) upon which the movant relies in support of the motion.

Motions for summary judgment must be served at least 20 days prior to the day set for the hearing on the motion. At least five days prior to the date set for the hearing, the responding party must identify any summary judgment evidence he intends to rely upon at the hearing.

VII. DAMAGES

A. Compensatory Damages

1. Generally

Compensatory damages, also known as actual damages, are intended to compensate the claimant for the loss or injury caused by the wrongful conduct of another. Compensatory damages are further categorized as either “general” or “special” damages. While general damages are those
that flow naturally from the breach, most often in the context of a breach of contract action, special damages are awarded in tort actions when the damages flow directly, naturally and proximately from the tortious conduct.

General damages need not be specifically pled in the complaint. However, special damages must be specifically stated in the pleadings. See Fla.R.Civ.Proc. 1.120(g).

2. **Damages in Personal Injury Actions**

Special damages in personal injury actions include, but are not necessarily limited to economic losses, including, but not limited to expenses for medical, dental, or psychiatric treatment, physical or vocational therapy, loss of past earnings, loss of earnings capacity, medication, prosthetic devices, transportation expenses to and from health care providers, property damage or losses, future medical expenses, permanent physical impairment, disfigurement, future lost earnings or diminished earning capacity based upon life expectancy, and other probable future consequences. At trial, all special compensatory damages must be proven with reasonable certainty.

Special damages also include non-economic damages or “pain and suffering” damages including but not limited to mental anguish or emotional distress, permanent physical impairment, disfigurement etc.

3. **The Impact Rule - Limitation on Recovery for Emotional Distress**

Florida follows the Impact Rule. The rule requires that before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries sustained in an impact. The impact rule has been traditionally applied primarily as a limitation to assure a tangible validity of claims for emotional or psychological harm. R.J. v. Humana of Fla., Inc., 652 So.2d 360, 362 (Fla.1995). However, in certain circumstances the impact rule will not bar a claim for purely psychological trauma. A claim may still exist for damages flowing from discernible physical injury when the injury is caused by psychological trauma resulting from a negligent injury imposed on another who, because of the plaintiff’s relationship to the tortiously injured person and the plaintiff’s involvement in the event causing that injury, the plaintiff is foreseeably emotionally injured. Champion v. Gray, 478 So.2d 17 (Fla. 1985). See also Watters v. Walgreen Co., 967 So.2d 930, (Fla. 1st DCA 2007), rehearing denied (Oct. 22, 2007).

Generally, the impact rule does not apply to intentional torts where the injuries are predominantly emotional in nature. Eastern Airlines, Inc. v.
King, 557 So. 2d 574 (Fla. 1990). Thus, claims for intentional infliction of emotional distress, invasion of privacy and the like are excluded from the rule.

4. Property Damage

Depending on the circumstances, damage to property, generally, is measured by the diminution of its value or the cost to repair (also known as the “restoration rule”).

a. Real Property Damage

The correct measure of damages in a case involving damage to real property depends on whether the damage is permanent or temporary. The measure of damage for permanent injury to real property, generally, is diminution in value, while the restoration rule is typically followed in cases involving temporary damage to real property. In any case however, the cost of repair cannot be utilized if the cost would exceed the fair market value of the property immediately prior to the loss. See Davey Compressor Co. v. City of Del Ray Beach, 639 So.2d 595 (Fla. 1994); Bisque Associates of Florida, Inc. v. Towers of Quayside Condo Ass’n., 639 So.2d 997 (Fla. 3d DCA 1994).

b. Personal Property Damage

(1) Destroyed Property

When personal property is destroyed (e.g. a totaled vehicle), the measure of damages is the fair market value of the property immediately before the loss. Ocean Elec. Co. v. Hughes Laboratories, Inc., 636 So.2d 112 (Fla. 3d DCA 1994).

(2) Damaged Property

If the personal property is only damaged, but not destroyed, the measure of damage is the difference between the fair market value immediately prior to the loss and its value immediately after the loss. The plaintiff, however, may instead choose to recover the reasonable repair cost under the restoration rule with allowance for any difference in value of the property after the repair. Merrill Stevens Dry Dock Co. v. Nicholas, 470 So.2d 32 (Fla. 3d DCA 1985).
5. **Loss of Use Damages**

Loss of use damages are determined by a calculation of the amount required to rent a similar item to perform the services usually provided by the damaged item during the time damaged property is being repaired. The time period of repair must be reasonable. *Mortellaro & Co. v. Atlantic Coast Line R. Co.*, 107 So. 528 (Fla. 1926); *Florida Drm Co. v. Thompson*, 668 So.2d 192 (Fla. 1996).

6. **Limitations on Damages, Generally**

With the exception of cases involving medical negligence and for certain negligence cases which accrued prior to April 26, 2006 where the comparative fault statute applies, there is no statutory limitation (i.e. cap) on the recovery of economic or non-economic damages in a tort action.

7. **Limitation on Damages in Medical Negligence Cases**

In medical malpractice and related cases only, statutory limitations are in place which cap the amount of non-economic damages recoverable from licensed medical practitioners and non-practitioners as defined under the statute. There is no limitation on the recovery of economic damages.

Generally, in cases for personal injury or wrongful death arising from the negligence of medical practitioners (regardless of the number of practitioners named), the non-economic damages recoverable is capped at $500,000 per claimant. If, however, the negligence resulted in a permanent vegetative state or death, the non-economic damages recoverable (regardless of the number of practitioners or claimants) is capped at $1 million dollars. However, in cases not involving death or permanent vegetative states, judges have the statutory authority to award up to $1 millions dollars in non-economic damages to the patient who was injured due to medical negligence if: (1) the judge determines that manifest injustice would occur unless increased non-economic damages are awarded and (2) the trier of fact determines that the defendant’s negligence causes a catastrophic injury as defined under the statute.

Limitations are also placed on recovery of non-economic damages in cases involving medical negligence of non-practitioners and practitioners providing emergency services and care. Generally speaking, recovery against non-practitioners is capped at $750,000 per claimant regardless of the number of non-practitioners; or $1.5 million if the negligence resulted in permanent vegetative state or death. The judge has the statutory authority to award up to $1.5 million under the same manifest injustice and catastrophic injury test set forth above.
Finally, the statute places a cap on the amount of non-economic damages recoverable from practitioners providing emergency services to a patient with whom the practitioner does not have an existing doctor-patient relationship. In these circumstances, non-economic damages are capped at $150,000 per claimant and $300,000 per all claimants. The limitation for non-practitioners providing emergency services is $750,000 per claimant and $1.5 million per all claimants. See 766.118, Florida Statutes.

B. Punitive Damages

1. Generally

Florida Statutes provide the standard under which punitive damages may be awarded in civil cases. A defendant may be liable for punitive damages only if the trier of fact, based upon clear and convincing evidence, finds that the defendant was guilty of intentional misconduct or gross negligence. See § 768.725, Florida Statutes.

a. Intentional Misconduct Defined

Intentional misconduct means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued the course of conduct, resulting in injury or damage.

b. Gross Negligence Defined

Gross negligence means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

2. Burden of Proof for Punitive Damages Award

The plaintiff has the burden of proving his entitlement to an award of punitive damages by clear and convincing evidence. The greater weight of the evidence standard applies to a determination of the amount of the punitive damages award. § 768.725, Florida Statutes.

3. Limitation on Punitive Damages

By statute, the general rule is that an award of punitive damages may not exceed the greater of three times compensatory damages or $500,000. § 768.73, Florida Statutes.
For conduct found to be motivated solely by unreasonable financial gain when the likelihood of injury was known to the managing agent, director, officer or other person responsible for making policy decisions, an award of punitive damages may not exceed the greater of four times compensatory damages or $2 million dollars.

Unless the court determines by clear and convincing evidence that a prior award was inadequate, punitive damages may not be awarded against a defendant who has already been subject to the entry of a punitive damages verdict which arises from the same act or course of conduct from which a claimant seeks to recover. In order to obtain this protection, the defendant must establish, before trial, that such an award has already been entered against him.

There is no cap on punitive damages when the fact finder determines that the defendant had a specific intent to harm the claimant and did, in fact, harm the claimant.

At trial, juries are not to be informed about the limitations on the award of punitive damages. See § 768.73, Florida Statutes.

There is no statutory limit on a punitive damage award in cases where the defendant was under the influence of any alcoholic beverage or drug which impaired his normal faculties or who had a blood or breath alcohol level of 0.08 percent or higher. See § 768.736, Florida Statutes.

4. **Insurability of Punitive Damages**

Florida public policy prohibits liability insurance coverage for punitive damages assessed against a person for his own conduct. On the other hand, Florida law allows insurance coverage for punitive damages when the insured is merely vicariously liable for another’s wrong. U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983). The analysis of the basis for the award against one whom may be vicariously liable should be carefully scrutinized since a corporation can only act through its officers and agents. Browning v. State, 101 Fla. 1051 (1931); Nooe v. State, 892 So.2d 1135, 1139 (Fla. 5th DCA 2005). As such, the acts of the employee directly responsible for the conduct giving rise to the punitive damage award, may be indistinguishable from the acts of the corporation itself, in which case insurance coverage for the corporation would not be available.

C. **Attorney's Fees**

1. **Generally**

Florida follows the American Rule with regard to the recovery of attorney’s fees. The general rule is that attorney’s fees are not recoverable.
as an element of damages in the absence of statutory authority or a contractual agreement. Dade County v. Pena, 664 So. 2d. 959 (Fla. 1995).

2. **The Wrongful Act Doctrine**

The Wrongful Act Doctrine provides an exception to the general rule against the award of attorney’s fees. The Wrongful Act Doctrine permits the recovery of attorney’s fees when the defendant has involved the claimant in litigation with others, and has placed the claimant in such relation with others as makes it necessary to incur expense to protect its interest. Such costs and expenses, including attorney’s fees, may then be recovered as an element of damages. Northamerican Van Lines, Inc. v. Roper, 429 So.2d 750 (Fla. 1st DCA 1983); Robbins v. McGrath, 955 So.2d 633 (Fla. 1st DCA 2007). Entitlement to fees under the wrongful act doctrine must be specifically pled. See Fla.R.Civ.Proc. 1.120(g).

3. **Attorney’s Fees in Insurance Bad Faith Litigation**

Reasonable attorney’s fees and costs are recoverable in first and third party insurance bad faith litigation. See § 624.155(4), Florida Statutes.

4. **Inequitable Conduct Doctrine**

In very limited circumstances, courts are authorized to award fees in the absence of a contract or statutory authority, based on the misconduct of a Party. This is a rarity and is reserved for those circumstances where one party has exhibited egregious behavior or acted in bad faith. Bitterman v. Bitterman, 714 So.2d 356 (Fla. 1998).

5. **Attorney’s Fees for Unsupported Claims or Defenses**

Upon motion or on the court’s initiative, pursuant to Florida statutes, reasonable attorney’s fees may be awarded to the prevailing party which will be assessed in equal amounts against the litigant and the litigant’s attorney, if the court finds that the losing party or his attorney knew or should have known that a claim or defense, when initially presented to the court or at any time before trial, was not supported by material facts necessary to prove the claim or defense, or would not be supported by the application of then existing law to the facts. An attorney will not be liable for fees if the attorney acted in good faith based upon representations of his client.

Any Motion for attorney’s fees under this statute must be served, but cannot be presented to the court until the expiration of 21 days of service of the Motion to allow the party against whom the motion is directed to withdraw the disputed claim or defense See § 57.105, Florida Statutes.
D. Pre-Judgment Interest

In Florida, pre-judgment cannot be recovered as an element of damages in unliquidated claims. A claim is unliquidated if the amount owed is contested and is not finally fixed until determined by the trier of fact. Accordingly, pre-judgment interest is usually not recoverable in negligence or other tort actions where the amount of the judgment cannot be determined until after trial.

E. Post-Judgment Interest

On the 1st of December, March, June and September, Florida's Chief Financial Officer sets the rate of interest that shall be payable on judgments for the next calendar quarter in accordance with the accounting methodology set forth in Florida Statutes. The post-judgment interest rate in effect on the date of the judgment generally is adjusted annually on January 1 of each year in accordance with the interest rate in effect on that date until the judgment is paid. See § 55.03, Florida Statutes.

It is important to verify the post judgment interest rate for all judgments entered in the state of Florida because the rates now vary on a quarterly basis. For the quarters effective October 1, 2011, January 1, 2012, April 1, 2012 and July 1, 2012, the interest rate was set at 4.75 % per annum for each period. Past and current interest rates can be verified at www.myfloridacfo/aadir/interest.htm.

VIII. INSURANCE COVERAGE IN FLORIDA

A. Mandatory Liability Coverage

The Florida Financial Responsibility Law of 1955 provides for minimum financial security required of owners and operators of motor vehicles in the state. The law is intended to ensure compensation to others for injury to person or property caused by the operation of a motor vehicle and requires persons who have been involved in an accident in the state to show proof of financial responsibility. See § 324.011, et. seq., Florida Statutes.


As a condition to registration of a vehicle in the state, every owner of operator of a motor vehicle must, among other statutorily permitted methods of proving financial responsibility, establish and maintain a policy of motor vehicle liability insurance in the minimum amount of $10,000 to cover the payment of claims for property of others damaged or destroyed in an accident. § 324.022, Florida Statutes.
2. **Proof of Financial Responsibility after Accident or Conviction - Minimum Requirements for Motor Vehicles**

The operator of a motor vehicle involved in a crash or who has been convicted of certain traffic convictions are required to prove financial responsibility by establishing and maintaining a policy of motor vehicle liability insurance with bodily injury and death coverage in the minimum amounts of $10,000 for any one person in any one crash and up to $20,000 for any two or more persons in any one crash, along with property damage coverage in the minimum amount of $10,000. See §§ 324.011, 324.021(7) and 324.072, Florida Statutes.

3. **Financial Responsibility and Driving Under the Influence (DUI)**

After a conviction, a plea or guilty or nolo contendere to a charge of driving under the influence, the minimum security required is a minimum of $100,000 because of bodily injury or death of any one person in any one crash; $300,000 for the injury or death of two or more persons in any one crash; and, a minimum amount of $50,000 because of property damage in any one crash. This applies to any owner or operator who has been found guilty of a charge of DUI after October 1, 2007. See § 324.023, Florida Statutes.

4. **Commercial Motor Vehicle - Minimum Requirements**

Commercial motor vehicles, as defined in Florida Statutes, must be insured with minimum levels of combined bodily injury and property damage insurance as follows: $50,000 per occurrence for a commercial vehicle with a gross vehicle weight of 26,000 pounds or more, but less than 35,000 pounds; $100,000 per occurrence for a commercial vehicle with a gross vehicle weight 35,000 pounds or more, but less than 44,000 pounds; $300,000 per occurrence for a commercial vehicle with a gross vehicle weight of 44,000 pounds or more.

Further, commercial vehicles subject to regulations of the USDOT, Title 49 C.F.R. part 387, subpart A, must be insured in an amount equivalent to the minimum levels set forth in the federal standards. See § 627.7415, Florida Statutes.

5. **Nonpublic Sector Buses - Minimum Requirements**

In addition to any other insurance requirements under Florida Statutes, nonpublic sector buses, must be insured with minimum levels of insurance in the amount of $100,000 because of bodily injury or death of any one person in any accident; in the amount of $300,000 because of bodily injury or death of two or more persons in any one accident and in the amount of $50,000 because of injury to, or destruction of, property of others in any one accident. Alternatively, nonpublic sector buses may
carry a combined bodily injury and property damage liability coverage in a sum of not less than $300,000. See § 627.742, Florida Statutes.

B Uninsured Motorist Coverage

1. Generally

Every policy of motor vehicle liability insurance in Florida which provides for bodily injury liability coverage must also contain uninsured motorist coverage equal to the bodily injury limits under the policy. The uninsured motorist coverage is for the protection of persons insured under the policy who are legally entitled to recover damages because of bodily injury, sickness, disease or death caused by an uninsured motorist. Uninsured motorist coverage must be provided unless the insured makes a written rejection of the coverage or selects lower limits on a form approved by the Department of Insurance. See § 627.727, Florida Statutes.

When an insured executes an election to reject or select lower uninsured motorist limits on forms approved by the Department of Insurance, it is conclusively presumed that it was an informed, knowing rejection of coverage or an election of lower limits on behalf of all insureds.

2. Exhaustion of Underlying Tortfeasor’s Policy Not Required

Full payment of the underlying tortfeasor’s limits of bodily injury liability coverage is not a condition precedent to the insured’s right to maintain an uninsured motorist claim. The uninsured motorist carrier, however, is entitled to a credit against total damages in the amount of the full coverage limits of the tortfeasor’s liability policy. See § 627.727(6)(c), Florida Statutes.

If, after receipt of the statutorily required notice of a proposed settlement with the underlying tortfeasor, the uninsured motorist carrier timely notifies the tortfeasor’s insurance carrier of its election to preserve its subrogation rights and pays the amount of the proposed settlement to the insured, then the uninsured motorist carrier is entitled to seek subrogation against the uninsured motorist and the liability insurer for the amounts paid in connection with the uninsured motorist claim. See § 627.727(6)(b).

3. Limited Tort Exemption for Uninsured Motorist Coverage

An uninsured motorist carrier is not legally liable for damages in tort for pain, suffering, mental anguish and inconvenience unless the injury or disease at issue involves (a) significant and permanent loss of an important bodily function; (b) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c) significant
and permanent scarring or disfigurement; or (d) death. See § 627.727(7), Florida Statutes.

C. Personal Injury Protection Coverage ("PIP")

1. Generally

Every insurance policy issued in Florida must provide for $10,000 in personal injury protection benefits ("PIP") for loss sustained as a result of bodily injury, sickness, disease or death arising out of the ownership, maintenance or use of a motor vehicle. The protection must extend to the named insured, relatives residing in the same household, persons operating the insured vehicle, passengers in such vehicle, and other persons struck by such vehicle while not occupants of a self-propelled vehicle.

PIP covers 80% of medical expenses up to $10,000. The benefits are limited to services and care provided, ordered or prescribed by a licensed physician, osteopath, or dentist or treatment provided by other health care providers as set forth in the statute See § 627.736, Florida Statutes. Effective January 1, 2013, the services of massage therapists and acupuncturists are no longer qualified medical services under Florida's personal injury protection statute.

2. Authorized Exclusions From PIP Benefits

PIP benefits may be excluded for injuries sustained by the named insured and relatives residing in the same household while occupying another vehicle owned by the named insured and not insured under the policy or for injuries sustained by any person operating the vehicle without the express or implied consent of the insured.

PIP benefits may also be excluded for any injured person if that person’s conduct contributed to the injury because of that person intentionally caused injury to himself or because that person was injured while committing a felony. See § 627.736(2), Florida Statutes.

3. Time for Filing and Payment of Claims

An insurer providing PIP coverage for which an insured has filed a claim must pay PIP benefits within thirty (30) days after being furnished written notice of the fact of a covered loss and the amount of the same. Benefits not paid within 30 days after receiving satisfactory proof of the claim are overdue. Overdue payments bear simple interest at the legal rate or at the rate established by the insurance contract, whichever is greater. See § 627.736(4), Florida Statutes.
4. **Reserves Required for Emergency Medical Treatment**

Upon notice of a claim, insurers are required to reserve $5,000 of PIP benefits for payment to physicians rendering emergency care or inpatient care in a hospital. 30 days after the insurer receives notice of an accident, the unclaimed amount of the reserve may be used to pay claims from other providers. The required time to pay claims to other providers is tolled for the time period the insurer is required to hold such claims due to the emergency medical treatment reserve requirement. However, there is no tolling of the time period by which an insurer must pay a provider for treatment with regarding to the $5,000 of PIP benefits not held in emergency treatment reserve. See § 627.736(4)(c).

5. **Generally, Subrogation Not Permitted**

An insurer that provides PIP benefits does not have a right of subrogation or a lien on any recovery in tort for PIP benefits paid. The injured insured, who is entitled to bring a lawsuit against a tortfeasor who caused the accident, has no right to recover any damages for which PIP benefits are paid or payable. See § 627.736(3), Florida Statutes.

6. **Limited Right of Reimbursement**

An insurer providing PIP benefits on a personal passenger vehicle has a right of reimbursement against the owner or insurer of a commercial motor vehicle, if the benefits paid result from the injured person having been an occupant of the commercial vehicle or result from the injured person having been struck by the commercial vehicle while the injured person was not an occupant of any self-propelled vehicle. See § 627.7405, Florida Statutes.

Generally speaking, a commercial motor vehicle is defined as any motor vehicle that is not a private passenger motor vehicle as defined in Florida statutes. A private passenger motor vehicle is any motor vehicle which is a sedan, station wagon or jeep type vehicle and, if not used primarily for occupational, professional or business purposes, a motor vehicle of the pick-up, panel, van, camper, or motor home type. See 627.732,(3), Florida Statutes.

The limited statutory right of reimbursement does not apply to taxicabs as defined in Florida statutes.

7. **Credit for Workers’ Compensation Benefits**

In Florida, PIP benefits are primary. However, the PIP carrier is entitled to a credit for any benefits received under any workers’ compensation law. See § 627.736(4), Florida Statutes.
8. **Interests of Medicare/Medicaid**

Effective January 1, 2013, PIP insurers will be required to reimburse Medicaid within 30 days of being notified that Medicaid paid benefits covered by personal injury protection.

9. **Independent Medical Examinations**

An insurer may request, at the insurer’s expense, that an injured person seeking PIP benefits submit to a mental or physical examination whenever the mental or physical condition of the injured person seeking benefits is material to any claim that has been made or may be made in the future. The examination must be conducted in a location where the injured person is receiving treatment or in a location reasonably accessible to the injured person. The insurer also, upon request of the injured person, must provide the injured person with a copy of any written report generated by the examination which sets forth the examiners findings and conclusions in detail. Thereafter, the insurer is entitled to request from the injured party, a copy of every written report available to the injured party concerning any examination previously or subsequently made. See § 627.736(7), Florida Statutes. If a person unreasonably refuses to submit or fails to appear at an examination, the personal injury protection carrier is no longer liable for subsequent benefits.

Effective January 1, 2013, an insured's refusal to submit to or failure to appear at two examinations raises a rebuttable presumption that the insured's refusal was unreasonable.

10. **Demand Letter as Condition Precedent to PIP Lawsuit**

As a condition precedent to filing any action for PIP benefits, the insurer must be provided with written notice of intent to initiate litigation. The notice may not be sent until the PIP claim is overdue. No lawsuit may be maintained, if the insurer, within 30 days after receipt of the demand letter, pays the overdue claim with the applicable interest and a penalty of 10 percent of the overdue amount, which penalty shall not exceed $250 dollars. If the demand involves a claim for future treatment, no lawsuit may be filed if the insurer mails to the injured person, notice of its agreement to pay for such future treatment and the 10 percent penalty up to the maximum of $250.00 dollars when it pays for the future treatment. See § 627.736(10), Florida Statutes.

11. **Attorney’s Fees**

Provided that the insured plaintiff meets the statutory requirements for filing suit for recovery of PIP benefits, if the insured is the prevailing party in an action initiated to recover PIP benefits, he will be entitled to a
reasonable attorney’s fee which shall be included as a part of the judgment. See §§ 627.736(8) and 627.428, Florida Statutes.

12. **Tolling of Statute of Limitation**

The Statute of limitation applicable to the filing of a lawsuit to recover PIP benefits is tolled for a period of 30 business days by the mailing of the Demand Letter required under the PIP statutes. § 627.736(10)(e), Florida Statutes.

13. **Optional Deductibles and Modified PIP Coverage**

A named insured may elect a deductible to apply to personal injury protection benefits, modified coverage, or combination thereof to apply to the named insured or the named insured and dependent relatives residing in the same household of the named insured. The notice of the insured right to elect a deductible or modified coverage must be made in clear unambiguous language as set forth in Florida Statutes. See § 627.739, Florida Statutes.

14. **Property Damage and PIP Enforcement**

Insurers are required to report to the Department of Highway Safety and Motor Vehicles (DHSMV) policy cancellations, non-renewals and new policies written. The DHSMV is required to suspend the driver’s licenses of those who have failed to obtain the required coverage. § 324.0221.

D. **Pre-Suit Demand for Mediation of Certain Claims Involving Motor Vehicles**

Prior to the institution of litigation, either the claimant or an insurer may demand mediation of a claim involving the use of a motor vehicle when the claim concerns property damage in any amount or, personal injury in the amount of $10,000 or less. Any such request for mediation must be filed with the Department of Insurance on an approved form. See § 627.745, Florida Statutes.

E. **Limited Tort Exemption for Certain Lawsuits Involving Motor Vehicles**

Under Florida law, there is an exemption from tort liability for damages because of bodily injury, sickness or disease arising out of the ownership, operation, maintenance or use of a motor vehicle to the extent of the $10,000 in personal injury protection benefits that are payable for such injury or, that would be payable but for any exclusion permitted under Florida Statutes.

In any tort action brought, a plaintiff may recover damages for pain, suffering, mental anguish and inconvenience only if the injury involves (a) significant and permanent loss of an important bodily function; (b) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c)
significant and permanent scarring or disfigurement; and (d) death.  See § 627.737, Florida Statutes.

1. **Mandatory Joinder of Derivative Claims**

   Generally, a Plaintiff bringing a lawsuit under the exceptions to Florida’s Tort Exemption statute must join all claims, including derivative claims, arising out of the Plaintiff’s injuries in one lawsuit. See § 627.7403, Florida Statutes.

2. **Challenges to Plaintiff’s Right to Maintain Lawsuit**

   When a defendant questions whether the Plaintiff has met the threshold requirements to bring a tort action, he may file a motion with the court to determine whether the requirements of the tort exemption statute have been met. Upon receipt of the motion, on a one-time basis only, the Court is required to examine the pleadings and evidence to determine whether the plaintiff will meet the requirement of establishing the existence of (a) significant and permanent loss of an important bodily function; (b) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c) significant and permanent scarring or disfigurement or (d) death. If the Court finds that the plaintiff will not be able to submit such evidence, the court must dismiss the Plaintiff’s claim without prejudice. See § 627.737(3), Florida statutes.

3. **Limitation on Punitive Damages**

   Punitive Damages are not allowed against an insurer in an action filed against the insurer for damages in excess of its policy limits. § 627.737(4), Florida Statutes.

**F. EXCLUSIONS, IN GENERAL**

Depending on the circumstances, every vehicle required to be registered or operated within Florida may be required to maintain minimum financial security. In cases where a driver has been required to comply with the Financial Responsibility Laws, arguably, any exclusion applicable to that person may only operate to exclude from coverage amounts in excess of the minimum security required.

1. **Named Insured and Family-Household Exclusions**

   In Florida, in the absence of a statutory prohibition, automobile liability insurance policy provisions which exclude members of the insured’s family or household are valid. Reid v. State Farm Fire & Casualty Co, 352 So.2d 1172 (Fla. 1978).
2. **Named Driver Exclusion**

An automobile liability policy may contain a named driver exclusion unless the policy was issued pursuant to a requirement of the State’s Financial Responsibility Law. *Hanover Insurance Co. v. Bramlitt*, 228 So.2d 288 (1st DCA Fla 1969).

3. **Non-Permissive Use Exclusion**

An insurer in Florida may exclude coverage to non-permissive users of motor vehicles.

**IX. IMPORTANT ISSUES/INFORMATION FOR INSURERS**

A. **Required PIP Reserves for Emergency Treatment**

Insurers are required to reserve $5,000 of PIP benefits for payment to physicians rendering emergency care or inpatient care in a hospital. 30 days after the insurer receives notice of an accident, the unclaimed amount of the reserve may be used to pay claims from other providers. The required time to pay claims to other providers is tolled for the time period the insurer is required to hold such claims due to the emergency medical treatment reserve requirement. However, there is no tolling of the time period by which an insurer must pay a provider for treatment with regard to the $5,000 of PIP benefits not held in emergency treatment reserve. See § 627.736(4)(c).

B. **Required Disclosure of Insurance Information**

Liability insurance carriers issuing policies which do or which may provide liability insurance coverage are required, within 30 days of the written request of a claimant, to provide a statement under oath setting forth (1) the name of the insurer; (2) the name of each insured; (3) the limits of liability coverage; (4) a statement of any policy or coverage defense which the insurer reasonably believes is available to the insurer at the time of filing the statement; and, (5) a copy of the policy. In addition, upon request, the insurer must also disclose the name and coverage of each known insurer and is required to forward the request for information to those other insurers. Upon receipt of information from those other insurers, the information received must be provided to the claimant within 30 days. The insurer’s statement pursuant to the statute must be immediately amended upon discovery of facts calling for an amendment of the statement. See § 627.4137, Florida Statutes.

Any request made to a self insured corporation must be served by certified mail on the resident agent of the corporation.
C. Reservation of Rights and Estoppel of Coverage Defenses

A liability insurer is not permitted to deny coverage based upon a particular coverage defense unless specific statutory requirements are met. See § 627.426, Florida Statutes. In order to preserve coverage defenses, the insurer must comply as follows:

1. Provide 30 Days Notice

Within 30 days after the insurer knew or should have known of a coverage defense, the insurer must provide written notice of its reservation of rights to assert a coverage defense to the named insured by registered or certified mail or by hand delivery.

2. Provide 60 Days Notice

Within 60 days of timely notice of the insurer’s reservation of rights to assert a coverage defense, or within 60 days of receipt of a summons and complaint naming the insured as a defendant, but in no case later than 30 days before trial, the insurer must:

   a. Give written notice of its refusal to defend the insured;
   
   b. Obtain a non-waiver agreement from the insured after full disclosure of the facts and policy provisions; or
   
   c. Retain independent counsel that is mutually agreeable to the parties.

D. Direct Action Statute

In Florida, a person not insured under the terms of a liability insurance contract, must first obtain a settlement or verdict against a person insured under the policy as a condition precedent to filing a direct action against a liability insurer. Insurers may, in accordance with the statute, include a provision in the policy which prohibits persons who are not designated as an insured from joining a liability insurer as a party-defendant with its insureds prior to the rendition of a verdict. See § 627.4136, Florida Statutes.

E. Duty to Defend

The duty to defend is separate from and broader than the duty to indemnify. The duty to defend is triggered if the allegations in the complaint, declaration or other statement of the cause of action raise the potentiality that the claim may be covered by the policy, even if such actions are groundless, false or fraudulent. All doubts as to whether a duty to defend exists must be resolved in favor of the insured. Amerisure Ins. Co. v. Gold Coast Marine Distributors, Inc., 771 So. 2d
579 (4th DCA 2000); Lawyers Title Ins. Corp. v. JDC (America) Corp. 52 F.3d 1575 (11th Cir. 1995).

Once there is a potentiality of coverage, the insurer is obligated to defend the entire suit until such time, if ever, that the claims have been limited to ones outside the policy coverage. C.A. Fielland, Inc. v. Fidelity & Cas. Co of New York, 297 So. 2d 122 (2nd DCA 1974).

If an insurer wrongfully refuses to defend on behalf of the insured, the insured may take whatever steps are necessary to protect itself from the claim, including controlling the litigation and settling the case. Thereafter, the insured may sue the insurer for its breach of the obligation to defend and the insurer will be liable for damages incurred by the insured as a result of the insurer's breach. Gallagher v. Dupont, 918 So.2d 342 (5th DCA 2005).

F. Bad Faith Litigation

Third-Party, First-Party and Statutory Bad faith against insurers are recognized in Florida.

1. Duty of Care in Bad Faith Actions

In Florida, an insurer 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 own business. The duty of good faith involves diligence and care in the investigation and evaluation of claims against the insured. Thus, the insurer must investigate the facts and give fair consideration to a settlement offer that is not unreasonable. Auto Mut. Indem. Co. v. Shaw, 184 So. 852 (Fla. 1938); Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783 (Fla. 1980).

2. Third-Party Bad Faith

A Third-Party bad faith action is one brought by a person who is not an insured under the policy of insurance against the insurer of one who is an insured under the policy. Most often, these actions arise out of liability insurance when the conduct of the insurance company exposes the insured to a verdict in excess of the insured’s policy limits when the insurance company could have or should have resolved the claim within the policy limits. If the insurance company is shown to have acted unreasonably in failing to settle, the insurance company becomes liable for the full award of damages, unrestricted by the policy limits. The injured third party is permitted to bring the third party bad faith claim directly against the insurer without an assignment by the insured when the third-party has obtained a verdict in excess of the policy limit. Thomson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971); State Farm Fire & Cas. Co. v.
Zebrowski, 706 So.2d 275 (Fla. 1997). See also 624.155(1)(b)(1), Florida Statutes.

a. Insurer’s Duty to Initiate Settlement Discussions

Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely an insurer has an affirmative duty to initiate settlement negotiations. Powell v. Prudential Property & Cas. Ins. Co., 584 So. 2d 12 (Fla 3rd DCA 1993).

b. Settlement Negotiations With Multiple Third-Party Claimants

When faced with multiple claims resulting from the same accident, the insurer has a duty to (1) fully investigate all claims arising from a multiple claim accident; (2) seek to settle as many claims as possible within the policy limit; (3) minimize the magnitude of possible excess judgments against the insured by reasoned claims settlement; and, (4) keep the insured informed of the claim resolution process. Gen Sec. Nat. Ins. Co. v. Marsh, 303 F.Supp 2d 1321 (M.D. Fla. 2004); Farinas v. Florida Farm Bureau General Ins. Co., 850 So.2d 555 (Fla. 4th DCA 2003).

c. Damages Recoverable in Third-Party Bad Faith Actions

(1) Generally

The measure of damages in a third-party bad faith action is the amount of any excess award over and above the insurance policy limit. Thompson v. Commercial Union Ins. Co., 250 So.2d 259 (Fla. 1971). See also § 624.155(8), Florida Statutes.

Other “reasonably foreseeable” damages that are sustained as a result of the insurer’s breach are also recoverable. See § 624.155(8).

(2) Punitive Damages

To recover punitive damages in a third-party bad faith action, the insurer’s conduct must be so egregious as to constitute an independent tort. In general, dishonestly, misrepresentations or fraudulent conduct must be alleged and proven. Pozzi Window Co. v. Auto Owners Ins. Co., 429 F.Supp 2d 1311 (S.D. Fla 2004); Dunn v. National Sec. Fire and Cas. Co., 631 So.2d 1103 (Fla. 5th DCA 1993).

With statutory bad faith claims, punitive damages may be awarded if the conduct occurs with such frequency as to indicate a general business practice. The conduct must also
be willful or in reckless disregard to the insured. See 624.155(4), Florida Statutes.

(3) Mental Anguish

In the absence of a physical injury, a third party bad faith plaintiff cannot recover for mental anguish unless there exist circumstances in which the defendant insurer acted with sufficient malice to support an award of punitive damages. Butchikas v. Travelers Indem. Co., 343 So. 2d 816 (Fla. 1976).

3. First Party Bad Faith

An action for First-Party Bad Faith was not recognized at common law in Florida, but today, is an action recognized by statute. See § 624.155. Florida Statutes.

A first-party bad faith action is one brought by an insured directly against his insurance company for the insurer’s failure to settle a claim under the insured’s own policy of insurance. Allstate Ins. Co. v. Clohessy, 32 F.Supp 2d 1328 (M.D. Fla 1998). The statute, which authorizes a civil action for bad faith, sets forth numerous Florida statutes, the violation of each of which may support a statutory claim for bad faith. Plaintiffs most often raise a violation of the unfair claims settlements practices as a basis for a statutory bad faith claim.

a. Unfair or Deceptive Practices

Usually, a claim for first-party statutory bad faith arises out of violations of Florida’s Unfair or Deceptive Trade Practices Statutes. The statute defines conduct of insurers which constitute unfair or deceptive practices under Florida law. The most common basis of liability derives from violations of the Unfair Claim Settlement Provisions of the statute. See § 626.9541(1)(i), Florida Statutes.

b. 60 Days Notice Requirement

A Plaintiff who intends to file a statutory first party bad faith claim is required to give the insurance company and the Department of Insurance 60 days notice of its intent to file a bad faith claim. The Notice must be provided on a form approved by the Department of Insurance and must contain the information described in the statute. See § 624.155(3).
c. Opportunity to Cure

After proper notice has been sent, the Plaintiff is not permitted to pursue his first-party bad faith action if, within 60 days of its receipt of plaintiff’s notice, the insurance company pays the damages or the circumstances which gave rise to the notice are corrected. See § 624.155(3)(d).

d. Damages Recoverable in First Party Bad Faith Actions

(1) Generally

The measure of damages in a first-party bad faith action are those “reasonably foreseeable” as a result of a violation of § 624.155, including amounts in excess of the policy limit. See also § 624.155(8), Florida Statutes.

(2) Punitive Damages

Punitive damages are only recoverable in a first-party action when the acts giving rise to the violations occur with such frequency to constitute a general business practice and are deemed (a) willful, wanton, and malicious; (b) in reckless disregard for the rights of any insured; or (c) in reckless disregard for the rights of a beneficiary under a life insurance contract. See § 624.155(5).

(3) Mental Anguish

Except in limited circumstances in first party bad faith claims against a health insurer, mental anguish presently cannot be recovered in a first party bad faith action. See Time Ins. Co. Inc. v. Burger, 712 So.2d 389 (Fla. 1998)(discussing requirements for recovery of mental anguish in first party action against a health insurer). See also Howell-Demarest v. State Farm Mutl Auto Ins, Co., 673 So. 2d 526 (4th DCA 1996) (suggesting recovery for mental anguish is limited to actions against health insurers).

4. Attorney’s Fees

In all bad faith actions, the plaintiff may recover attorney’s fees and costs incurred as a result of bringing the bad faith action. See § 624.155(4).
D. Negotiating Directly With Attorneys

There are no provisions in Florida prohibiting claims representatives from negotiating directly with Plaintiff's attorney after suit is filed. However, the fact that the attorney was retained by a Plaintiff to handle the litigation, does not give the attorney the implied or apparent authority to settle his client’s case. A settlement agreement made with the attorney is only enforceable when the attorney was given clear and unequivocal authority by the client to settle the claim. Sosnick v. McManus, 815 So. 2d 759 (Fla. 3rd DCA 1988); Ponce v. U-Haul Co. of Florida, 979 So.2d 380 (Fla. 4th DCA 2008).

E. Releases and Covenants Not to Sue

1. Generally

A release is the giving up or abandoning of a claim or right to the person against whom the claim is asserted. A party who releases his claim against another effectually gives up and discharges his right to pursue the claim. A covenant not to sue, on the other hand, is an agreement under which the person who has a claim against another agrees not to sue the party against whom the claim may be maintained.

Releases and covenants not to sue are contracts and are governed by the general rules applicable to all contracts. That is, the intention of the parties as expressed in the contract itself determines the extent and operation of the release. Further, Florida statutes governing releases have been enacted to further Florida’s public policy which favors the settlement of civil actions. See §§ 46.015 and 768.041, Florida Statutes.

2. Effect of Release of One Tortfeasor on Joint Tortfeasors

A release or covenant not to sue one tortfeasor does not operate to release or discharge the liability of any other tortfeasor who may be liable for the same tort. If a defendant shows that the plaintiff has entered into a release or covenant not to sue another person in partial satisfaction of the damages at issue, then the court must set off the amount stated in the release from the amount of any judgment entered against the defendant after the jury has rendered its verdict. See §§ 46.015 and 768.041, Florida Statutes.

3. Effect of Release of One Tortfeasor on Subsequent Tortfeasors

Florida release statutes, which permit plaintiffs to settle claims without jeopardizing rights of action that may remain against others, do not apply to preserve claims against subsequent tortfeasors. If a plaintiff intends to pursue a subsequent tortfeasor (such as medical malpractice against a doctor occurring after the initial tort), the Plaintiff must expressly reserve
the right to pursue such a claim in his release with the initial tortfeasor. Broz v. Rodriguez, 891 So. 2d 1205 (4th DCA 2005).

4. **Effect of Release on Tortfeasor’s Right of Contribution**

A settling tortfeasor is not entitled to contribution against a joint tortfeasor whose liability in the action was not extinguished by the settling tortfeasor’s release. *See § 768.31(d), Florida Statutes.*

G. **Subrogation**

Generally, an insurer is subrogated to claims of its insured against others once the insurer has paid for the loss incurred by the insured. *See Dantzler Lumber & Export Co. v. Columbia Cas. Co., 115 Fla. 541 (1934).*

Except in cases involving accidents involving an owner or insurer of a commercial motor vehicle (in which case a right of reimbursement exists), an insurer paying personal injury protection benefits has no right of subrogation and no claim against any other person or insurer to recover any benefits paid by reason of the alleged fault of such other person in causing or contributing to the accident. *See §§ 627.736(3) and § 627.7405, Florida Statutes.*

X. **MISCELLANEOUS RULES**

A. **Joint and Several Liability**

Joint Tortfeasor liability is governed by the Uniform Contribution Among Tortfeasors Act. The statute provides that when two or more persons become jointly or severally liable in tort for the same injury, there is a right of contribution among them even though judgment has not been recovered against all or any of them. *See § 768.31, Florida Statutes.* However, no right of contribution exists by a tortfeasor who has committed an intentional tort.

1. **Right of Contribution Limited to Amounts in Excess of Pro Rata Share**

The right of contribution only exists to the extent that a tortfeasor has paid more than his pro rata share of the common liability. *See § 768.31(b), Florida Statutes.*

2. **Effect of Settlement by One Tortfeasor**

A settling tortfeasor is not entitled to contribution against a joint tortfeasor whose liability in the action was not extinguished by the settling tortfeasor’s release. *See § 768.31(d), Florida Statutes.*
3. **Liability Insurer’s Right of Subrogation**

A liability insurer who has discharged the liability of an insured tortfeasor by payment is subrogated to the tortfeasor’s right of contribution to the extent of the amount it has paid in excess of the tortfeasor’s pro-rata share. See § 768.31(e), Florida Statutes

B. **Liens**

1. **Hospital Liens**

Florida hospital liens exist on a county-by-county basis by virtue of special acts or local ordinances.

2. **Workers' Compensation**

A worker’s compensation insurer is subrogated to the rights of the employee or his or her dependents against a third-party tortfeasor, to the extent of the amount of compensation benefits paid or to be paid as provided by the worker’s compensation law, when the employee or his dependents have accepted compensation or other benefits, or have begun proceedings under the worker’s compensation laws. See § 440.39, Florida Statutes.

The employee or his dependents who file suit against a third-party tortfeasor must serve the employer, any worker’s compensation carrier, and all parties to the lawsuit or their attorneys of record, notice that the lawsuit has been filed. The carrier must serve notice of payment of compensation on the employee and all parties to the suit.

After suit is filed, the employer or worker’s compensation carrier may file in the lawsuit a Notice of Payment of Compensation which notice constitutes a lien on any judgment or settlement recovered in the action. See § 440.39(3)(a).

a. **Employer or Carrier’s Right to Bring Third-Party Lawsuit**

If the injured employee fails to bring a lawsuit against the third-party tortfeasor within 1 year after the cause of action accrues, the employer or worker’s compensation carrier, upon providing 30 days notice to the employee, may initiate a lawsuit against the third-party tortfeasor.

If the employer or carrier fails to bring a lawsuit against the third-party within 2 years after the cause of action accrues, the right to pursue the litigation reverts back to the employee or his dependents. However, the employer and carrier’s right to notice
and preservation of their lien is still intact. See § 440.39(4), Florida Statutes.

b. Settlement of Third-Party Lawsuits

Settlements of third-party lawsuits where worker’s compensation benefits have been paid or are payable may not be settled except upon agreement of the injured employee or his dependents and the employer or the employer’s insurance carrier. See § 440.39(5), Florida Statutes.

c. Statutory Mutual Duty to Cooperate

Florida statutes provide that the employee, employer and carrier have a duty to cooperate with each other in investigating and prosecuting claims and potential claims against third-party tortfeasors by producing non-privileged documents and allowing inspection of premises, but only to the extent as necessary to achieve that purpose. See § 440.39(7), Florida Statutes.

C. Minors

Before an action in tort is initiated on behalf of a minor, the natural or appointed guardian of a minor may petition the court to approve the settlement. The petition must set forth the nature of the claim and the proposed settlement. If the court is satisfied that the settlement is in the best interest of the minor, the court may enter an order authorizing the settlement and may require a bond. The natural guardian may seek approval of a settlement on behalf of the minor, before suit, in the same manner above, without bond, provided that the settlement amount does not exceed $15,000. A legal guardianship is required if the settlement exceeds that amount. See § 744.387, Florida Statutes.

The mother and father are the joint natural guardians of their natural and adoptive children during the age of the child’s minority. The natural guardians are authorized to settle any tort claim on behalf of their minor children without appointment, authority or bond when the amounts received, in the aggregate, do not exceed $15,000. See § 744.301, Florida Statutes.

All settlements with minors reached after a lawsuit has been commenced must be approved by a court having jurisdiction over the case. See § 744.387, Florida Statutes.

D. Formal Proposals of Settlement in Negligence Actions

Offers of Settlement in negligence cases in Florida are governed by Florida Statutes and the Rules of Civil Procedure. Generally, 90 days after commencement or service of the lawsuit, but not later than 45 days before trial,
either party can serve a formal proposal of settlement on another party which must particularly state, among other things, the amount of the offer and any relevant conditions. Unless withdrawn, the offer will remain open for 30 days after service of the proposal. If after the expiration of 30 days, the offer has been neither withdrawn nor accepted, the offer is deemed rejected. See 768.79, Florida Statutes and 1.442 Fla.R.Civ.P.

1. Consequences of Rejection of Offers

If a defendant files an offer of judgment in any civil action for damages which is not accepted by the plaintiff within 30 days, the defendant is entitled to recover reasonable costs and attorney’s fees incurred from the date of the filing of the offer if judgment is one of no liability or, the judgment obtained by the plaintiff is at least 25% less than the offer.

Similarly if a plaintiff files a demand for judgment which is not accepted by the defendant within the 30 days and the plaintiff recovers a judgment in an amount at least 25% greater than the offer, the plaintiff is entitled to recover reasonable costs and attorney’s fees from the date of filing of the demand. See § 768.79, Florida Statutes.

E. Recorded Statements

1. Disclosure in Litigation, Generally

The Florida Rules of Civil Procedure provide that a party may obtain a statement concerning the action or its subject matter previously made by that party. A person who is not a party may, upon request, obtain a statement concerning the action or its subject matter previously made by that person. Neither of these requests need to be supported by the "substantial need" or "undue hardship" tests ordinarily required for statements obtained in anticipation of litigation. See Fla.R.Civ.Proc. 1.280(3).

The Florida Security of Communications Act prohibits a party to a conversation from recording such conversation without the consent of all the parties to the conversation. See 934.02, et. seq., Florida Statutes.

2. Admissibility in Court

Generally, a recorded statement is admissible for impeachment purposes under the Florida Rules of Evidence. See Fla.R.Evid. 90.614. It is also admissible as substantial evidence as an admission if it is of a party opponent.
F. Res Judicata and Collateral Estoppel

Under the principles of "res judicata," a final decree bars a subsequent suit between the same parties based on the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, not necessarily actually adjudicated, in the prior proceeding. Carnival Corp. v. Middleton, 941 So. 2d 421 (Fla. 3rd DCA 2006). In connection with different causes of action, the doctrine of collateral estoppel bars relitigation of the same issues between the same parties.

G. Admissibility of Traffic Citations in Civil Cases

As a general rule, traffic citations are not admissible in any trial in Florida except when used as evidence of falsification, forgery, uttering, fraud, or perjury, or when used as physical evidence resulting from a forensic examination of the citation. See § 316.650, Florida Statutes.

However, an admission against interest that is made by a party involved in a motor vehicle accident may be used against such party in the trial of the action. For example, a defendant's prior admission of guilt of a traffic infraction may be used against the defendant in a subsequent civil action arising out of the accident to which the admission relates where the accident involved injuries and therefore required the defendant to attend a mandatory hearing on the citation.
# APPENDIX

## FLORIDA JUDICIAL CIRCUITS - TRIAL COURTS

### By County

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FLORIDA DISTRICT COURTS OF APPEALS
By Judicial Circuits

First District Court of Appeal
Tallahassee, Florida
1st, 2nd, 3rd, 4th, 8th and 14th Judicial Circuits

Second District Court of Appeal
Lakeland and Tampa, Florida
6th, 10th, 12th, 13th and 20th Judicial Circuits

Third District Court of Appeal
Miami, Florida
11th and 16th Judicial Circuits

Fourth District Court of Appeal
West Palm Beach, Florida
15th, 17th and 19th Judicial Circuits

Fifth District Court of Appeal
Daytona Beach, Florida
5th, 7th, 9th and 18th Judicial Circuits