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Survey of Florida Law: Real Property

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Survey of Florida Law: Real Property

Ronald Benton Brown* and Joseph M. Grohman**

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I. INTRODUCTION

This survey covers judicial decisions and Florida legislation that appeared between July 1, 1998 and June 30, 1999. Real estate law continues to develop in interesting ways and the authors have selected the cases and statutes that they think will be of particular interest to real estate practitioners and others involved with Florida real estate law.¹ The authors do not intend this survey to be all inclusive.² The general goal is to inform the reader, but on occasion the authors felt compelled to voice disagreement or hopes for the future.

II. ATTORNEYS' FEES

A. *Eminent Domain*

1. Statutory Changes

1999 Fla. Laws. ch 385 is a huge act relating to the Department of Transportation.³ Buried deep within this act are some significant changes to provisions relating to attorneys' fees under the eminent domain statutes.⁴ The most important changes are: section 73.015(4) of the *Florida Statutes* will provide for attorneys' fees and costs when the parties reach agreement without litigating;⁵ the condemnee will no longer be able to recover

1. Note that this article does not include zoning and land use because those are covered in a different article.

2. When dealing with legislation, the authors strongly recommend reading the entire act.

3. Under article III, section 5 of the Florida Constitution, a legislative act is limited to one subject. If this act satisfies the one subject rule, then the rule is entirely meaningless.

4. For further discussion see the Eminent Domain section *infra* Part X. See also Paul D. Bain, *1999 Amendments to Florida's Eminent Domain Statutes*, THE FLA. B.J., Nov. 1999 at 68, 68-71.

5. Ch. 99-385, § 57(4), Fla. Laws 3820, 3878-79 (codified as amended FLA. STAT. § 73.015(4) (1999)).

prejudgment interest on attorneys' fees and costs;⁶ the modification of the calculation of the benefit achieved by the attorney, which is the basis for calculating attorneys' fees, to include nonmonetary benefits; and a schedule to use in the calculating the fees from the benefit.⁷

2. Trial

Department of Transportation v. Skidmore.⁸ The district court found that the decision the trial court made followed the correct approach for calculating fees.⁹ The district court determined the benefits that had been obtained for the clients, calculated the lodestar figure using the factors listed in the statute,¹⁰ and then decided "whether to adjust that figure based on the total benefits obtained."¹¹ However, the attorneys' fees were \$900,000, when the benefit obtained was only \$1,225,000.¹² The attorneys' fee were equal to almost seventy-five percent of the benefit, in contrast to the norm which was twenty-five to thirty-five percent.¹³ In fact, the client was not entitled to keep all the money that the Department of Transportation had deposited in the registry of the court at the beginning of this quick take proceeding.¹⁴ These factors alone made the district court state, "we would find ourselves hard-pressed to affirm this award."¹⁵

In addition, other errors necessitated reversal. First, in calculating the client's benefit, the court included the value of the Department of Transportation's rebuilding of a pier, despite the fact that the client, and its

6. *Id.* Paul D. Bain questioned the constitutionality of this provision based on the supreme court's reasoning in *Boulis v. Florida Dep't of Trans.*, 733 So. 2d 959 (Fla. 1999). Bain, *supra*, note 4, at 70. *Boulis* is discussed *infra* text accompanying notes 333-43, that prejudgment interest on costs is required by the Florida Constitution.

7. Ch. 49-385, § 60, 1999 Fla. Laws 3820, 3880 (codified at FLA. STAT. § 73.091 (1999)).

8. 720 So. 2d 1125 (Fla. 4th Dist. Ct. App. 1998).

9. *Id.* at 1129.

10. *Id.* at 1128.

The novelty, difficulty, and importance of the questions involved.

The skill employed by the attorney in conducting the cause.

The amount of money involved.

The responsibility incurred and fulfilled by the attorney.

The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

Id. (quoting FLA. STAT. § 73.092(2)(a)-(e) (1991)).

11. *Skidmore*, 720 So. 2d at 1129.

12. *Id.*

13. *Id.* at 1130.

14. *Id.*

15. *Id.*

attorney, had vigorously opposed the rebuilding.¹⁶ Second, in calculating the number of hours expended by the attorneys, the court included the time that they had spent litigating the question of whether their client improperly filled in sovereignty lands.¹⁷ The district court held that to be a matter that was merely incidental to the eminent domain proceedings and, therefore, not compensable.¹⁸

Finally, in taxing costs, the trial court was bound by the Statewide Uniform Guidelines for Taxation of Costs.¹⁹ While “[t]he trial court may deviate from the Guidelines depending on the facts of the case as justice may require,”²⁰ the trial court went too far here. It was error to include office expenses such as postage, long distance calls, fax transmissions and delivery services.²¹ It was error to award computer research costs that should have been considered as overhead.²² In addition, it was also error to include travel expenses for experts and witnesses where the record did not reflect that they had to travel from out of state.²³ Furthermore, it was error to award the law firm’s surcharge assessed on other expenses.²⁴

*Teeter v. Department of Transportation.*²⁵ The condemnee sought attorneys’ fees under section 73.092 of the *Florida Statutes*.²⁶ The trial court awarded fees based solely upon the monetary benefits achieved for the client under section 73.092(1), which provided, “[e]xcept as otherwise provided in this section, the court, in eminent domain proceedings, shall award attorneys’ fees based solely on the benefits achieved for the client.”²⁷ The trial court rejected the condemnee’s additional request for fees under section 73.092(2).²⁸ The district court affirmed.²⁹ Section 73.092(2) provided for the payment of attorneys’ fees where such fees have been “incurred in defeating an order of taking, or for an apportionment, or other supplemental proceedings.”³⁰ This case was settled before it went to trial.³¹ Utilizing the plain meaning approach to statutory interpretation, the court concluded that

16. *Skidmore*, 720 So. 2d at 1129.

17. *Id.*

18. *Id.*

19. *Id.* at 1130–31.

20. *Id.* at 1130.

21. *Skidmore*, 720 So. 2d at 1130.

22. *Id.*

23. *Id.*

24. *Id.* at 1130–31.

25. 713 So. 2d 1090 (Fla. 5th Dist. Ct. App. 1998).

26. *Id.* at 1091; FLA. STAT. § 73.092 (Supp. 1994).

27. *Teeter*, 713 So. 2d at 1091; FLA. STAT. § 73.092(1).

28. *Teeter*, 713 So. 2d at 1091.

29. *Id.*

30. *Id.*; FLA. STAT. § 73.092(2).

31. *Teeter*, 713 So. 2d at 1091–92.

section 73.092(2) simply did not apply to this situation.³² Furthermore, the condemnee was not entitled to attorneys' fees for hours spent litigating the attorneys' fees issue because that was not provided for by the statute.³³

Judge Sharp concurred specially in order to urge the legislature to reconsider the potential constitutional defects in the statute.³⁴ Although acknowledging that no constitutional issues had been raised in this case, she noted that the statute was "fraught with problems and may be constitutionally defective."³⁵ Under the Florida Constitution, the condemnee is entitled to attorneys' fees, as part of the mandated compensation.³⁶ The limit of the statute on attorneys' fees, based upon the nature of the proceeding, may shortchange some future condemnees.³⁷

3. Appellate

*Department of Transportation v. Skinners Wholesale Nursery, Inc.*³⁸ The land in this case was the subject of a "quick take."³⁹ The parties agreed on all issues except business damages which went to trial.⁴⁰ The Department of Transportation's ("DOT") position was that business damages were \$130,000, but the final judgment awarded to the landowner was \$2,950,000.⁴¹ Of course, the DOT appealed, but the landowner prevailed again and the award was upheld.⁴² In calculating appellate attorneys' fees, the trial court determined a reasonable hourly rate of \$250 per hour.⁴³ It concluded from the evidence that 100.75 hours had been expended in the case.⁴⁴ The hours expended produced a lodestar fee of \$25,187.50.⁴⁵ The court then "applied what it described as a 'results obtained' enhancement in an amount equal to 2.5% of the \$2,950,000, the amount of the business damages awarded at trial, or \$73,750; and rounded the awarded fee to \$98,000."⁴⁶ The DOT appealed the addition of the enhancement and the

32. *Id.* at 1092.

33. *Id.*

34. *Id.* (Sharp, J., concurring).

35. *Id.*

36. *Teeter*, 713 So. 2d at 1092 (citing FLA. CONST. art. X, § 6(a)).

37. *See* FLA. STAT. § 73.092 (1999).

38. 736 So. 2d 3 (Fla. 1st Dist. Ct. App. 1998).

39. *Id.* at 4.

40. *Id.*

41. *Id.* at 5.

42. *Id.* at 3.

43. *Skinners Wholesale Nursery, Inc.*, 736 So. 2d at 5.

44. *Id.*

45. *Id.*

46. *Id.*

district court reluctantly reversed, although it did not find the award to be excessive.⁴⁷

The use of the lodestar approach was the correct way to approach appellate attorneys' fees. Moreover, applying an enhancement for results obtained might be justified in the rare case where the quality of service and the results obtained were exceptional.⁴⁸ However, it would be inappropriate to use a risk multiplier because that is designed to compensate the lawyer for the risk of not getting paid in a contingent fee case.⁴⁹ In this eminent domain proceeding where the condemning authority had appealed, attorneys' fees were mandated by statute,⁵⁰ so there was no risk that this attorney would not get paid.⁵¹ Unfortunately, the trial court's order, and the evidence on which it was based, considered the risk of losing on appeal as a factor in calculating the enhancement.⁵² Thus reversal was required.⁵³

*Seminole County v. Boyle Investment Co.*⁵⁴ In this condemnation case, the county had appealed the trial court's award of attorneys' fees to the landowner.⁵⁵ The district court reversed the award of interest on the attorneys' fees and the inclusion of expert witness fees, but affirmed on all other points.⁵⁶ The county then opposed the landowner's motion for appellate attorneys' fees, apparently on the theory that it had been the prevailing party on the appeal.⁵⁷ However, the district court concluded that the legislature mandated landowners to receive reasonable appellate attorneys' fees in all eminent domain cases, unless the appeal was filed by the landowner and the appeal was unsuccessful.⁵⁸ The exception did not apply to this case because the appeal had been filed by the county.⁵⁹

47. *See id.* at 8–9.

48. *See Skidders Wholesale Nursery, Inc.*, 736 So. 2d at 9.

49. *See id.* at 8.

50. *Id.* at 3; FLA. STAT. § 73.131(2) (1993).

51. *See* FLA. STAT. § 73.131(2) (1993).

52. *Skidders Wholesale Nursery, Inc.*, 736 So. 2d at 8–9.

53. *Id.* at 9.

54. 724 So. 2d 645 (Fla. 5th Dist. Ct. App. 1999), *review denied*, 732 So. 2d 328 (Fla. 1999).

55. *Id.* at 645.

56. *Id.*

57. *See id.* at 645–66.

58. *Id.* at 646. Section 73.131(2) of the *Florida Statutes* provides that “[t]he petitioner [condemning authority] shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorneys’ fee to be assessed by that court, except upon an appeal taken by a defendant [condemnee] in which the judgment of the lower court shall be affirmed.” FLA. STAT. § 73.131(2) (1999).

59. *Boyle Inv. Co.*, 724 So. 2d at 646.

B. *Landlord and Tenant*

*Florida RS, Inc. v. Nelson.*⁶⁰ The tenant brought suit claiming the landlord had breached the lease by, inter alia, failing to pay interest on an annual basis as required by statute.⁶¹ The court rejected the tenant's motion for certification of a class action, but the tenant prevailed on his original claim and was awarded \$30.70 interest on his security deposit.⁶² The court then awarded the tenant, an attorney who represented himself with the aid of another lawyer, attorneys' fees of \$27,654.⁶³

The district court reversed.⁶⁴ By statute, attorneys' fees could be recovered by the prevailing party in litigation concerning a residential lease.⁶⁵ However, the district court concluded that the tenant had not prevailed on the attempt to have the class certified.⁶⁶ Therefore, the tenant was not entitled to attorneys' fees involved with that attempt.⁶⁷ The tenant was entitled to attorneys' fees for claims on which he prevailed that included only the attorney's time spent on recovering interest on his security deposit.⁶⁸

III. BROKERS

A. *Discipline and Licensing*

*Starr v. Department of Business & Professional Regulation.*⁶⁹ In completing her application for a license, Starr failed to reveal that she had pled no contest to two separate misdemeanor charges, i.e., disorderly intoxication and disorderly conduct.⁷⁰ When that was discovered, the Department of Business and Professional Regulation ("DBPR") revoked her license.⁷¹ On appeal, she challenged the Department's right to inquire about criminal conduct not a felony and not related to real estate transactions.⁷² The district court summarily rejected that claim and any argument challenging the license revocation as being different from sanctions given to

60. 24 Fla. L. Weekly D57 (5th Dist. Ct. App. Dec. 18, 1998).

61. *Id.* at D57; FLA. STAT. § 83.49(9) (1995).

62. *Nelson*, 24 Fla. L. Weekly at D57-58.

63. *Id.* at D57.

64. *Id.* at D58.

65. FLA. STAT. § 83.48 (1995).

66. *Nelson*, 24 Fla. L. Weekly at D58.

67. *Id.* at D58-59.

68. *Id.*

69. 729 So. 2d 1006 (Fla. 4th Dist. Ct. App. 1999).

70. *Id.* at 1006.

71. *Id.*

72. *Id.*

others for similar offenses or as being beyond the authority of the Department.⁷³

*White v. Department of Business & Professional Regulation.*⁷⁴ White was both a broker and a building contractor.⁷⁵ Buyers agreed to buy a lot in Whisper Ridge Subdivision on which the broker would build their house.⁷⁶ The purchase contract provided that the deposit would be held in escrow by Les White Realty/Builders.⁷⁷ However, the deposit was never put in the escrow.⁷⁸ White used the money to buy the lot in his own name.⁷⁹ Then White's construction financing disappeared, so the house was never built and the lot never sold to the buyers.⁸⁰ White, however, refused to return their deposit.⁸¹ When the DBPR began disciplinary proceedings, White's defense was that he acted only as a builder in this transaction, not as a broker, so the DBPR had no basis for disciplining him.⁸²

The Real Estate Commission found otherwise and revoked his broker's license.⁸³ The record revealed that, throughout the transaction, White had represented himself as a licensed real estate broker.⁸⁴ The purchase contract indicated that White was acting as a broker and that the deposit would be held in escrow by his realty company.⁸⁵ "Although the evidence at the hearing disclosed White wore several 'hats' in this transaction, it supports the Commission's conclusion that one of the hats worn was that of a licensed real estate broker."⁸⁶ In that role, White had breached his statutory duties to properly escrow the deposit money and return the deposit.⁸⁷ In light of the fact that White's license was already suspended at the time of this transaction, the Commission was justified in revoking his license.⁸⁸

73. *Id.* at 1006-07.

74. 715 So. 2d 1130 (Fla. 5th Dist. Ct. App. 1998).

75. *Id.* at 1130.

76. *Id.*

77. *Id.*

78. *Id.*

79. *White*, 715 So. 2d at 1130.

80. *Id.*

81. *Id.*

82. *Id.* at 1131.

83. *Id.* at 1130.

84. *White*, 715 So. 2d at 1130.

85. *Id.* at 1130-31.

86. *Id.* at 1131.

87. *Id.*; FLA. STAT. § 475.25(1)(d) (1999).

88. *White*, 715 So. 2d at 1131.

B. Brokerage Agreements and Commissions

*A.F.S. Services, Inc. v. Venturvest Realty Corp.*⁸⁹ Under the brokerage agreement, the broker (actually a co-broker in this situation) would earn the first half of its commission within thirty days after execution of the lease and the second half thirty days after the first month's rent had been collected.⁹⁰ A commercial tenant was procured.⁹¹ The tenant signed the lease and paid a deposit covering security and prepaid rent.⁹² However, eleven days later, the landlord and tenant signed a "Second Lease Addendum," increasing the premises by approximately fifty percent.⁹³ Eventually, the tenant defaulted on its obligations under the amended lease.⁹⁴

The broker claimed that it was entitled to its commission because it had fully performed.⁹⁵ The landlord, however, pointed out that the lease also provided that, "[n]o commission shall be earned by Broker in the event of a monetary default by Tenant."⁹⁶ With the terms apparently in conflict, the trial court ruled for the landlord, but the district court reversed the decision in part.⁹⁷ It ruled that the broker had earned the first half of the commission based upon the lease signing and the second half based upon the payment of the first month's rent.⁹⁸ The court concluded simply, "default under the Second Lease Addendum does not in any way affect A.F.S.'s entitlement to the commission that it had already earned."⁹⁹

*Earnest & Stewart, Inc. v. Codina.*¹⁰⁰ The sellers had an exclusive listing agreement with a broker.¹⁰¹ Under that listing agreement, the broker could pay a portion of its commission to a cooperating broker.¹⁰² Another broker, Earnest & Stewart, was aware that the house was for sale.¹⁰³ One of its sales people informed the Coneses of that fact and offered to show them the house.¹⁰⁴ The Coneses refused that offer because they were already

89. 725 So. 2d 1252 (Fla. 3d Dist. Ct. App. 1999), *review denied*, (Mar. 10, 1999).

90. *Id.* at 1253.

91. *Id.*

92. *Id.*

93. *Id.*

94. *A.F.S. Servs., Inc.*, 725 So. 2d at 1253.

95. *Id.*

96. *Id.*

97. *Id.* at 1252.

98. *Id.* at 1253.

99. *A.F.S. Servs., Inc.*, 725 So. 2d at 1253.

100. 732 So. 2d 364 (Fla. 3d Dist. Ct. App. 1999), *review denied*, (Mar. 24, 1999).

101. *Id.* at 365.

102. *Id.*

103. *Id.*

104. *Id.*

familiar with the house and knew the sellers.¹⁰⁵ The Coneses dealt directly with the sellers in negotiating the deal which culminated with the sale of the house to the Coneses.¹⁰⁶ Honoring their listing agreement, the sellers paid the real estate commission to their exclusive broker.¹⁰⁷ Earnest & Stewart, however, claimed that they were also entitled to a real estate commission because they had procured the buyer.¹⁰⁸

Earnest & Stewart's claim was rejected by the trial court which granted summary judgment to the buyers and sellers and the Third District Court of Appeal affirmed.¹⁰⁹ The claim was based on the theory that Earnest & Stewart had become the cooperating brokers and were entitled, as third party beneficiaries of the listing agreement, to share in the commission.¹¹⁰ The district court concluded they had produced a ready, willing and able buyer and, therefore, had not become cooperating brokers.¹¹¹ Thus they had not earned a broker's commission.¹¹² The court likened it to the situation where a broker merely tells a customer about a "For Sale" sign it has seen on the lawn of a property.¹¹³ That alone is not enough to earn a commission.¹¹⁴ The court did not, however, address the validity of the plaintiff's third party beneficiary theory. Furthermore, it specifically avoided dealing with the question of whether the broker, even if the theory had been valid, was entitled to sue the sellers and buyers, rather than the listing broker, for its share of the commission.

IV. CONDOMINIUMS

*Graves v. Ciega Verde Condominium Ass'n, Inc.*¹¹⁵ Nancy Graves, the personal representative to Fred Graves' estate, appealed the trial court's non-final order vacating an amended final judgment of foreclosure and canceling judicial sale against Ciega Verde Condominium Association, Inc. ("Ciega Verde") and its unit owners in this foreclosure and construction lien action.¹¹⁶

105. *Earnest & Stewart, Inc.*, 732 So. 2d at 365.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 365-67.

110. *Earnest & Stewart, Inc.*, 732 So. 2d at 365 n.2.

111. *Id.* at 365-66.

112. *Id.* at 366.

113. *Id.*

114. *Id.*

115. 703 So. 2d 1109 (Fla. 2d Dist. Ct. App. 1997).

116. *Id.* at 1110.

Decedent, Fred Graves, as a general contractor, performed repair work to the condominiums pursuant to a contract.¹¹⁷ Ciega Verde later refused to pay Graves for his services and denied Graves access to the property.¹¹⁸ Graves served a claim of lien and a contractor's affidavit.¹¹⁹ Subsequently, Graves filed an amended complaint which sought to foreclose the mechanic's lien against the unit owners and sought recovery of damages for breach of contract against Ciega Verde.¹²⁰ Graves sued the unit owners as a defendant class with Ciega Verde as class representative.¹²¹ Ciega Verde, in its individual capacity and as representative of the class, answered the amended complaint.¹²²

The contract portion of the complaint was set for binding arbitration where Graves was the prevailing party.¹²³ "Graves served Ciega Verde with a motion to confirm the arbitration award and to set cause for trial on the foreclosure action against the unit owners."¹²⁴ "[T]he trial court entered final judgment in March 1996, . . . and set [judicial] sale for May 1996."¹²⁵

Counsel for unit owners "filed a motion to set aside the amended final judgment . . . [claiming] the trial court did not have jurisdiction to order foreclosure of the unit owners' property."¹²⁶ Ultimately, the trial court granted the unit owners' motion to dismiss and dismissed them from the action.¹²⁷ Since Graves failed to serve such unit owners "within 120 days from filing the original complaint as required by Florida Rule of Civil Procedure [Rule] 1.170(I) [sic]," he was precluded from filing the original complaint.¹²⁸

The district court recognized that the trial court erred in vacating the amended final judgment of foreclosure.¹²⁹ The trial court had jurisdiction of the unit owners because they constituted a class with a common interest based on membership in Ciega Verde.¹³⁰

Ciega Verde's Declaration of Condominium stated that each unit owner was a member of the condominium association while they owned the unit.¹³¹

117. *Id.*

118. *Id.*

119. *Id.*

120. *Graves*, 703 So. 2d at 1110.

121. *Id.* at 1111.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Graves*, 703 So. 2d at 1111.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Graves*, 703 So. 2d at 1111; see FLA. R. CIV. P. 1.221.

131. *Graves*, 703 So. 2d at 1111.

When Ciega Verde authorized work to be performed on the common grounds, it was understood that the unit owners consented to that authorization.¹³² As such, Graves' lien attached to each condo unit and could be foreclosed.¹³³

Each unit owner was not required to receive individual notice.¹³⁴ It was the condominium's board of directors' fiduciary and statutory obligation to give unit owners notice of a lawsuit.¹³⁵ Graves' service upon Ciega Verde, the class representative, was sufficient.¹³⁶ If the court wanted to require notice to the individual members, it should have provided Graves adequate time to do so.¹³⁷

Perlow v. Goldberg.¹³⁸ This court affirmed the order dismissing owner's claims because the facts showed the directors could not be held liable in their individual capacity.¹³⁹ Perlow sought personal judgments for breach of fiduciary duty against Goldberg and Leb for "failure to properly administer insurance proceeds."¹⁴⁰

The condominium association directors were immune from individual liability absent fraud, self-dealing, or criminal activity.¹⁴¹ The court below relied on *Munder v. Circle One Condominium, Inc.*,¹⁴² which furthered this rule.¹⁴³ This court agreed with that holding and stated the directors here were neither unjustly enriched nor did they commit fraud or a crime.¹⁴⁴ At most, the directors were negligent by failing to properly administrate insurance proceeds from Hurricane Andrew.¹⁴⁵ This negligence was not enough to create personal liability for the condominium directors.¹⁴⁶

The court also recognized that the owner's reliance on *B & J Holding Group v. Weiss*¹⁴⁷ was unwarranted because the directors in that case deliberately engaged in self-dealing.¹⁴⁸ That was not the situation here.¹⁴⁹

132. *Id.* at 1112.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Graves*, 703 So. 2d at 1112.

137. *Id.*

138. 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997).

139. *Id.* at 149.

140. *Id.*

141. *Id.*; see FLA. STAT. §§ 607.0831(1), 617.0834, 718.111(2) (1995).

142. 596 So. 2d 144 (Fla. 4th Dist. Ct. App. 1992).

143. *Perlow*, 700 So. 2d at 150.

144. *Id.*

145. *Id.*

146. *Id.*

147. 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1977).

148. *Perlow*, 700 So. 2d at 150; see *B & J Holding Corp.*, 353 So. 2d at 142.

149. *Perlow*, 700 So. 2d at 150.

*Ruffin v. Kingswood E. Condominium Ass'n, Inc.*¹⁵⁰ Kingswood E. Condominium Association ("Kingswood") brought an arbitration proceeding under section 718.1255 of the *Florida Statutes*, against unit owner Mary Ruffin and her son, appellant Paul Ruffin.¹⁵¹ The reason for the arbitration was that Kingswood alleged that Mary Ruffin and the appellant were in violation of the condominium declarations.¹⁵² Kingswood requested the Division of Florida Land Sales, Condominium and Mobile Homes of the Department of Business Regulation to issue an order requiring appellant as tenant to vacate the premises and restrain him from further entry.¹⁵³ The appellant informed "the arbitrator that his mother had moved... and therefore, the matter was moot."¹⁵⁴ However, Kingswood wanted future protection. So, the arbitrator issued an order that "Mr. Ruffin shall remain away and off the condominium property."¹⁵⁵

The appellant filed a complaint for a trial de novo in circuit court and Kingswood moved for summary judgment on the grounds that the case was moot.¹⁵⁶ The circuit court entered the summary judgment and reserved jurisdiction to assess attorneys' fees.¹⁵⁷

The appellate court, *sua sponte*, considered the subject matter jurisdiction of the arbitrator to have heard this action.¹⁵⁸ The court looked at section 718.1255(1) of the *Florida Statutes*,¹⁵⁹ and found that the arbitrator had no subject matter jurisdiction.¹⁶⁰ The arbitrator may only hear disputes within its statutory authority and disputes that include disagreements involving eviction or other removal are not within the arbitrator's statutory authority.¹⁶¹ Further, the appellant was not the owner of the unit and, therefore, section 718.1255 did not cover disputes with the appellant.¹⁶²

Since the arbitrator lacked subject matter jurisdiction the trial de novo was not moot.¹⁶³ If the appellant had not challenged the matter, the arbitrator's order would have become final.¹⁶⁴ Therefore, this court reversed

150. 719 So. 2d 951 (Fla. 4th Dist. Ct. App. 1998).

151. *Id.* at 952; *See* FLA. STAT. § 718.1255 (1995).

152. *Ruffin*, 719 So. 2d at 952.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Ruffin*, 719 So. 2d at 952.

158. *Id.*

159. FLA. STAT. § 718.1255(1) (1995).

160. *Ruffin*, 719 So. 2d at 953.

161. *See id.*

162. *See id.*; *See* *Carlandia Corp. v. Obernauer*, 695 So. 2d 408, 410 (Fla. 4th Dist. Ct. App. 1997).

163. *Ruffin*, 719 So. 2d at 953.

164. *Id.*

the final judgment and directed the trial court to enter an order vacating the arbitrator's final order.¹⁶⁵

Current legislative changes include, but are not limited to, the following:

Section 718.111(11)(d) of the *Florida Statutes*¹⁶⁶ now includes subparagraph (d) which provides for the association to "maintain adequate insurance or fidelity bonding of all persons who control or disburse funds of the association."¹⁶⁷

Section 718.112(d)(8) of the *Florida Statutes*¹⁶⁸ provides that, unless the bylaws provide otherwise, any vacancy on the board of directors of the association prior to the expiration of a term may be filled by a majority vote of the remaining directors even though they may constitute less than a quorum or by the sole remaining director.¹⁶⁹ Alternatively, however, the board may hold an election to fill the vacancy.¹⁷⁰

Section 718.503(2)(a) of the *Florida Statutes*¹⁷¹ has been amended to require that a unit owner who is not a developer shall include a copy of the financial information required by section 718.111 in the disclosure information presented to a prospective purchaser.¹⁷² Likewise, a prospectus or offering circular, per section 718.504¹⁷³ of the *Florida Statutes*, requires the same information to be included.¹⁷⁴

V. CONSTRUCTION

Gaston-Thacker General Partners v. School Board.¹⁷⁵ The plaintiff was the successful bidder on a school construction project.¹⁷⁶ The contract required that a certain percentage of the subcontract work be allocated to firms owned by hispanics, blacks, and women.¹⁷⁷ To make it possible for the plaintiff to satisfy that requirement, the school board agreed to make bi-weekly progress payments to under financed subcontractors.¹⁷⁸ As the

165. *Id.*

166. FLA. STAT § 718.111(11)(d) (1999).

167. *Id.*

168. *Id.* § 718.112(d)(8).

169. *Id.*

170. *Id.*

171. FLA. STAT. § 718.503(2)(a) (1999).

172. *Id.*

173. *Id.* § 718.504.

174. *Id.*

175. 12 Fla. L. Weekly Fed. D381 (S.D. Fla. Apr. 22, 1999).

176. *Id.* at D381.

177. *Id.*

178. *Id.* at D382.

project progressed, "it allegedly became clear to both parties that the drawings, specifications, and addenda were flawed and could not be used for the Project."¹⁷⁹ That resulted in extra work for plaintiff and in delays in the progress payments to the subcontractors.¹⁸⁰ To keep them working, plaintiff was forced to make their progress payments out of its funds.¹⁸¹ When payment was not forthcoming from the school board, the plaintiff brought this suit in federal district court claiming: 1) breach of contract; 2) rescission and restitution; and 3) quantum meruit.¹⁸² The school board responded with a motion to dismiss based on the clause in the contract that provided that, "[a]ll matters in dispute under this Contract and/or the Contract Documents shall be resolved in the Circuit Court for the 11th Judicial Circuit, In and For Dade County, Florida."¹⁸³ There was no doubt that a forum selection clause can preclude removal of a claim to a federal court.¹⁸⁴ Furthermore, there was no allegation that this forum selection clause was unreasonable or unjust, or that it had been procured by fraud or overreaching.¹⁸⁵ Nor was there an allegation that the clause failed to unequivocally state the selected forum.¹⁸⁶ Thus, there was no claim on which the clause could have been held invalid.¹⁸⁷ Plaintiff's argument was that its claims did not fit within reach of the clause and so it was free to bring these claims in federal court.¹⁸⁸

That argument was rejected by Chief Judge Davis.¹⁸⁹ Even though the moving party had a heavy burden, the plaintiff could not survive the motion to dismiss merely by arguing that these claims did not arise under the contract.¹⁹⁰ Analysis of the term led to the contrary conclusion.¹⁹¹ To interpret the contract as plaintiff wanted would allow parallel claims to be litigated simultaneously in state and federal court, and that could not have been what the parties intended by this clause, particularly as the contract was the only basis for the relationship out of which these claims arose.¹⁹²

179. *Id.*

180. *Gaston-Thacker Gen. Partners*, 12 Fla. L. Weekly Fed. at D382.

181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.*

185. *Gaston-Thacker Gen. Partners*, 12 Fla. L. Weekly Fed. at D382.

186. *Id.*

187. *Id.*

188. *Id.* at D382-83.

189. *Id.*

190. *Gaston-Thacker Gen. Partners*, 12 Fla. L. Weekly Fed. at D382-83.

191. *Id.* at 383.

192. *Id.*

*Sabal Chase Homeowners' Ass'n, Inc. v. Walt Disney World Co.*¹⁹³ The condominium was built between 1973 and 1978.¹⁹⁴ In 1992, Hurricane Andrew severely damaged the common areas.¹⁹⁵ Consequently, in 1994, the Homeowners' Association brought this action against, *inter alia*, the builder of the condominium, claiming latent construction defects.¹⁹⁶ The trial court granted the defendants' motion for summary judgment based on the fifteen year statute of repose provided by section 95.11(3)(c) of the *Florida Statutes*.¹⁹⁷ The Third District Court of Appeal affirmed.¹⁹⁸

On appeal, the homeowners association unsuccessfully raised two points.¹⁹⁹ The first was that the statute was inapplicable because it was enacted in 1980, after the acts complained of had occurred.²⁰⁰ The statute had originally been enacted in 1978, before the construction was completed, but the enactment was held invalid because the legislature had failed to make an express finding of overwhelming public necessity as required by the constitution.²⁰¹ The legislature cured that defect by reenacting the statute with an express finding, having the effect that "all parts of the original statute which were reenacted are deemed to have been in continuous effect."²⁰²

The second point was that the fifteen years had not expired because the time did not begin to run until the developer turned over control of the association to the unit owners.²⁰³ This argument was based on section 718.124 of the *Florida Statutes* which provides that, "[t]he statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration."²⁰⁴ The district court rejected this argument.²⁰⁵ It noted that courts have clearly delineated the distinction between a statute of limitation and a statute of repose.²⁰⁶ The fifteen year statute at issue here was clearly a

193. 726 So. 2d 796 (Fla. 3d Dist. Ct. App. 1999), *review denied*, (Mar. 24, 1999).

194. *Id.* at 797.

195. *Id.*

196. *Id.*

197. *Id.* (citing FLA. STAT. § 95.11(3)(c) (Supp. 1980)).

198. *Sabal Chase Homeowners' Ass'n*, 726 So. 2d at 799.

199. *Id.* at 798.

200. *Id.* at 797-98.

201. *Id.* at 799 (citing *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979)).

202. *Id.* at 799.

203. *Sabal Chase Homeowners' Ass'n*, 726 So. 2d at 798.

204. *Id.* at 798 n.1 (citing FLA. STAT. § 718.124 (1995)).

205. *Id.* at 799.

206. *Id.* at 798.

statute of repose, therefore, section 718.124 was not applicable to delay its application.²⁰⁷

Judge Cope's dissent focused on the distinction of the statute of limitations and the statute of repose considered in the majority's opinion.²⁰⁸ Judge Cope disliked the fact that the term statute of limitations is technically distinguishable from a "statute of repose," but has been used generically to include all statutes that impose time limits for bringing suit.²⁰⁹ The Florida Legislature seems to use the generic definition by including this statute of repose in chapter ninety-five under the general term "statute of limitations."²¹⁰ In interpreting a statute, the critical question is what the legislature intended.²¹¹ Furthermore, any doubt regarding the limit intended by the legislature, should be resolved in favor of the longer period because limitations defenses are not preferred.²¹²

VI. COOPERATIVES

Current legislative changes include, but are not limited to, the following:

Section 719.103 of the *Florida Statutes* has added additional definitions including those for "buyers," "common areas," and "conspicuous type."²¹³ A "buyer" is one "who purchases a cooperative," and the words "purchaser" and "buyer" may be used interchangeably within the act.²¹⁴ "Common areas" now include, among other things, cooperative property which is not included within the units.²¹⁵ "Conspicuous type" means typing capital letters not smaller than the largest type on the page on which it appears.²¹⁶ Also, there are additional definitions for "division," "limited common areas," "rental agreement," and "residential cooperative."²¹⁷

Section 719.1035 of the *Florida Statutes* has been amended to require that, upon creating a cooperative, the developer or association must record the information with the division, on a division form, within thirty working days.²¹⁸

207. *Id.* at 799.

208. *Sabal Chase Homeowners' Ass'n*, 726 So. 2d at 799-801 (Cope, J., dissenting).

209. *Id.* at 800.

210. *Id.* at 801.

211. *Id.* at 800-01.

212. *Id.* at 801.

213. FLA. STAT. § 719.103 (1999).

214. *Id.* § 719.103(4).

215. *Id.* §§ 719.103(7), (8)(a).

216. *Id.* § 719.103(11).

217. *Id.* §§ 719.103(17), (18), (20), (21).

218. FLA. STAT. § 719.1035 (1999).

Section 719.104 of the *Florida Statutes* now includes subpart (10), requiring the board to notify the division before any action is taken that would dissolve or merge the cooperative association.²¹⁹

Section 719.502(1)(a) of the *Florida Statutes* now includes a provision that states:

[a] developer shall not close on any contract for sale or contract for a lease period of more than 5 years until the developer prepares and files with the division documents complying with the requirements of this chapter and the rules promulgated by the division and until the division notifies the developer that the filing is proper.²²⁰

Further, any contract for sale or for a lease period of more than five years shall not be closed on by the developer until all documents, as required by section 719.503(1)(b), are prepared and delivered by the developer to the prospective buyer.²²¹

Section 719.503(1)(b) of the *Florida Statutes* has an added provision requiring that:

[t]he developer shall not close for 15 days following the execution of the agreement and delivery of the documents to the buyer as evidenced by a receipt for documents signed by the buyer unless the buyer is informed in the 15-day voidability period and agrees to close prior to the expiration of the 15 days.²²²

The developer must keep in its records "a separate signed agreement as proof of the buyer's agreement to close prior to the expiration of the voidability period."²²³

Section seven of Chapter 99-350 of the *Laws of Florida* adds section 718.105(5) to the 1999 *Florida Statutes*, requiring the filing of a certificate demonstrating all taxes have been fully paid.²²⁴

219. *Id.* § 719.104(10).

220. *Id.* § 719.502(1)(a).

221. *Id.*

222. *Id.* § 719.503(1)(b).

223. FLA. STAT. § 719.503(1)(b) (1999).

224. Ch. 99-350, § 1, 1999 Fla. Laws 3589, 3589 (codified at FLA. STAT. § 718.105(5) (1999)).

VII. DEEDS, RESTRICTIONS, AND COVENANTS

*Mora v. Karr.*²²⁵ The court affirmed the trial court's denial of the temporary injunction to the Moras, regarding a violation of deed restrictions.²²⁶ Karr wished to purchase a home and rebuild so that it would contain "a three car garage and a twenty five foot setback."²²⁷ However, deed restrictions only allowed a two car garage and required a thirty-five foot setback.²²⁸ Karr secured a waiver to those restrictions from the developer and from adjacent property owners prior to the purchase.²²⁹ After closing, Mr. Mora, an adjacent property owner and attorney, wrote Karr a letter stating that he would sue over the deed restrictions he waived.²³⁰ Karr continued with construction, and Mora sued.²³¹

Both the trial court, and this court, denied injunctive relief to Mora.²³² The most compelling evidence was the fact that Mora waived the deed restrictions prior to the construction, and that Karr relied on that waiver in making the purchase.²³³

VIII. EASEMENTS

*Citgo Petroleum Corp. v. Florida East Coast Railway Co.*²³⁴ Final judgment was entered which quieted title to certain property in favor of Florida East Coast Railway Company ("FEC").²³⁵ The appellate court reversed, finding that "Citgo was granted an express easement to construct and maintain a pipeline on the subject property . . . and that Citgo's failure to record this easement does not render it ineffectual against FEC since FEC was on inquiry notice of its existence."²³⁶

The events giving rise to this dispute involved the expansion of the Fort Lauderdale-Hollywood International Airport and the resulting utilities relocation.²³⁷ Citgo's licensing contract with FEC provided them with the "right and privilege" to operate a pipeline under FEC's main track, and

225. 697 So. 2d 887 (Fla. 4th Dist. Ct. App. 1997).

226. *Id.* at 888.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Mora*, 697 So. 2d at 888.

231. *Id.*

232. *Id.*

233. *Id.*

234. 706 So. 2d 383 (Fla. 4th Dist. Ct. App. 1998).

235. *Id.* at 384.

236. *Id.*

237. *Id.*

across their right-of-way.²³⁸ FEC's right-of-way and Citgo's pipeline both had to be repositioned when the airport was expanded.²³⁹ Citgo and Florida's Department of Transportation ("DOT") agreed to reestablish the pipeline.²⁴⁰ The stipulated agreement stated that property rights along the original pipeline belonged to Citgo. It also provided that Citgo transfer those property rights to the DOT in exchange for allowing Citgo to reposition and operate the pipeline on other DOT property.²⁴¹

Citgo informed FEC that the pipeline was to be reestablished across the proposed relocation of FEC's right-of-way.²⁴² FEC sent Citgo the appropriate engineering specifications, as well as an application for a new licensing agreement.²⁴³ FEC remained adamant that, until it reached an agreement with Broward County to reposition its right-of-way, it was unable to consider granting Citgo a utility crossing permit.²⁴⁴

FEC and Broward County eventually "reached an agreement with Broward County to relocate the railroad track."²⁴⁵ That agreement provided that FEC would transfer its existing right-of-way, and in exchange retrieve a replacement right-of-way to Broward County.²⁴⁶ The parcels of land comprising the new right-of-way were transferred to FEC, which promptly recorded the quitclaim deed.²⁴⁷ Citgo did not maintain any easements on record regarding this property.²⁴⁸

The new right-of-way was to be transferred to FEC "free and clear of all encumbrances."²⁴⁹ However, FEC was required to "grant easements, licenses, and permits to various utility companies . . . to allow storm sewers, fuel lines, and other appurtenances to cross the new right-of-way."²⁵⁰ No mention was made of the relocated Citgo pipeline.²⁵¹

FEC sent Citgo an additional application for a licensing agreement.²⁵² As before, this licensing agreement was never executed.²⁵³ After FEC's railroad tracks and Citgo's pipeline were fully completed, it was evident that

238. *Id.*

239. *Citgo*, 706 So. 2d at 384.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Citgo*, 706 So. 2d at 384.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Citgo*, 706 So. 2d at 384.

250. *Id.*

251. *Id.* at 385.

252. *Id.*

253. *Id.*

the railroad track was built between two of the pipeline's protruding vents.²⁵⁴ In response, FEC brought suit to quiet title.²⁵⁵

Citgo argued that it had an express easement due to the earlier agreement with the DOT.²⁵⁶ After the proceedings began, Citgo recorded a Notice of Easement.²⁵⁷ The court concluded that FEC was not on inquiry notice of any "potential unrecorded easement," that Citgo was never granted an easement, and that Citgo's Notice of Easement was null and void.²⁵⁸ Citgo appealed the court's final judgment.²⁵⁹

Under de novo review, the appellate court was convinced that the 1983 Agreement granted Citgo an express easement to operate and preserve the reestablished pipeline.²⁶⁰ The court stated that "[a]n easement is the right in one other than the owner of the land to use land for some particular purpose or purposes."²⁶¹ The applicable rule to determine whether the agreement did in fact grant Citgo an easement, is that "no particular form and language are necessary to create an easement; rather, any words clearly showing the intention of the parties to create a servitude on a sufficiently identifiable estate is sufficient."²⁶² No provision in the 1983 Agreement affirmatively established that an easement was not intended.²⁶³ In fact, the court found the DOT manifested an intent to grant Citgo an easement based on other provisions in the agreement.²⁶⁴

The court also rejected FEC's argument that the easement was ineffectual against FEC because of Citgo's failure to record it.²⁶⁵ In Florida, the recording act subjects FEC to Citgo's pre-existing, unrecorded easement, unless FEC was "without notice" of it.²⁶⁶ "If the circumstances known to FEC when it acquired the subject property were 'such as should reasonably suggest inquiry' into Citgo's property rights, then FEC is deemed to be on 'inquiry notice' of—and bound by—those encumbrances which would have

254. *Citgo*, 706 So. 2d at 385.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Citgo*, 706 So. 2d at 385.

260. *Id.*

261. *Id.* (quoting *Dean v. MOD Properties, Ltd.*, 528 So. 2d 432, 433 (Fla. 5th Dist. Ct. App. 1988)).

262. *Id.* (quoting *Hynes v. City of Lakeland*, 451 So. 2d 505, 511 (Fla. 2d Dist. Ct. App. 1984)).

263. *Id.*

264. *Citgo*, 706 So. 2d at 385.

265. *Id.*

266. *Id.*; see FLA. STAT. § 695.01(2) (1995).

been discovered upon a reasonable inquiry."²⁶⁷ This court concluded that "Citgo's actual, open, and obvious possession by construction of a conspicuous pipeline placed FEC on inquiry notice of Citgo's easement."²⁶⁸

*H & F Land, Inc. v. Panama City-Bay County Airport & Industrial District.*²⁶⁹ The issue before the court was "whether the Marketable Record Title Act (hereinafter MRTA) Chapter 712, of the Florida Statutes, operates to extinguish an otherwise valid claim of an easement of necessity, when such a claim has not been asserted within 30 years, as required by [the Act]."²⁷⁰

The appellate court recognized the general rule that a "landowner has a right to access his land."²⁷¹ However, it disagreed with H & F, the owner of a landlocked estate, that its claim deserved different treatment from any other claim of an interest in land which did not fall within an exception to the MRTA, and which had not been asserted in a timely matter.²⁷²

The MRTA was devised to streamline conveyances of real property, balance titles, and provide assurance to land ownership.²⁷³ A party can only blame himself if he fails to provide proper notice.²⁷⁴ The legislature intended to afford a means to preserve old claims and interests, and to give a reasonable time period to take steps to accomplish the purpose.²⁷⁵

Since the policies underlying the MRTA conflict with the public policy that "lands should not be rendered unfit for occupancy or cultivation," the court certified a question of great public importance:

DOES THE MARKETABLE RECORD TITLE ACT, CHAPTER
712, FLORIDA STATUTES, OPERATE TO EXTINGUISH AN
OTHERWISE VALID CLAIM OF A COMMON LAW WAY OF
NECESSITY WHEN SUCH CLAIM WAS NOT ASSERTED
WITHIN 30 YEARS?²⁷⁶

267. *Citgo*, 706 So. 2d at 386 (citing *Chatlos v. McPherson*, 95 So. 2d 506, 509 (Fla. 1957)).

268. *Id.*

269. 706 So. 2d 327 (Fla. 1st Dist. Ct. App. 1998).

270. *Id.* at 327.

271. *Id.*; see *Roy v. Euro-Holland Vastgoed*, 404 So. 2d 410 (Fla. 4th Dist. Ct. App. 1981).

272. *H & F Land, Inc.*, 706 So. 2d at 328.

273. *Id.* (citing *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 444 (Fla. 1978)).

274. *Id.*

275. *Id.*

276. *Id.*

*Highland Constuction, Inc. v. Paquette.*²⁷⁷ This court affirmed final judgment granting Paquette an implied easement over Highland's property.²⁷⁸ Paquette sued Highland requesting an implied easement be granted over Vickers Street.²⁷⁹ Once Vickers Street was abandoned, ownership reverted to Highland.²⁸⁰

With regard to determining the existence of an implied easement, Florida adopted the "beneficial" or "complete enjoyment rule."²⁸¹ This rule states that the grantee acquires the right to all streets in the plat advantageous to him.²⁸² If the grantee can show he will suffer injury, differing in degree and kind from everyone else, he is authorized to acquire an implied easement.²⁸³ Paquette satisfied the beneficial enjoyment rule.²⁸⁴ Since they operate two car businesses on their property, and Vickers Street was the only viable entrance to these establishments, the loss of this access would impair the business.²⁸⁵ As such, the implied easement was granted.²⁸⁶

*Sears, Roebuck & Co. v. Franchise Finance Corp. of America.*²⁸⁷ This court reversed a final summary judgment that "declared a condition in a nonexclusive easement unenforceable and void."²⁸⁸ Sears owns real property where it operates a retail store, adjacent to a retail shopping center owned by Bradenton Mall Associates ("Developer").²⁸⁹ Sears and Developer managed their parcels under a joint Operating Agreement because they had adjacent parcels and parking lots that were connected.²⁹⁰ Southern Homes Park, Inc. ("Southern"), a corporate affiliate of Developer, owned an "outparcel" adjacent to the others but only accessible through the Sears parking lot.²⁹¹ In 1987, Southern sold its outparcel to Suncoast Rax, Inc. ("Suncoast"), on the condition that Southern acquired an ingress and egress easement to the "outparcel" over a section of the Sears parking lot.²⁹² At the same time, Suncoast, was contracting to sell the "outparcel" and easement, if acquired,

277. 697 So. 2d 235 (Fla. 5th Dist Ct. App. 1997).

278. *Id.* at 236.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Paquette*, 697 So. 2d at 236.

283. *Id.*

284. *Id.* at 237.

285. *Id.*

286. *Id.*

287. 711 So. 2d 1189 (Fla. 2d Dist. Ct. App. 1998).

288. *Id.* at 1190.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Sears*, 711 So. 2d at 1190.

to the appellee, Franchise Finance Corporation of America ("F.F.C.A.").²⁹³ However, F.F.C.A. agreed to lease the property back to Suncoast.²⁹⁴ Developer and Sears agreed that Sears would grant the easement to Suncoast, and Developer, in return, would sweep both the Developer parking area and the Sears entire parking area.²⁹⁵ The easement provided:

The rights granted herein shall be perpetual, but shall expire in the event that:

(iii) Developer . . . shall fail to sweep that portion of Grantor's parcel devoted to customer parking and which includes the Easement Parcel ("Parking Parcel") as shown in yellow on Exhibit C hereto. Grantor, its employees, agents or contractors shall upon written notice to both Developer and Grantee, have the right, at its cost and expense, to sweep the Parking Parcel. In the event that after notice Developer and/or Grantee fails to or refuses to cure, Grantor shall have the right to terminate the easements granted herein by filing a Notice of Termination of Easement in the Public Records of Manatee County, Florida, thirty (30) days, after written notice to both Grantee and Bradenton.²⁹⁶

In 1990, Suncoast went out of business and F.F.C.A. terminated the lease.²⁹⁷ In November, 1992, Developer sent F.F.C.A. an invoice for the annual cost of sweeping the Sears parking area.²⁹⁸ Developer notified F.F.C.A. that if the invoice was not paid, the Developer would cease sweeping the Sears parking area.²⁹⁹ F.F.C.A. refused to pay the invoice, and fearing that Sears may want to terminate the easement, brought its declaratory action to have the "sweeping" condition proclaimed void and unenforceable.³⁰⁰ The trial court declared the forfeiture provision unenforceable under section 689.18 of the *Florida Statutes* because it provides that "reverter or forfeiture provisions of unlimited duration in the conveyance of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of the state."³⁰¹

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. *Sears*, 711 So. 2d at 1190.

298. *Id.*

299. *Id.* at 1191.

300. *Id.*

301. *Id.*; FLA. STAT. § 689.18 (1999).

The appellate court rejected this argument, because a grant of easement is not a conveyance of a proprietary interest in real property.³⁰² An easement only grants the right to use property for some particular purpose, and does not transfer title to land or disinherit the owner of the land subject to easement.³⁰³ Therefore, this court concluded that "a specified condition to the continuance of an easement agreed upon by the parties . . . is not an encumbrance to the marketability of title to real estate" which is meant to be protected by section 689.18 of the *Florida Statutes*.³⁰⁴ Easements that cease upon the occurrence of a clearly defined condition have been recognized in the past.³⁰⁵

Furthermore, this court found it was an error of the trial court to apply section 689.18.³⁰⁶ Even if it did apply, the forfeiture provision would only become void twenty-one years after the granting of the easement, because section 689.18 (3) and (4) provide that the provisions do not become void until twenty-one years after the conveyance has passed.³⁰⁷

Shiner v. Baita.³⁰⁸ Shiner sought to terminate a real property right reserved by Baita through a deed given by Baita to Shiner's predecessor in interest.³⁰⁹ A reservation was placed in the deed by Baita, the original grantor of the property which stated:

Grantors reserve to themselves, their heirs and assigns the right to a hook-up to septic tank located on the land herein conveyed, said septic tank being located to the Southeast of the acre being retained by the Grantors herein with the understanding that responsibility of maintaining said septic tank shall remain with the Grantors, their heirs and assigns, and for purposes of maintenance the Grantors, their heirs and assigns, shall have the right to ingress and egress to maintain said septic tank. It is understood this reservation of use of the septic tank is to continue indefinitely but that should Grantee, his successors or assigns determine later that connection to septic tank interferes with use of property herein conveyed, Grantee, his successors or assigns shall have the right to pay expenses necessary to construct a septic tank on the premises which are herein reserved

302. *Sears*, 711 So. 2d at 1191.

303. *Id.*; see *Easton v. Appler*, 548 So. 2d 691, 696 (Fla. 3d Dist. Ct. App. 1989); see also *Dean v. MOD Properties, Ltd.*, 528 So. 2d 432, 433 (Fla. 5th Dist. Ct. App. 1988).

304. *Sears*, 711 So. 2d at 1191.

305. *Id.*; see *Dotson v. Wolfe*, 391 So. 2d 757, 759 (Fla. 5th Dist. Ct. App. 1980).

306. *Sears*, 711 So. 2d at 1192.

307. *Id.* (citing FLA. STAT. §§ 689.18(3), (4) (1987)).

308. 710 So. 2d 711 (Fla. 1st Dist. Ct. App. 1998).

309. *Id.* at 711.

by the Grantors, and then in that event, this right of hook-up to septic tank shall cease and be of no further force and effect.³¹⁰

Shiner elected to construct a septic tank on the property still held by Baita, because she believed she had the right to do so after acquiring the property.³¹¹ Shiner felt that this action would end the reserved right for Baita's septic tank hook up.³¹² Baita, who intended to develop a mobile home park, disputed Shiner's view.³¹³

The lower court found the restrictive covenant to be ambiguous, and Shiner's septic tank would deprive Baita of using her property.³¹⁴ Therefore, the lower court held that Shiner could not take any action regarding the septic tank that would deprive Baita from using and enjoying her property.³¹⁵

The appellate court reversed the lower court's decision.³¹⁶ First, the court found that a restrictive covenant did not exist.³¹⁷ Rather, a reservation existed and that the deed created an easement, not a restrictive covenant.³¹⁸ Although an easement is often permanent, it does not have to be, and may in fact end upon the happening of a condition.³¹⁹

When there is a grant of easement, "[t]he intent of the parties . . . is determined by a fair interpretation of the language."³²⁰ When the language is unambiguous, the court must look at the plain meaning.³²¹ This court found that there was no ambiguity in the language of the deed, and it clearly shows that if the grantee determines that the septic tank interferes with their use of the property, they may construct a septic tank on the property and the hook-up septic tank shall cease.³²² Therefore, because "[t]he easement holder cannot expand the easement beyond what was contemplated at the

310. *Id.* at 711-12.

311. *Id.* at 712.

312. *Id.*

313. *Shiner*, 710 So. 2d at 712.

314. *Id.*

315. *Id.*

316. *Id.* at 713.

317. *Id.* at 712.

318. *Shiner*, 710 So. 2d at 712; *see Homer v. Dadeland Shopping Ctr., Inc.*, 229 So. 2d 834, 836 (Fla. 1969).

319. *Shiner*, 710 So. 2d at 712; *see Dotson v. Wolfe*, 391 So. 2d 757, 759 (Fla. 5th Dist. Ct. App. 1980).

320. *Shiner*, 710 So. 2d at 712 (quoting *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. 1st Dist. Ct. App. 1984)).

321. *Id.* at 712; *see Richardson v. Deerwood Club, Inc.*, 589 So. 2d 937, 939 (Fla. 1st Dist. Ct. App. 1991).

322. *Shiner*, 710 So. 2d at 712.

time it was granted,"³²³ the appellate court held that the appellant is permitted to enforce the unambiguous provisions and reversed the lower court's order.³²⁴

IX. ELECTIVE SHARE

Chapter 99-343 of the *Laws of Florida* provides numerous changes to section 732 of the *Florida Statutes*, including, but not limited to, expanding the elective share right to various assets not included in the probate estate.³²⁵

X. EMINENT DOMAIN

A. Condemnation

1. In General

Buried in 1999 Fla. Laws. ch 385, a huge act relating to the DOT,³²⁶ are some significant changes to the eminent domain statutes.³²⁷ The most important changes are that section 73.015(1) of the *Florida Statutes* will require every condemner to: 1) provide the landowner with notice by certified mail of the planned taking; 2) make a written offer to buy the land; and 3) negotiate in good faith before filing the condemnation petition.³²⁸ The condemner is also required to notify the owners of businesses located on the land.³²⁹ The condemner will no longer be allowed to take an entire property when that is not needed for the condemner's project, but taking the whole would be cheaper because that approach would avoid having to pay business damages.³³⁰ Section 73.015(4) of the *Florida Statutes* will provide for attorneys' fees and costs when the parties reach

323. *Id.* at 712-13 (quoting *Walters v. McCall*, 450 So. 2d 1139, 1142 (Fla. 1st Dist. Ct. App. 1984)); *Fields v. Nichols*, 482 So. 2d 410, 414 (Fla. 5th Dist. Ct. App. 1985).

324. *Shiner*, 710 So. 2d at 713.

325. 1999 Fla. Laws ch. 99-343 (codified at FLA. STAT. § 732 (1999)).

326. Under article III, section 5 of the Florida Constitution, a legislative act is limited to one subject. If this act satisfies the one subject rule, then the rule is entirely meaningless.

327. For further discussion see *Bain*, *supra*, note 4, at 68.

328. Ch. 99-385, § 57(1), 1999 Fla. Laws 3820, 3823 (codified at FLA. STAT. § 20.23 (1999)).

329. *Id.* § 57(2), 1999 Fla. Laws at 3825 (codified at FLA. STAT. § 206.45 (1999)).

330. FLA. STAT. § 337.27(2) (1999) has been eliminated; Ch. 99-385, § 64, 1999 Fla. Laws 3820, 3826-27 (codified at FLA. STAT. § 215.615 (1999)).

agreement without litigating,³³¹ however, the condemnee will no longer be able to recover prejudgment interest on attorneys' fees and costs.³³²

*Boulis v. Florida Department of Transportation.*³³³ At trial, the condemnee succeeded in winning a verdict that valued the land substantially higher than the Department of Transportation had claimed.³³⁴ As costs, the condemnee was awarded expert witness fees, but the trial court denied his claim for prejudgment interest on that amount.³³⁵ The Fifth District Court of Appeal affirmed, but the decision was reversed by a unanimous Supreme Court of Florida.³³⁶

The holding was narrow.³³⁷ "[P]rejudgment interest is to be awarded on reasonable costs in eminent domain proceedings, but only from the date those costs were actually paid and only after the trial court makes a determination of entitlement to the costs."³³⁸ The decision was based upon the mandate of the Florida Constitution that the state pay "full compensation" for property taken,³³⁹ and the statute that provides for "all reasonable costs incurred."³⁴⁰ The court clarified that, "Boulis should be awarded prejudgment interest *from the date of payment* once the trial court determines reasonable entitlement."³⁴¹ This is consistent with the supreme court's earlier determination that prejudgment interest could be awarded on attorneys' fees in appropriate cases.³⁴² However, the legislature reacted quickly and tried to overrule *Boulis*.³⁴³ It will be interesting to see if that will be successful.³⁴⁴

331. Ch. 99-385, § 57(4), 1999 Fla. Laws 3820, 3825 (codified at FLA. STAT. § 73.091 (1999)).

332. *Id.* § 60, 1999 Fla. Laws at 3880 (codified at FLA. STAT. § 73.091 (1999)).

333. 733 So. 2d 959 (Fla. 1999).

334. *Id.* at 960-61.

335. *Id.* at 961.

336. *Id.* at 961, 963.

337. *Boulis*, 733 So. 2d at 963.

338. *Id.*

339. FLA. CONST. art. X, § 6(a).

340. FLA. STAT. § 73.091(1) (1999).

341. *Boulis*, 733 So. 2d at 962 (emphasis added).

342. *Quality Eng'd Installation, Inc. v. Higley, Inc.*, 670 So. 2d 929 (Fla. 1996). In contrast, the supreme court held, in *Lee v. Wells Fargo Armored Services*, 707 So. 2d 700, 702 (Fla. 1998), that prejudgment interest on attorneys' fees was not available in workers compensation cases due to the language of Section 440.34(1) of the *Florida Statutes*. *Lee*, 707 So. 2d at 702.

343. Ch. 99-385, § 60, 1999 Fla. Laws 3820, 3880 (codified at FLA. STAT. § 73.091 (1999)).

344. See the statutory changes discussed *supra* at notes 3-7.

*Blockbuster Video, Inc. v. Florida Department of Transportation.*³⁴⁵ The tenant operated a store in a strip mall.³⁴⁶ When the landlord decided to sell the mall, it kept an outparcel and agreed to relocate the tenant to a new building there.³⁴⁷ When the new building was ready, the tenant's inventory was shifted to it, about fifty feet away.³⁴⁸ The business was shut down for only a few hours during the move.³⁴⁹ The business reopened with the same address, the same telephone number and the same customers.³⁵⁰

Later, the DOT took a section of the store and parking lot in a road widening project.³⁵¹ The tenant claimed statutory business damages.³⁵² The trial court granted the DOT's motion for summary judgment on the grounds that the store had not operated in that location for five years, as required by the statute.³⁵³ The tenant appealed on the grounds that it met the statutory five-year period, when including its period of occupying the original store in the calculation.³⁵⁴

The Second District Court of Appeal reversed, holding the summary judgment as inappropriate.³⁵⁵ It acknowledged that recovery of business damages was a matter of "legislative largess," and therefore, should be strictly construed.³⁵⁶ However, it considered the legislative purpose behind the statute and the plain meaning of "location" more convincing.³⁵⁷ "Any reasonable definition of 'location' creates only one location for [the tenant] under the facts in this case."³⁵⁸ Moreover, it rejected application of the "parent tract" as the applicable test, holding that it is a doctrine used in determining whether severance damages could be recovered, and having no application to a business damages determination.³⁵⁹

*Grandpa's Park, Inc. v. Florida Department of Transportation.*³⁶⁰ When the DOT took 0.665 acres from Grandpa's Park, it claimed damages for the diminution in value of its remaining 107 acres due to downzoning

345. 714 So. 2d 1222 (Fla. 2d Dist. Ct. App. 1998).

346. *Id.* at 1223.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Blockbuster*, 714 So. 2d at 1223.

351. *Id.*

352. *Id.*; see FLA. STAT. § 73.071(3)(b) (1995).

353. *Blockbuster*, 714 So. 2d at 1223.

354. *Id.*

355. *Id.* at 1225.

356. *Id.* at 1223-24.

357. *Id.* at 1224.

358. *Blockbuster*, 714 So. 2d at 1224.

359. *Id.*

360. 726 So. 2d 789 (Fla. 1st Dist. Ct. App. 1998).

and impairment of access resulting from the elimination of its two access routes.³⁶¹ The trial court denied recovery, and the district court affirmed.³⁶²

Regarding the downzone claim, the court noted that the general rule is that the value of the condemned property is based on the facts existing at the time of the taking, but there is an exception when the property value at that time is depressed by the market's anticipation of that taking.³⁶³ However, Grandpa's Park did not fit into that exception because, at the trial court level, the DOT had not influenced the city to downzone the land, nor had the city downzoned it in anticipation of the taking of the 0.665 acres.³⁶⁴

The claim for diminution in value of the land retained was also rejected.³⁶⁵ The rule is that a partial taking does not entitle a person to compensation for a decrease in the value of land retained.³⁶⁶ The exception to this rule is where the land taken "constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put."³⁶⁷ The court found this exception inapplicable because the loss of access was not caused by diminishing access from an abutting road.³⁶⁸ The court concluded Grandpa's "theory that, in effect, it has been deprived of all reasonable use of the property, is more appropriate in the context of an inverse condemnation claim."³⁶⁹

Judge Booth dissented.³⁷⁰ He noted that the effect of the downzoning and condemnation was to leave Grandpa's with a 107-acre tract of land on which he is able to construct two residences, with no permitable access.³⁷¹ Moreover, Judge Booth argued that the majority had misread the law on decreasing land value, due to the threat of condemnation, by focusing on the actual filing of the condemnation rather than the announcement of intent to condemn.³⁷² Thus, "[f]actual issues existing as to these matters were improperly removed from the jury's consideration."³⁷³

361. *Id.* at 790.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Grandpa's Park*, 726 So. 2d at 791.

366. *Id.*

367. *Id.* (quoting *Lee County v. Exchange Nat'l Bank*, 417 So. 2d 268, 269 (Fla. 2d Dist. Ct. App. 1982)).

368. *Id.*

369. *Id.*

370. *Grandpa's Park*, 726 So. 2d at 791. (Booth, J., dissenting).

371. *Id.*

372. *Id.* at 793.

373. *Id.* at 791.

*Seminole County v. Sanford Court Investors, Ltd.*³⁷⁴ The County engaged in a road widening project that required taking part of the parking lot owned by Cumberland Farms.³⁷⁵ At that time, Cumberland had two tenants, Deis and Hancock.³⁷⁶ Deis' original written lease had expired and he was then under a month to month lease.³⁷⁷ Hancock was under an extension of its original lease.³⁷⁸ More than two years after the filing of the condemnation action, Cumberland Farms notified these tenants that their leases were being terminated so it could build itself a new larger store.³⁷⁹ In a letter to Deis, Cumberland Farms stated, but for the condemnation, Deis would have continued to be its "tenant for the indefinite future."³⁸⁰

In the condemnation proceeding, Deis and Hancock sought business damages.³⁸¹ Their expert witness was allowed to testify about their business damages, calculated on the theory that their leases would be continually renewed for the indefinite future.³⁸² He based this on the past history of renewals by Cumberland Farms.³⁸³ The district court found that the admission of this testimony amounted to error.³⁸⁴

Business damages are provided by statute, not by constitutional mandate.³⁸⁵ A statute providing such legislative largess is to be narrowly construed. Consequently, a tenant is entitled to recover business damages based only upon its leasehold interest at the time of the taking.³⁸⁶ Thus, Deis was entitled to business damages suffered over a one month period, and Hancock was entitled to business damages until the lease was properly terminated by the landlord, prior to the end of its current term.³⁸⁷

The district court also found the trial court had erred in allowing, as business damages, the losses suffered when the tenants auctioned off their inventory and other personal property in order to vacate the premises.³⁸⁸ The tenants never presented "any evidence [showing that] they were required to

374. 24 Fla. L. Weekly D1056 (5th Dist. Ct. App. Apr. 30, 1999) (the opinion cited was later *withdrawn and superceded on clarification* by *Seminole County v. Sanford Court Investors*, 743 So. 2d 1165 (Fla. 5th Dist. Ct. App. 1999)).

375. *Id.* at D1056.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Sanford*, 24 Fla. L. Weekly at D1056.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Sanford*, 24 Fla. L. Weekly at D1056.

385. *Id.*; See FLA. STAT. § 73.071(3)(b) (1995).

386. *Sanford*, 24 Fla. L. Weekly at D1056.

387. *Id.* at D1057.

388. *Id.*

move their business property as a result of the County's taking."³⁸⁹ They were vacating because the landlord had terminated their leases, and apparently, the district court did not consider the "but for" letter sufficient to establish the causal connection between the taking and the landlord's decision to terminate.³⁹⁰

*Florida Department of Transportation v. Powell.*³⁹¹ The DOT brought this condemnation action as part of a project funded by the Federal Highway Administration.³⁹² Naegele owned a billboard and leased space for it on the land that was being taken.³⁹³ This qualified as a nonconforming use because a new ordinance prohibiting off site signs was enacted.³⁹⁴ Thus, he could not move his sign to another location.³⁹⁵ Since federal funds were involved, the Federal Uniform Relocation Act³⁹⁶ applied, and Naegele was entitled to compensation under it.³⁹⁷ The trial court ruled that the federal statute required separate trials, one for the billboard taking and the other for the taking of the freehold.³⁹⁸ The district court disagreed, but refused to reverse.³⁹⁹ The Federal Uniform Relocation Act did abrogate the unity rule under which the value of the property taken must be calculated and then apportioned between the owners of the various interests.⁴⁰⁰ However, it only required that the jury consider the value of the leasehold separately, and that could be accomplished without separate trials.⁴⁰¹ In this record, the trial court, in an exercise of its discretion, could have severed the billboard taking, thus holding separate trials did not amount to reversible error.⁴⁰²

On appeal, the DOT challenged the admission of expert valuation testimony that utilized the gross rent multiplier approach.⁴⁰³ The DOT claimed that the method allowed, in effect, the recovery of business damages that were not provided for by the statute, which only allowed recovery of "just compensation."⁴⁰⁴ The district court rejected this argument.⁴⁰⁵ When a

389. *Id.*

390. *Id.* For the same reason, the tenants' claim for moving expenses was rejected. *Id.*

391. 721 So. 2d 795 (Fla. 1st Dist. Ct. App. 1998).

392. *Id.* at 796.

393. *Id.*

394. *Id.*

395. *Id.*

396. 42 U.S.C. § 4652 (1994).

397. *Powell*, 721 So. 2d at 796-97.

398. *Id.* at 797.

399. *Id.*

400. *Id.*

401. *Id.*

402. *Powell*, 721 So. 2d at 797-98.

403. *Id.* at 798.

404. *Id.*

405. *Id.*

structure has been taken, the statute allows the owner to recover the greater of the fair market value of the structure or the amount the structure contributes to the value of the land.⁴⁰⁶ The statute did not provide the method by which these values were to be calculated. Naegele's expert used both an income approach and a market approach, based on the gross rent multiplier, to calculate the fair market value of the structure.⁴⁰⁷ The two methods produced approximately the same result.⁴⁰⁸ Therefore, it was not error to allow the gross rent multiplier testimony into evidence.⁴⁰⁹

2. Quick Taking

*Florida Department of Transportation v. Barbara's Creative Jewelry.*⁴¹⁰ The DOT began a road widening project.⁴¹¹ It decided to take appellee's entire parcel, because a study that the DOT performed indicated that it would ultimately cost less than a partial taking, which would include the payment of severance damages.⁴¹² By statute, the legislature has recognized that reducing the costs of a property acquisition is a public purpose that justified taking the additional land.⁴¹³ However, the owner objected, and argued that a partial taking would not be more expensive.⁴¹⁴ Logically, determining which would be more expensive involved calculating out what the condemnation award would be for both a partial taking and a full taking.⁴¹⁵ The trial judge reasoned that valuation of the property in eminent domain was a jury question, thus determining which was more expensive was also a jury question.⁴¹⁶ Therefore, the judge denied the petition for a quick taking.⁴¹⁷ The Fourth District reversed.⁴¹⁸

The condemning authority has the burden of showing that there was a reasonable necessity for condemnation.⁴¹⁹ Whether or not the authority has

406. *Id.*

407. *Powell*, 721 So. 2d at 798.

408. *Id.*

409. *Id.*

410. 728 So. 2d 240 (Fla. 4th Dist. Ct. App. 1998), *review granted*, *Murphy v. Florida Dept. of Trans.*, 744 So. 2d 455 (Fla. 1999).

411. *Id.* at 241.

412. *Id.*

413. *Id.*; FLA. STAT. § 337.27(2) (1995).

414. *Barbara's Creative Jewelry*, 728 So. 2d at 241.

415. *Id.* at 242.

416. *Id.*

417. *Id.*

418. *Id.* at 243.

419. *Barbara's Creative Jewelry*, 728 So. 2d at 242 (citing *Lakeland v. Bunch*, 293 So. 2d 66, 69 (Fla. 1974)).

met that burden is a question for the court.⁴²⁰ Here, the DOT presented the testimony of the engineers on the road project, who professed the need for some of the land.⁴²¹ The DOT then presented the testimony of appraisers and accountants.⁴²² They testified that taking only the land needed for the road widening project would result in a greater expense to the state than would taking the entire parcel.⁴²³ Consequently, the DOT had met its burden.⁴²⁴

The burden then shifted to the objecting landowner to show bad faith or an abuse of discretion by the condemning authority.⁴²⁵ These were also questions for the court.⁴²⁶ They did not involve final determinations of what compensation would be paid to the condemnee.⁴²⁷ Here, the landowner presented a "viable position"⁴²⁸ that the partial taking would be cheaper, but that did not satisfy their burden which required a showing that the DOT acted in bad faith or abused its discretion.⁴²⁹ Consequently, the trial judge should not have denied the quick taking.⁴³⁰

Judge Polen wrote the dissenting opinion.⁴³¹ He observed that the majority opinion was at odds with the plain language of the statute.⁴³² Furthermore, he was concerned that a due process violation would result if the court allowed the taking, and a jury subsequently determined that a partial taking would have been cheaper.⁴³³ Thus, there would be no public purpose to justify taking more than the condemning authority was going to use.⁴³⁴ In light of these thoughtful arguments, it is hoped that the supreme court will answer the certified question:

WHERE CONDEMNATION UNDER SECTION 337.27(2),
FLORIDA STATUTES, IS REQUESTED, AND THE
PROPERTY OWNER DISPUTES THE RELATIVE VALUES OF
A WHOLE TAKE OVER A PARTIAL TAKE, MAY A TRIAL
COURT DENY A QUICK TAKING UNDER SECTION 74.031,

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Barbara's Creative Jewelry*, 728 So. 2d at 242.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Barbara's Creative Jewelry*, 728 So. 2d at 242.

430. *Id.* at 243.

431. *Id.* (Polen, J., dissenting).

432. *Id.* at 244; *see* FLA. STAT. § 337.27(2) (1995).

433. *Powell*, 728 So. 2d at 244.

434. *Id.*

FLORIDA STATUTES, AND DEFER THE QUESTION OF THE EXTENT OF THE TAKE UNTIL A JURY DETERMINES THE VALUE OF BOTH A WHOLE TAKE AND A PARTIAL TAKE OF THE PROPERTY?⁴³⁵

B. *Inverse Condemnation*

*Hernando County v. Anderson.*⁴³⁶ Billboards were located on land that the county acquired.⁴³⁷ The county destroyed them without giving their owners any notice or opportunity to remove them.⁴³⁸ The owners brought this suit against the county for compensation.⁴³⁹ "In Florida, billboards are considered personal property rather than realty."⁴⁴⁰ Consequently, acquisition of the land did not include title to the billboards, and the county was held liable for taking this private property.⁴⁴¹

*Palm Beach County v. Cove Club Investors.*⁴⁴² The county condemned a lot in a residential mobile home community and paid compensation to the lot owner.⁴⁴³ The plaintiff in this case runs the community's country club.⁴⁴⁴ Under the recorded Declaration of Conditions, Covenants, Restrictions and Reservations, each purchaser of a lot in the mobile home community was required to pay a monthly recreational fee to the country club, in exchange for the right to use the club's recreational facilities.⁴⁴⁵ The effect of the condemnation was to give the county title to that lot, free of the burden of paying that monthly fee.⁴⁴⁶ The plaintiff characterized this as a taking of its private property for public use, and therefore, demanded compensation in this inverse condemnation action.⁴⁴⁷ The circuit court, the Fourth District Court of Appeal,⁴⁴⁸ and the Supreme Court of Florida all agreed.⁴⁴⁹

435. *Id.* at 243.

436. 737 So. 2d 569 (Fla. 5th Dist. Ct. App. 1999), *review denied*, (July 21, 1999).

437. *Id.* at 569.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Anderson*, 737 So. 2d at 569.

442. 734 So. 2d 379 (Fla. 1999).

443. *Id.* at 380.

444. *Id.*

445. *Id.* at 380-81.

446. *Id.*

447. *Cove Club Investors*, 734 So. 2d at 380.

448. *Palm Beach County v. Cove Club Investors, Ltd.*, 692 So. 2d 998 (Fla. 4th Dist. Ct. App. 1997).

449. *Cove Club Investors*, 734 So. 2d at 381.

The court noted that the loss of the benefit of every covenant will not result in a compensable taking.⁴⁵⁰ Thus, if the lot was taken in a development that was the subject of mutual restrictive covenants, the owners of the other lots would not have a claim for compensation due solely to the loss of that one lot from the scheme of restrictions.⁴⁵¹ Nor would the owner of a franchise, such as the right to supply gas to the homes in the development, have a valid claim for compensation when one of the home lots was taken in an eminent domain action.⁴⁵² The court went to great lengths to point out that this case was different.⁴⁵³ Here, each lot owner had a right of access to the club's property, and the club was still required to provide those facilities to the remaining lot owners, in reliance on its income from those fees.⁴⁵⁴ Moreover, the club had a corresponding right to a lien on any lot whose owner failed to pay the fees.⁴⁵⁵ Consequently, the club had more than mere contract rights. The club had lost property and compensation must be paid for it.⁴⁵⁶ Senior Justice Overton found this distinction unconvincing.⁴⁵⁷ To him, this was just one more provider of services who had lost a customer, and not a situation requiring the payment of compensation.⁴⁵⁸

*City of Miami v. Keshbro, Inc.*⁴⁵⁹ The Nuisance Abatement Board was faced with the difficult problem of abating prostitution and drug use at a motel.⁴⁶⁰ A series of limited solutions, including partial closures, failed to cure the problem, so the Board issued a six month closure order that was enforced by an injunction issued by the circuit court.⁴⁶¹ The motel's owner sought compensation, alleging that it had been deprived of all economic use of its property for the six month period.⁴⁶² "We are faced with a deceptively simple-appearing question: whether the owners are required to be compensated by the City for a valid exercise of the City's power to abate nuisances because that exercise deprived the owners, at least temporarily, of

450. *Id.* at 383.

451. *Id.*

452. *See id.*

453. Justice Anstead wrote the majority opinion. *Id.*

454. *Cove Club Investors*, 734 So. 2d at 381.

455. *Id.*

456. *Id.*

457. *Id.* at 390 (Overton, J., dissenting).

458. *Id.*

459. 717 So. 2d 601 (Fla. 3d Dist. Ct. App. 1998), *review granted*, 729 So. 2d 392 (Fla. 1999).

460. *Id.* at 602.

461. *Id.*

462. *Id.* at 603.

all economic use of their property.”⁴⁶³ The court concluded that *Lucas* provided the controlling law, but still found that compensation was not required.⁴⁶⁴ “[T]he record reflects that the motel was, in reality, not a motel, but rather a brothel and drug house which the owners, for whatever reason, failed to stop operating on their property.”⁴⁶⁵ These were public nuisances that were not protected by the common law.⁴⁶⁶ The owner had no right to continue them and their continuation could be prohibited by the city.⁴⁶⁷ No compensation would be required if shutting down the motel was the only method to stop these uses.⁴⁶⁸ In fact, these activities had become “inextricably intertwined with the motel.”⁴⁶⁹

*Koontz v. St. Johns River Water Management District.*⁴⁷⁰ The landowner wanted to develop a portion of his property.⁴⁷¹ To do so, he needed a permit to dredge 3.4 acres of wetlands, along with a wetland resource management permit.⁴⁷² The Water Management District indicated it would issue the permits if he would deed part of his land to the district, and also replace culverts over four miles away as offsite mitigation.⁴⁷³ He refused to perform the offsite mitigation, so the district denied his permit application. As a result, Koontz filed this suit claiming inverse condemnation.⁴⁷⁴

The Water Management District raised the defense of ripeness.⁴⁷⁵ It claimed that he could have, and should have, attempted to make additional filings, offering different concessions, until an agreement could be reached so he could obtain his permits.⁴⁷⁶ The trial court found this argument convincing, but the district court reversed.⁴⁷⁷ Quite simply,

[t]here is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the

463. *Id.*

464. *Keshbro*, 717 So. 2d at 604 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

465. *Id.*

466. *Id.* at 605.

467. *See id.*

468. *Id.* at 604–05.

469. *Keshbro*, 717 So. 2d at 602.

470. 720 So. 2d 560 (Fla. 5th Dist. Ct. App. 1998), *review denied*, 729 So. 2d 394 (Fla. 1999).

471. *Id.* at 561.

472. *Id.*

473. *Id.*

474. *Id.*

475. *Koontz*, 720 So. 2d at 561.

476. *Id.* at 562.

477. *Id.*

governing body finally approves one before he can go to court. If the governing body finally turns down an application and the owner does not desire to make any further concessions in order to possibly obtain an approval, the issue is ripe.⁴⁷⁸

In a footnote, the court distinguished this case from *Williamson Co. Regional Planning v. Hamilton Bank*,⁴⁷⁹ where the landowner could have applied for a variance but had not done so.⁴⁸⁰

*South Florida Water Management Distric. v. Basore of Florida, Inc.*⁴⁸¹ Basore was growing lettuce on its farm when a big storm hit.⁴⁸² It claimed that its lettuce crop was damaged by flooding, resulting from the high water levels in the District's canals thwarting its efforts to pump water off its fields.⁴⁸³ The Fourth District Court of Appeal rejected its claim that a taking had occurred.⁴⁸⁴ The court recognized that a governmental taking of personal property would require compensation, but concluded that these damaged crops were part of the realty.⁴⁸⁵ At best, the flooding might have amounted to a temporary taking of the land, but that argument had never been raised by Basore.⁴⁸⁶ Consequently, there was no basis for relief under the taking clause.⁴⁸⁷ Basore would have to base any claim for relief on a tort theory, e.g., declaring that the district had been negligent in not reducing the water levels enough in the canal before the storm.⁴⁸⁸

*Town of Jupiter v. Alexander.*⁴⁸⁹ The claimant contracted to buy vacant land in June, 1988.⁴⁹⁰ The land consisted of a parcel on the shore and an island about 500 yards from the mainland.⁴⁹¹ Due to problems with the zoning of the island, she was not able to finalize her plan to build on the mainland and the island until late 1991.⁴⁹² She sued for a temporary taking

478. *Id.*

479. 473 U.S. 172 (1985).

480. *Koontz*, 720 So. 2d at 562 n.2 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187-88 (1985)).

481. 723 So. 2d 287 (Fla. 4th Dist. Ct. App. 1998), *review denied*, 740 So. 2d 527 (Fla. 1999).

482. *Id.* at 288.

483. *Id.*

484. *Id.*

485. *Id.* at 289.

486. *Basore*, 723 So. 2d at 288.

487. *Id.*

488. *Id.* at 290.

489. 23 Fla. L. Weekly D2139 (4th Dist. Ct. App. 1998), *review denied*, 729 So. 2d 389 (Fla. 1999).

490. *Id.*

491. *Id.*

492. *Id.* at D2140.

of her land during that period.⁴⁹³ The district court concluded that she had not been deprived of all use of her land when considering it as one parcel, and that was appropriate, even though they were not physically contiguous, because: 1) they were to be put to one integrated use; 2) one owner owned both parcels, i.e., there was unity of ownership; and 3) they were to be treated by their owner as one integrated tract.⁴⁹⁴ In fact, the highest and best use of the island could only be achieved if the island was developed jointly with the mainland tract.⁴⁹⁵ The owner was not prevented from using the mainland tract while the approvals were obtained for the island portion, therefore, so there was no taking.⁴⁹⁶ This seems oddly like a Catch-22, because it would have been unreasonable for the owner to proceed with her plans on the mainland without knowing if she would ever get the island portion approved.⁴⁹⁷ She could have found herself stuck with structures intended for supporting island use, which may have never occurred, and this would have put her plans for the entire tract on hold.⁴⁹⁸

XI. ENVIRONMENTAL LAW

*The City of Jacksonville v. American Environmental Services, Inc.*⁴⁹⁹ The court addressed the lower court judge's declaratory statement concerning the applicability and validity of the local certificate of need ("CON") application ordinances.⁵⁰⁰ This court affirmed the lower court's decision and held American Environmental Services could not be compelled to procure a local CON from the City of Jacksonville.⁵⁰¹

Jacksonville's CON ordinances, as applied to American Environmental Services proposed hazardous waste transfer station, conflicted with chapter 403 of the *Florida Statutes*.⁵⁰² The Jacksonville ordinance requires a violation of local need, and ordains a condition requiring that the waste only be of the type produced in Duval County.⁵⁰³

In comparison, chapter 403 of the *Florida Statutes* documents a statewide need for hazardous waste facilities, and ponders regional facilities

493. *Id.*

494. *Alexander*, 23 Fla. L. Weekly at D2140-41.

495. *Id.* at D2141.

496. *Id.*

497. *See id.*

498. *See id.*

499. 699 So. 2d 255 (Fla. 1st Dist. Ct. App. 1997), *review denied*, 717 So. 2d 529 (Fla. 1998).

500. *Id.* at 256.

501. *Id.*

502. *Id.*; *See* FLA. STAT. § 403.7225(8) (1995).

503. *American Envtl. Servs., Inc.*, 699 So. 2d at 256.

for the transfer, storage, and treatment of hazardous waste.⁵⁰⁴ The City of Jacksonville can not prevent the facility by determining lack of local need, even though statutes refer to local assessments of hazardous waste management.⁵⁰⁵ Local assessments have the purpose of collecting information for an evaluation of need within the state.⁵⁰⁶

Local governments cannot enact an ordinance relating to the subject of hazardous waste regulation more stringent than section 403.⁵⁰⁷ Pursuant to chapter 403, local governments can control the zoning of such hazardous waste, and ordain requisite conditions to protect the health, safety, and welfare of citizens.⁵⁰⁸ However, it may not implement a further obligation to satisfy a test for local need.⁵⁰⁹

*Secret Oaks Owner's Ass'n v. Department of Environmental Protection.*⁵¹⁰ The final order of the Department of Environmental Protection ("DEP") denied the association the right to request a permit to build a dock on sovereign land.⁵¹¹ This court concluded that the association had a "sufficient title interest" in the uplands for the purpose of obtaining authorization to build a dock, and thus, the final order was reversed.⁵¹²

This is the third appeal involving the two parties in dispute here, the association and the Parlatos.⁵¹³ This brief pertains solely to the last appeal.⁵¹⁴ The association, through Environmental Services, Inc., filed an application with the DEP for the permits needed to build the dock.⁵¹⁵ This was the issue of the prior appeal.⁵¹⁶ The application solicited a dredge fill permit and authorization from the state, as owner of the submerged lands, to assemble such dock.⁵¹⁷ Almost a year later, the DEP denied the application and stated that the holder of an easement does not have sufficient title

504. *Id.* at 256; see FLA. STAT. § 403.7225(7), (8) (1995); FLA. STAT. § 403.723 (1995).

505. *American Envtl. Servs., Inc.*, 699 So. 2d at 256.

506. *Id.*; see FLA. STAT. § 403.7225 (1995).

507. *American Envtl. Servs., Inc.*, 699 So. 2d at 256; see FLA. STAT. § 403.7225(10) (1995).

508. *American Envtl. Servs., Inc.*, 699 So. 2d at 257; see *Escambia County v. Trans. Pac.*, 584 So. 2d 603 (Fla. 1st Dist Ct. App. 1991).

509. *American Envtl. Servs., Inc.*, 699 So. 2d at 257.

510. 704 So. 2d 702 (Fla. 5th Dist. Ct. App. 1998), *review dismissed*, 719 So. 2d 288 (Fla. 1998).

511. *Id.* at 703.

512. *Id.*

513. *Id.*

514. *See id.*

515. *Secret Oaks Owner's Ass'n*, 704 So. 2d at 704.

516. *Id.*

517. *Id.*

interest to make an application for activities pertaining to submerged lands.⁵¹⁸

In return, Secret Oaks requested a formal hearing.⁵¹⁹ The hearing officer determined that there were no material issues of fact, and thus, ordered the case back to the agency for an informal hearing.⁵²⁰ The director at the informal hearing stated the issue as whether the association, as the holder of an easement, is among the class of persons permitted to file a request to perform activities on state-owned sovereign submerged lands.⁵²¹ The director issued a lengthy order regarding such issue.⁵²²

The DEP framed the issue as follows:

[W]hether the Association, as the holder of recorded contractual rights to construct, maintain and use all docks on lot 10, and, concomitantly, to limit the rights of any owner or lessee of lot 10, is precluded from applying for a permit to construct a dock because the rule requirement of "sufficient title interest in uplands for the intended purpose" means the appellant must have a possessory interest in the upland property.⁵²³

In this case, the Owners' Agreement and the recorded easement on lot ten provided that lot owners in the Secret Oaks Subdivision were granted pedestrian access to the St. John's River and to any dock that is situated or may later be situated thereon.⁵²⁴ The Association was obligated to improve, repair, or maintain the easement.⁵²⁵

The DEP relies on the definition of "title interest" as set forth in *Black's Law Dictionary*: Title is defined as, "the means whereby the owner of lands has the just possession of his property. The union of all the elements which constitute ownership. Full independent and fee ownership[;] The right to or ownership in land . . ."⁵²⁶ Just because title can be the means to receive right of possession, that does not dictate that all possessory interests are title interests.⁵²⁷ This case clearly shows that the association has recorded contractual rights in lot ten adequate to grant the right to

518. *Id.*

519. *Id.* at 705.

520. *Secret Oaks Owner's Ass'n*, 704 So. 2d at 705.

521. *Id.*

522. *Id.*

523. *Id.* at 706.

524. *Id.*

525. *Secret Oaks Owner's Ass'n*, 704 So. 2d at 706.

526. *Id.* at 707; see BLACK'S LAW DICTIONARY 1485 (6th ed. 1990).

527. *Secret Oaks Owner's Ass'n*, 704 So. 2d at 707.

construct the dock.⁵²⁸ If the language “sufficient title interest in the uplands” meant only “right of possession,” the Agency would have specified.⁵²⁹

In addition, the DEP offers no reason why a possessory interest is the only possible “title interest,” or why “possessory” interests would be the minimum “sufficient title interest” for dockbuilding permit application.⁵³⁰ This court viewed the Agency’s interpretation as illogical and unreasonable.⁵³¹ To interpret “title interest” as meaning “right of possession” creates irrational distinctions.⁵³²

XII. HOMEOWNERS’ ASSOCIATIONS

Section 617.303 of the *Florida Statutes* has a new subsection (8).⁵³³ This subsection provides that “[a]ll association funds held by a developer shall be maintained separately in the association’s name.”⁵³⁴ There shall be no commingling of reserve and operating funds prior to turnover.⁵³⁵ However, the association may jointly invest reserve funds, even though the invested funds must be accounted for separately.⁵³⁶

Section 617.307 of the *Florida Statutes* has a new subsection (3).⁵³⁷ This subsection is designed to provide for the transition of a homeowners’ association control in a community.⁵³⁸ Under this subsection, such shall occur when the members are entitled to elect at least a majority of the board of directors of the homeowners’ association.⁵³⁹ The developer shall, at its expense, have no more than ninety days to deliver the prescribed documents to the board.⁵⁴⁰

Section 617.0375 of *Florida Statutes* was enacted to create a list of prohibitive clauses to be found in homeowners’ association documents.⁵⁴¹ Subsection (1) and its sub parts prohibit provisions to the effect that the developer has the unilateral ability, and right, to make changes in the homeowners’ association documents, after the transition of the association’s

528. *Id.*

529. *Id.*

530. *Id.*

531. *Id.*

532. *Secret Oaks Owner’s Ass’n*, 704 So. 2d at 707.

533. FLA. STAT. § 617.303(8) (1999).

534. *Id.* § 617.303(8)(a).

535. *Id.*

536. *Id.*

537. *Id.* § 617.307(3).

538. FLA. STAT. § 617.307(3) (1999).

539. *Id.*

540. *Id.*

541. *Id.* § 617.3075(1).

control in a community to the non-developer members.⁵⁴² Also, the association is restricted from filing a lawsuit against the developer, and the developer is entitled to cast votes in an amount that exceeds one vote per residential lot, after the transition to the association.⁵⁴³

Subparagraph (2) declares the prohibited position, stated above, unenforceable as a matter of public policy, where those clauses were created on or after the effective date of that section, October 1, 1998.⁵⁴⁴

XIII. INSURANCE

*Fassi v. American Fire & Casualty Co.*⁵⁴⁵ The appellate court affirmed final judgment denying Fassi's claim for fire damages.⁵⁴⁶ Fassi's home was destroyed by fire and he filed a claim for damages under their homeowners' policy.⁵⁴⁷ American Fire and Casualty ("American") was suspicious as to the cause of the fire, and wanted Fassi to submit to examination under oath and provide a sworn claim of loss.⁵⁴⁸ The examination was never conducted since Fassi failed to contact the attorneys involved.⁵⁴⁹ In addition, Fassi still failed to respond after American followed up with a letter.⁵⁵⁰ The law firm scheduled the examination on behalf of American.⁵⁵¹ In return, Fassi refused to submit to the sworn examination because of the threat of criminal proceedings.⁵⁵²

A claimant cannot recover fire losses under an insurance policy and refuse to comply with policy requirements to submit to sworn examination because criminal charges related to the cause of fire may be pending against him.⁵⁵³

The examination was again rescheduled, and once again, Fassi failed to appear or respond.⁵⁵⁴ Three months later, Fassi wished to have the

542. *Id.*

543. FLA. STAT. § 617.3075(1) (1999).

544. *Id.* § 617.3075(2).

545. 700 So. 2d 51 (Fla. 5th Dist. Ct. App. 1997).

546. *Id.* at 52.

547. *Id.*

548. *Id.*

549. *Id.*

550. *Fassi*, 700 So. 2d at 52.

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*

examination conducted but American responded that it was too late.⁵⁵⁵ Summary judgment was granted after Fassi filed suit on the policy.⁵⁵⁶

This court agreed with American's contentions.⁵⁵⁷ Fassi was given one last chance to explain the refusal to cooperate, and failure to respond would lead to denial of the claim.⁵⁵⁸ Since Fassi did not explain, no further notice was required on American's behalf.⁵⁵⁹ The final letter to Fassi was only an opportunity to explain, not a chance to participate.⁵⁶⁰ The court concluded that five opportunities to participate were enough.⁵⁶¹

XIV. LANDLORD AND TENANT

*ARC Foods, Inc. v. MGI Properties.*⁵⁶² The commercial lease provided that: "[d]uring the lease term and any options; the landlord agrees not to rent to any other tenant that sells take-out or delivery pizza."⁵⁶³ The landlord rented the neighboring space to an Italian restaurant, so the tenant declared the lease had been breached, moved out, and refused to pay any more rent.⁵⁶⁴ The landlord brought this action for damages.⁵⁶⁵ The affidavit of the owner of the neighboring restaurant acknowledged that the store did sell take-out pizza, but claimed that its take-out pizza sales amounted to less than one half of one percent of the business of any of its restaurants.⁵⁶⁶ Based on that affidavit, the trial court granted summary judgment for the landlord.⁵⁶⁷ The district court reversed the trial court's decision.⁵⁶⁸

The district court first addressed the summary judgment issue and held that summary judgment should only be granted when there are no genuine issues of material fact.⁵⁶⁹ The lease with the neighboring restaurant did, however, technically violate the terms of this lease.⁵⁷⁰ The landlord's claim that the violation was minimal, and had little effect on the tenant, created an

555. *Fassi*, 700 So. 2d at 53.

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.*

560. *Fassi*, 700 So. 2d at 53.

561. *Id.*

562. 724 So. 2d 663 (Fla. 2d Dist. Ct. App. 1999).

563. *Id.* at 664.

564. *Id.*

565. *Id.*

566. *Id.*

567. *ARC Foods*, 724 So. 2d at 664.

568. *Id.* at 665.

569. FLA. R. CIV. P. 1.510(c).

570. *ARC Foods*, 724 So. 2d at 664.

issue of fact that could be resolved only by a judge weighing the evidence.⁵⁷¹ Thus, summary judgment was inappropriate.⁵⁷² Furthermore, the claim that the tenant had waived its rights under this clause by failing to object earlier, or to the presence of other competing restaurants, also raised issues of fact that could not be resolved by summary judgment.⁵⁷³

The court also declared that the trial court had erred in its calculation of damages.⁵⁷⁴ The landlord found another tenant for the vacated space, and the court awarded the landlord the real estate broker's commission.⁵⁷⁵ However, the new tenant's lease was at a higher rent, and for a period longer, than was left on the defendant's lease.⁵⁷⁶ The defendant could not be held liable for a commission that was calculated at the higher rent and longer term.⁵⁷⁷ The defendant was liable only for paying the commission involved in finding its replacement, i.e., a commission based on the remaining term and at the rent provided for in the lease.⁵⁷⁸

*DHSH Corp. v. Affordable Enterprises Exchange.*⁵⁷⁹ When this commercial lease was negotiated, the tenant wanted an option to renew for another seven-year term because of the substantial capital investment involved in setting up an automobile paint and body shop.⁵⁸⁰ The landlord, concerned that the shop might be an eyesore, included in the lease a clause requiring the outside to be cleaned twice daily and cars to be stored inside at night.⁵⁸¹ It also contained a renewal option which was the source of the problem.⁵⁸²

The lease granted the tenant a five-year option to renew, but it went on to provide that, "[l]andlord—at [l]andlord's sole option to renew—shall notify [t]enant if they desire to honor the option"⁵⁸³ Who had the right to exercise, or not exercise, the renewal option? The successor landlord, interpreting the lease as giving that right to the landlord, decided it did not want to renew the lease, and sent the tenant a notice that the lease would not

571. *Id.*

572. *Id.*

573. *Id.*

574. *Id.* at 664–65.

575. *ARC Foods*, 724 So. 2d at 664.

576. *Id.* at 664–65.

577. *Id.* at 665.

578. *Id.*

579. 734 So. 2d 567 (Fla. 4th Dist. Ct. App. 1999).

580. *Id.* at 568.

581. *Id.*

582. *Id.*

583. *Id.*

be renewed.⁵⁸⁴ Wanting to renew the lease, the tenant brought this action for declaratory judgment.⁵⁸⁵

The trial court concluded that the renewal option contained an irreconcilable conflict.⁵⁸⁶ The landlord and tenant could not both have a renewal option. Attempting to reconcile all the terms, the landlord asserted that the intent was to give the landlord the right to offer the tenant the renewal option if it wanted to, but that would have rendered the option illusory.⁵⁸⁷ The court solved the problem by invoking the "principles of contract construction," under which an ambiguous term must be interpreted against the one who drafted it.⁵⁸⁸ In this case, the term was drafted by the landlord's real estate broker, so the term was interpreted in favor of the tenant.⁵⁸⁹ The term was drafted by the agent of the prior landlord, not the successor landlord involved in this litigation, but it did not change the application of the rule or the outcome.⁵⁹⁰

*Foster v. Matthews.*⁵⁹¹ The lease included two paragraphs relating to the landlord's liability if the tenant suffered injury.⁵⁹² The first portion of the lease provided that the landlord would not be liable for damage or injury caused by water.⁵⁹³ The second portion provided that the tenant placed its personal property on the premises, at its own risk.⁵⁹⁴ Water leaked into the leased premises, causing one of the co-tenants to slip and fall, and she sued the landlord for negligence.⁵⁹⁵ Relying on the terms in the lease, the trial judge granted summary judgment for the landlord.⁵⁹⁶ The Third District Court of Appeal reversed the trial court's decision.⁵⁹⁷

Exculpatory clauses are not favored in the law to absolve the landlord from liability due to its negligence.⁵⁹⁸ The clause must be clear enough to release a party from liability for negligence.⁵⁹⁹ The terms in this lease did not provide such a clear statement of intent, so the court should not have

584. *DHSH*, 734 So. 2d at 568.

585. *Id.*

586. *Id.*

587. *Id.*

588. *Id.* at 569.

589. *DHSH*, 734 So. 2d at 568.

590. *Id.* at 568-69.

591. 714 So. 2d 1215 (Fla. 3d Dist. Ct. App. 1998).

592. *Id.* at 1216.

593. *Id.*

594. *Id.*

595. *Id.*

596. *Foster*, 714 So. 2d at 1216.

597. *Id.*

598. *Id.*

599. *Id.*

granted summary judgment.⁶⁰⁰ However, Judge Cope, in a brief concurrence, observed that in a prior case, a lease similar to this had been read to reveal a clear intent to absolve the landlord of liability for its own negligence when exculpatory clauses similar to these were read in conjunction with an indemnity clause.⁶⁰¹

*Greco v. Corn.*⁶⁰² Here, the parties had entered into a four-year commercial lease that included a purchase option.⁶⁰³ However, a dispute quickly arose as to whether the purchase price included rent credit.⁶⁰⁴ The landlords notified the tenants that they would not accept any rent payments until the option issue was resolved.⁶⁰⁵ When an agreement could not be reached, the landlords brought an unsuccessful action for declaratory judgment to determine whether there had been a "meeting of the minds" to create a binding contract.⁶⁰⁶ Following the conclusion of that action, the landlords sent the tenants letters demanding the unpaid rent.⁶⁰⁷ When the tenants failed to make payment, the landlords sought and obtained an eviction judgment removing the tenants from the property.⁶⁰⁸

This case began when the tenants brought an action for specific performance of the option.⁶⁰⁹ The landlords then counterclaimed for the unpaid rent and the unpaid option fee.⁶¹⁰ The tenants' defense was that the landlords waived their claims by refusing to accept the payments.⁶¹¹ The trial court denied relief to both.⁶¹² The Second District Court of Appeal held that the landlords had not waived their claims.⁶¹³ Unfortunately, the court does not explain why this was not a waiver. The landlords' refusal to accept "rent payments until a determination was made regarding the option to purchase clause"⁶¹⁴

600. *Id.*

601. *Foster*, 714 So. 2d at 1217 (citing *Meyer v. Carribbean Interiors, Inc.*, 435 So. 2d 936 (Fla. 3d Dist. Ct. App. 1983)).

602. 724 So. 2d 612 (Fla. 2d Dist. Ct. App. 1998), *review denied*, 735 So. 2d 1284 (Fla. 1999).

603. *Id.* at 613.

604. *Id.*

605. *Id.*

606. *Id.*

607. *Greco*, 724 So. 2d at 613.

608. *Id.*

609. *Id.* at 612.

610. *Id.* at 613.

611. *Id.*

612. *Greco*, 724 So. 2d at 613.

613. *Id.*

614. *Id.*

LaFountain v. Estate of Kelly.⁶¹⁵ This commercial lease had a renewal option that provided “[i]n the event Lessee exercises its option to renew, the lease payment for the renewal period will be negotiated between the parties.”⁶¹⁶ The tenant gave notice of her intent to exercise the option, but the parties could not agree on the amount of the rent payments.⁶¹⁷ Subsequently, the tenant died and her estate brought this suit against the landlord for wrongful breach of the renewal option and tortious breach of contract.⁶¹⁸ The trial court dismissed the complaint with prejudice and the district court affirmed.⁶¹⁹

Here, the parties could not agree to the rent and the option did not provide a rent amount or a method to calculate a rent amount.⁶²⁰ Once the parties had failed to reach an agreement, the court had no method for calculating what the rent should have been.⁶²¹ The court could not provide a term that the parties failed to agree on, there had been no meeting of the minds on that point.⁶²² Therefore, the renewal option was too vague to be enforced.⁶²³ The district court avoided language in an earlier case that such options were valid by pointing out that case was an eminent domain action. In the past, the parties had not even begun to negotiate the extension term when the condemnation proceeding began, so it was still possible that the extension option might be successfully implemented but for the condemnation.⁶²⁴

Making Ends Meet, Inc. v. Cusick.⁶²⁵ The landlord sued for unpaid rent, and the tenant counterclaimed for tortious interference with a business relationship.⁶²⁶ The tortious interference claim was based on the landlord’s exercise of his power under the lease to either approve, or not approve, a proposed sale of the lease by the tenant.⁶²⁷ The landlord’s defense was that he could not be held liable for interference with a business relationship of which he was a party.⁶²⁸ The trial and district courts disagreed with that

615. 732 So. 2d 503 (Fla. 1st Dist. Ct. App. 1999).

616. *Id.* at 504.

617. *Id.*

618. *Id.*

619. *Id.*

620. *LaFountain*, 732 So. 2d at 505.

621. *Id.*

622. *Id.*

623. *Id.*

624. *Id.* (citing *State Rd. Dep’t v. Tampa Bay Theaters, Inc.*, 208 So. 2d 485 (Fla. 2d Dist. Ct. App. 1968)).

625. 719 So. 2d 926 (Fla. 3d Dist. Ct. App. 1998), *review denied*, 732 So. 2d 326 (Fla. 1999).

626. *Id.* at 926–27.

627. *Id.* at 927.

628. *Id.*

interpretation of the law.⁶²⁹ Apparently, the landlord created one hurdle after another to prevent the tenant from ever successfully assigning its leasehold.⁶³⁰ The landlord had no right to play that game. His approval power could only be exercised for a proper purpose. His wrongful conduct under this set of circumstances cost him \$250,000.⁶³¹

Margolis v. Andromides.⁶³² The tenant had a twenty-five year lease with an option to renew for an additional twenty-five years.⁶³³ The tenant sent two letters to the landlords giving notice that he was exercising his renewal option.⁶³⁴ In response, the tenant received a letter from a relative of the landlords, authorizing the lease extension.⁶³⁵ In 1992, eleven years later, but still during the original term of the lease, the tenant received a surprise.⁶³⁶ The landlords claimed that the extension option had never been exercised and that their relative did not have the authority to authorize an extension.⁶³⁷ The dispute went to arbitration, where it was concluded that the landlords were correct.⁶³⁸ In 1997, the tenant brought this suit against the relative for breach of implied warranty of authority.⁶³⁹ The circuit court granted the landlords' motion for summary judgment based on the statute of limitations.⁶⁴⁰

Breach of implied warranty of authority is subject to a four year statute of limitations.⁶⁴¹ The critical question was when the cause of action accrued so that the time would begin to run.⁶⁴² The tenant claimed it began to run at the arbitration award, but the circuit court had disagreed, and the district court affirmed.⁶⁴³ The opinion stated, "[a] cause of action 'accrues' when the last element necessary to constitute the cause of action occurs."⁶⁴⁴ The arbitration award was not a necessary element.⁶⁴⁵ This cause of action is based upon misrepresentation, and the final element of misrepresentation is

629. *Id.* at 927-28.

630. *Making Ends Meet, Inc.*, 719 So. 2d at 928.

631. *Id.* at 927.

632. 732 So. 2d 507 (Fla. 4th Dist. Ct. App. 1999).

633. *Id.* at 508.

634. *Id.*

635. *Id.*

636. *Id.*

637. *Margolis*, 732 So. 2d at 508.

638. *Id.* at 508-09.

639. *Id.* at 509.

640. *Id.*

641. *Id.*

642. *Margolis*, 732 So. 2d at 509.

643. *Id.*

644. *Id.*

645. *Id.*

that harm is caused by it.⁶⁴⁶ That happened when the landlords repudiated their relative's authority to extend the lease.⁶⁴⁷ This happened more than four years before the complaint in this case was filed.⁶⁴⁸ Nothing had tolled the running of the statute, so the action was barred.⁶⁴⁹

*Menendez v. Palms W. Condominium Ass'n.*⁶⁵⁰ The condominium association acted as the rental manager for the unit in question.⁶⁵¹ The tenant heard a knock at the door, opened it, and at least two people came inside.⁶⁵² One of the individuals shot the tenant.⁶⁵³ This suit charged that the unit owners and the condominium association were liable because they had breached their duty of care by failing to provide adequate security on the premises, in particular, by failing to provide a peephole or door scope by which a person inside the unit could see who was outside the front door.⁶⁵⁴ Although the tenant's expert testified that this was a high crime area, the circuit court granted summary judgment for the defendants.⁶⁵⁵

The general rule is that a landlord has no duty to protect a tenant from criminal acts of third persons.⁶⁵⁶ In order for such a duty to arise, "the tenant must allege and prove that the landlord had actual or constructive knowledge of prior similar acts committed on invitees on the premises."⁶⁵⁷ However, the existence of crime in the area "was not sufficient to put the defendants on constructive notice of a particular risk."⁶⁵⁸ Moreover, there was nothing in the record to show that the crime in the area was the type of crime that could have been prevented by installing a peephole or door scope.⁶⁵⁹

The tenant also failed to establish that the lack of a peephole or door scope was a defect or inherently dangerous condition.⁶⁶⁰ There was no evidence that the unit would have been made safer by the installation of such devices.⁶⁶¹ In addition, even if this was a defect, it was an obvious defect, and not a latent one.⁶⁶² Finally, neither the lease nor the Residential

646. *Id.*

647. *Margolis*, 732 So. 2d at 510.

648. *Id.*

649. *Id.*

650. 736 So. 2d 58 (Fla. 1st Dist. Ct. App. 1999).

651. *Id.* at 59.

652. *Id.* at 59–60.

653. *Id.* at 60.

654. *Id.*

655. *Menendez*, 736 So. 2d at 60.

656. *Id.*

657. *Id.* at 61.

658. *Id.*

659. *Id.*

660. *Menendez*, 736 So. 2d at 61.

661. *Id.*

662. *Id.* at 61–62.

Landlord and Tenant Act imposed a duty on the landlord to provide a peephole or door scope.⁶⁶³ Thus, the decision of the circuit court was affirmed.⁶⁶⁴

*Estate of Basile v. Famest, Inc.*⁶⁶⁵ Basile guaranteed a commercial lease for a company in which he was a stockholder.⁶⁶⁶ The guaranty was limited to defaults during the first two years of the original lease, or the first three years of an approved sublease.⁶⁶⁷ The tenant transferred his rights and interests to LM, a local corporation, under a document that stated that the landlord was not releasing the original tenant from liability under the lease.⁶⁶⁸ A default occurred more than two years after the original lease was entered, but the landlord sued on the guaranty claiming that the guarantor was still liable.⁶⁶⁹ The landlord's theory was that the default had occurred during the first three years of a sublease.⁶⁷⁰ The death of the guarantor was not an issue addressed in this decision.

The trial court concluded that the transaction with LM was a sublease, and the landlord expressly reserved the right to hold the original tenant liable.⁶⁷¹ Therefore, the guaranty was still in effect at the time of the breach.⁶⁷² However, the district court disagreed.⁶⁷³ Under the traditional test, a sublease would occur only if the tenant kept a reversionary interest.⁶⁷⁴ The tenant here made no attempt to keep any such interest, therefore the landlord's retaining rights had no effect upon the characterization of the transaction.⁶⁷⁵ Since the guarantee was not extended by an assignment, the guarantor was not liable.⁶⁷⁶

*Straub Capital Corp. v. Chopin.*⁶⁷⁷ In November 1994, a law firm entered into a fifty page lease that contained an integration clause, providing that all negotiations and agreements were in the writing.⁶⁷⁸ The lease did contain a time is of the essence clause, but did not contain an express

663. *Id.* at 62.

664. *Id.*

665. 718 So. 2d 892 (Fla. 4th Dist. Ct. App. 1998).

666. *Id.* at 892.

667. *Id.*

668. *Id.*

669. *Id.*

670. *Basile*, 718 So. 2d at 892.

671. *Id.*

672. *Id.*

673. *Id.* at 893.

674. *Id.* at 892.

675. *Basile*, 718 So. 2d at 893.

676. *Id.*

677. 724 So. 2d 577 (Fla. 4th Dist. Ct. App. 1998).

678. *Id.* at 578.

occupancy date.⁶⁷⁹ The space was not ready for occupancy until April, 1995.⁶⁸⁰ After taking possession, the firm sued for damages, alleging that it had been assured that the space would be ready by the first of January.⁶⁸¹ Based upon the evidence, the trial court rejected the fraud in the inducement claim, but granted substantial damages for lost profits based on negligent misrepresentation.⁶⁸² The Fourth District Court of Appeal reversed.⁶⁸³

"[A]bsent some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses."⁶⁸⁴ Fraud in the inducement would have been an independent tort on which damages could have been rendered, but the court rejected that claim.⁶⁸⁵ Consequently, the claim was essentially that the landlord had breached the lease by failing to deliver the premises on time.⁶⁸⁶ At best, there was a contractual breach.⁶⁸⁷ Since the claim was solely for economic loss, tort damages should not have been awarded.⁶⁸⁸

*WPB, Ltd. v. Supran.*⁶⁸⁹ A commercial lease provided that deposit money would bear interest, but failed to specify a rate.⁶⁹⁰ The district court concluded that the rate would be supplied by section 687.01 of the *Florida Statutes*.⁶⁹¹ That statute provided, "[i]n all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 12 percent per annum, but the parties may contract for a greater or lesser rate by a contract in writing."⁶⁹² A special contract is a contract that would have to be express because it could not be implied in law or in fact.⁶⁹³ The lease was silent as

679. *Id.*

680. *Id.*

681. *Id.*

682. *Straub Capital*, 724 So. 2d at 578-79.

683. *Id.* at 579.

684. *Id.* (citing *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So. 2d 1238, 1239 (Fla. 1996)).

685. *Id.*

686. *Id.*

687. *Straub Capital*, 724 So. 2d at 579.

688. *Id.*

689. 720 So. 2d 1091 (Fla. 4th Dist. Ct. App. 1998).

690. *Id.* at 1092.

691. *Id.* (citing FLA. STAT. § 687.01 (1989)). The current version of the statute incorporates, by reference, the rate set according to section 55.03 of the *Florida Statutes*. See FLA. STAT. § 55.03 (1999).

692. *Supran*, 720 So. 2d at 1092 (quoting FLA. STAT. § 687.01 (1989)).

693. *Id.* at 1092-93.

to the interest rate, so there was no special contract to set the rate.⁶⁹⁴ Thus, the statute filled that gap.⁶⁹⁵

XV. LIENS

*Morse Diesel International, Inc. v. 2000 Island Boulevard, Inc.*⁶⁹⁶ The appellate court reversed a peremptory writ of mandamus authorizing release of a cash bond in favor of 2000 Island Boulevard, Inc. ("Williams Island"), owner and developer of a 280 unit condominium project.⁶⁹⁷ The court remanded, with directions that Williams Island redeposit disbursed proceeds from the cash bond pending further orders.⁶⁹⁸

Morse Diesel sued Williams Island for money due under a construction contract.⁶⁹⁹ The parties entered into an agreement which gave Morse Diesel a lien on twenty condo units to secure the claim.⁷⁰⁰ Morse agreed to release its lien rights as to the other units.⁷⁰¹ Williams Island posted a bond on a prorated basis as to five of the units.⁷⁰² Morse asserted additional claims when another dispute arose between the parties.⁷⁰³ Williams Island later filed an emergency motion for the clerk to transfer the existing liens to its cash bond and to reduce Morse's amended claim of lien when the subcontractors were paid.⁷⁰⁴

The trial court allowed the lien transfer to a cash bond, but denied Williams Island's request for reduction of the bond.⁷⁰⁵ Since Williams Island failed to receive the bond reduction, it filed for a writ of mandamus directing the clerk to disburse the cash bond as per section 713.24(4) of the *Florida Statutes*.⁷⁰⁶ The lower court directed the clerk to release the cash bond.⁷⁰⁷

The appellate court concluded that the lower court abused its discretion in granting the writ of mandamus where:

694. *Id.* at 1093.

695. *Id.*

696. 698 So. 2d 309 (Fla. 3d Dist. Ct. App. 1997).

697. *Id.* at 310.

698. *Id.* at 313.

699. *Id.* at 310.

700. *Id.* at 311.

701. *Morse Diesel*, 698 So. 2d at 311.

702. *Id.*

703. *Id.*

704. *Id.*

705. *Id.*

706. *Morse Diesel*, 698 So. 2d at 311.

707. *Id.* at 312.

(1) the record did not disclose Williams Island's clear legal right to the same in that a genuine dispute existed as to whether Morse Diesel's claim of lien had expired by operation of law; (2) Williams Island had another adequate legal remedy to procure the release of these funds; and (3) Morse Diesel was an interested party to the mandamus proceeding who had not been brought before the court.⁷⁰⁸

To receive a writ of mandamus, "petitioner must demonstrate a clear legal right to the performance of a ministerial duty by the respondent and that no other adequate remedy exists."⁷⁰⁹ The court found that Williams Island did not establish a clear legal right to a mandamus where the clerk's answer and defenses created a genuine issue of fact about whether Morse's claim of lien had expired and/or been satisfied.⁷¹⁰ Williams Island did not allege in its complaint that it had no adequate remedy at law.⁷¹¹ Just because Williams Island was unsuccessful in getting the bond reduced, this did not signify that such remedies were inadequate.⁷¹²

The court also held that the writ should not have been entered when Morse was an interested party, but was given no notice or opportunity to be heard on the issues.⁷¹³ In addition, it was an abuse of discretion to grant the writ releasing the cash bond when the funds were in dispute between the parties in another pending action.⁷¹⁴ The lower court should have required Williams Island to redeposit disbursed proceeds of the cash bond.

*Robinson v. Sterling Door & Window Co.*⁷¹⁵ The issue before the court was whether the trial court erred when applying section 55.10(1) of the *Florida Statutes* to Sterling Door's judgment lien on Robinson's real estate.⁷¹⁶ The trial court determined that Sterling Door had a valid lien on Robinson's property.⁷¹⁷ Robinson claimed the lien was defective because Sterling's address was lacking, as required per section 55.10(1).⁷¹⁸ The trial court held that the statute was satisfied since the names of the attorneys involved were included in the judgment lien.⁷¹⁹ The court noted that section

708. *Id.*

709. *Id.*; see *Pino v. District Court of Appeal*, 604 So. 2d 1232, 1233 (Fla. 1992).

710. *Moore Diesel*, 698 So. 2d at 312.

711. *Id.*

712. *Id.*

713. *Id.*

714. *Id.*

715. 698 So. 2d 570 (Fla. 1st Dist. Ct. App. 1997).

716. *Id.* at 571.

717. *Id.*

718. *Id.*; see FLA. STAT. § 55.10(1) (1997).

719. *Robinson*, 698 So. 2d at 571.

55.10(1) of the *Florida Statutes* specifically recognizes that “[a] judgment, order, or decree does not become a lien on real estate unless the address of the person who has a lien as a result of such judgment . . . is contained in the judgment.”⁷²⁰ Since courts must give effect to statutory language, the appellee’s address must be on the judgment lien.⁷²¹ Without the address, there was no lien on Robinson’s real estate.⁷²²

Wolf v. Spariosu.⁷²³ The appellate court reversed final summary judgment of foreclosure, which declared Wolf Group’s lien to be superior to the interests of all appellees, except Maysonet Landscape Company’s claim of lien.⁷²⁴ The court agreed with the Wolf Group that their mortgage gained priority over Maysonet through the doctrine of equitable subrogation or conventional subrogation.⁷²⁵

Maysonet and the Spariosus entered into a contract for landscaping materials and services for the property.⁷²⁶ Maysonet filed and duly recorded a claim of lien.⁷²⁷ At that time, two existing mortgages were already recorded on the property.⁷²⁸ A few months later, the Spariosus executed a note and mortgage to City First Mortgage Corporation (“City”).⁷²⁹ Two prerequisites existed in order for the loan to go to the Spariosus as borrowers.⁷³⁰ First, the proceeds from City’s loan were to be used to satisfy the two previously recorded mortgages.⁷³¹ Second, City’s first mortgage would be substituted in the place of the two prior mortgages.⁷³² City’s mortgage was later assigned to the Wolf Group.⁷³³

Maysonet sued the borrowers and recorded its notice of *lis pendens*.⁷³⁴ When the borrowers defaulted on the City’s loan, Wolf Group sought to foreclose the mortgage, and Maysonet was later named as a defendant in the amended complaint.⁷³⁵ The lower court entered a final judgment of

720. *Id.* (quoting FLA. STAT. § 55.10(1) (1997)) (emphasis in original).

721. *Id.*

722. *Id.*

723. 706 So. 2d 881 (Fla. 3d Dist. Ct. App. 1998), *cause dismissed*, Maysonet Landscape Co. v. Wolf (Fla. 1998).

724. *Id.* at 882.

725. *Id.*

726. *Id.*

727. *Id.*

728. *Wolf*, 706 So. 2d at 882.

729. *Id.*

730. *Id.*

731. *Id.*

732. *Id.*

733. *Wolf*, 706 So. 2d at 882.

734. *Id.*

735. *Id.*

mortgage foreclosure finding the Wolf Group's interest superior to the interests of all defendants except Maysonet.⁷³⁶

[S]ubrogation is the "substitution of one person to the position of another with reference to a legal claim or right. The doctrine of subrogation is generally invoked when one person has satisfied the obligations of another and equity compels that the person discharging the debt stand in the shoes of the person whose claim has been discharged, thereby succeeding to the rights and priorities of the original creditor."⁷³⁷

The appellate court found that, under the doctrine of conventional subrogation, the Wolf Group's lien should have been superior to Maysonet's lien.⁷³⁸ Evidence showed that the borrowers had an agreement with City for the City mortgage to be substituted in place of the two prior mortgages.⁷³⁹

Conventional subrogation . . . arises by virtue of an agreement, express or implied, that a third person or one having no previous interest in the matter involved shall, upon discharging an obligation or paying a debt, be substituted in the place of the creditor with respect to such rights, remedies, or securities as [the creditor] may have against the debtor.⁷⁴⁰

The court concluded "that the Wolf Group's lien was entitled to priority over Maysonet's lien under the doctrine of conventional subrogation."⁷⁴¹

*Zalay v. Ace Cabinets of Clearwater, Inc.*⁷⁴² The court affirmed final judgment in a construction lien action filed by subcontractors and materialmen.⁷⁴³ Evidence supported the trial court's decision that all but one of the claims were valid and timely, and created liens against the property.⁷⁴⁴

In 1992, the Zalays contracted with Charles Walker Corporation to build a home for \$360,000.⁷⁴⁵ Zalay had to make only one final payment in

736. *Id.* at 883.

737. *Id.* at 883 (quoting *Eastern Nat'l Bank v. Glendale Fed. Sav. & Loan Ass'n*, 508 So. 2d 1323, 1324 (Fla. 3d Dist. Ct. App. 1987)).

738. *Wolf*, 706 So. 2d at 884.

739. *Id.*

740. *Id.* at 883 (citing *Foreman v. First Nat'l Bank*, 79 So. 742, 744 (1918)).

741. *Id.* at 884.

742. 700 So. 2d 15 (Fla. 2d Dist. Ct. App. 1997).

743. *Id.* at 16.

744. *Id.*

745. *Id.*

the amount of \$45,267.07.⁷⁴⁶ Although most of the work was completed on the home, several subcontractors and materialmen remained unpaid.⁷⁴⁷ Three lienors recorded claims totaling about \$31,000, and Artistic Surfaces presented an untimely claim for \$2600.⁷⁴⁸

The issue before the court was whether the language of section 713.06 of the *Florida Statutes* allows the attorneys' fees and costs ultimately awarded under section 713.29 to become a lien against the property.⁷⁴⁹ The court concluded "that the limitation in section 713.06(3)(h) is intended to define the extent of the lien for the lienor's materials or services prior to litigation, and is not intended to preclude a lien for costs and attorneys' fees in a lien foreclosure action."⁷⁵⁰

The court found it important to examine section 713.06(1) of the *Florida Statutes*.⁷⁵¹ This statute provides:

A materialman or laborer, either of whom is not in privity with the owner, or a subcontractor or sub-subcontractor who complies with the provisions of this part and is subject to the limitations thereof, has a lien on the real property improved for any money that is owed to him for labor⁷⁵²

Nothing in this statute expressly provides a lien for attorneys' fees and costs.⁷⁵³ Construction lien statutes should not be liberally construed in favor of any person.⁷⁵⁴ "[A]ttorneys' fees awarded under section 713.29 are not an element of damages, but are 'taxed as part of . . . costs.'"⁷⁵⁵ The court saw no reason why the costs involved in a construction lien action should not be included within the lien.⁷⁵⁶

Legislative changes include, but are not limited to, the following: With respect to public lands and property, section 255.05(2)(a) of the *Florida Statutes* now provides that where a claimant is no longer furnishing labor on a project, a contractor, its agent or attorney may elect to shorten the prescribed time within which an action to enforce a claim against the

746. *Id.*

747. *Zalay*, 700 So. 2d at 16.

748. *Id.* at 17.

749. *Id.*

750. *Id.*

751. *Id.*

752. *Zalay*, 700 So. 2d at 17 (quoting FLA. STAT. § 713.06(1) (1993)).

753. *Id.*

754. *Id.*

755. *Id.* at 18 (omission in original).

756. *Id.*

payment bond may be made.⁷⁵⁷ This may be done by filing a Notice of Contest of Claim Against Payment Bond.⁷⁵⁸ The form and procedure for such are set out in the above referenced statute.⁷⁵⁹

Section 713.01(12) of the *Florida Statutes* has been amended to include in the definition of "improve," a provision for solid waste collection or disposal on the site of the improvement.⁷⁶⁰ Likewise, the definitions for "improvement," "subcontractor," and "sub-subcontractor" have been amended to reflect the same.⁷⁶¹

Section 713.23(1)(e) of the *Florida Statutes* has been amended to provide a shorter time for a contractor to claim against a payment bond.⁷⁶² This statute provides a form for filing a "Notice of Contest of Claim Against Payment Bond." Comparatively, section 713.235(1) of the *Florida Statutes* provides a form for a "Waiver of Right To Claim Against the Payment Bond."⁷⁶³

XVI. MORTGAGES

*Alafaya Square Ass'n v. Great Western Bank.*⁷⁶⁴ The court granted appellee's motion for rehearing of the opinion dated February 7, 1997.⁷⁶⁵ The opinion was entered in place of the previous one.⁷⁶⁶ The court reversed the trial court's order appointing a receiver because there was no showing that Alafaya wasted or impaired the real property.⁷⁶⁷ Alafaya owned a shopping center encumbered by a mortgage in favor of WHC.⁷⁶⁸ If there was a default on the mortgage, Alafaya agreed to have a receiver appointed.⁷⁶⁹ After the loan matured, Alafaya did in fact default on payment.⁷⁷⁰ In response,⁷⁷¹ WHC sued to foreclose and requested the appointment of a receiver.

757. FLA. STAT. § 255.05(2)(a) (1999).

758. *Id.*

759. *Id.*

760. *Id.* § 713.01(12).

761. *Id.* § 713.01(14), (26), (27).

762. FLA. STAT. § 713.23(1)(e) (1999).

763. *Id.* § 713.235(1).

764. 700 So. 2d 38 (Fla. 5th Dist. Ct. App. 1997).

765. *Id.* at 39.

766. *Id.*

767. *Id.*

768. *Id.*

769. *Alafaya*, 700 So. 2d at 39.

770. *Id.*

771. *Id.*

The trial court granted WHC's motion to sequester the rents received from the shopping center's tenants.⁷⁷² All rent collected was placed in escrow and Alafaya could not expend funds from the account without the court's approval.⁷⁷³ Alafaya requested use of the escrow funds from WHC to do repairs on the property. After Alafaya received no response, it requested permission from the trial court to expend the funds.⁷⁷⁴ Alafaya later requested WHC's consent to withdraw escrow funds for payment of real estate taxes.⁷⁷⁵ WHC again failed to answer.⁷⁷⁶ In response to Alafaya's request for funds to repair, "WHC filed a motion for appointment of receiver alleging an 'apparent waste to the property.'"⁷⁷⁷

The trial court granted WHC's motion for the appointment of a receiver, and Alafaya appealed arguing that evidence failed to show Alafaya wasted or impaired the property.⁷⁷⁸ "The appointment of a receiver in a foreclosure action is not a matter of right... it is an extraordinary remedy."⁷⁷⁹ The receiver's role "is to preserve the value of the secured property."⁷⁸⁰ The trial court can appoint a receiver, but only if evidence suggests that the secured property is being wasted or subject to serious risk of loss.⁷⁸¹

The appellate court agreed that the evidence did not constitute waste or impairment.⁷⁸² The only waste could be the disrepair to the parking lot and the exterior paint.⁷⁸³ Alafaya took timely action to get WHC to release the funds.⁷⁸⁴ As such, there could be no waste since the failure to repair was due to WHC's refusal to release the funds.⁷⁸⁵ The appellate court reversed because the facts did not justify the remedy of receivership.⁷⁸⁶

*Beach v. Ocwen Federal Bank.*⁷⁸⁷ Beach, the borrowers, asked the United States Supreme Court to consider whether the three year rescission

772. *Id.*

773. *Id.*

774. *Alafaya*, 700 So. 2d at 39.

775. *Id.*

776. *Id.*

777. *Id.*

778. *Id.* at 40.

779. *Alfaya*, 700 So. 2d at 40; *see Barnett Bank of Alachua County v. Steinberg*, 632 So. 2d 233, 234 (Fla. 1st Dist. Ct. App. 1994).

780. *Alfaya*, 700 So. 2d at 40.

781. *Id.*; *see Atco Constr. & Dev. Corp. v. Beneficial Sav. Bank*, 523 So. 2d 747, 750 (Fla. 5th Dist. Ct. App. 1988).

782. *Alfaya*, 700 So. 2d at 40.

783. *Id.*

784. *Id.*

785. *Id.*

786. *Id.* at 41.

787. 523 U.S. 410 (1998).

period, under the Truth-in-Lending Act, precluded a right of action after a specified time.⁷⁸⁸ If so, the borrowers would not be able to raise their right to rescind under the act as a recoupment defense in a foreclosure action brought by the lender more than three years after the loan transaction date.⁷⁸⁹ The Court found the language in 15 U.S.C. § 1635(f) to be clear, and held that the right of rescission “shall expire” after the three year period.⁷⁹⁰ Therefore, it was not a statute of limitations and could not be raised as a recoupment defense after the expiration.⁷⁹¹

*Blatchley v. Boatman’s National Mortgage, Inc.*⁷⁹² The court affirmed an order denying Blatchley’s motion to vacate the foreclosure sale of his home.⁷⁹³ The summary final judgment in foreclosure stated the sale date was January 9, 1997.⁷⁹⁴ Boatman’s moved for an order changing the sale date to January 7, because January 9 was a “scrivener’s error” and the published “Notice of Foreclosure Sale contained the correct date of January 7.”⁷⁹⁵ The court granted the date change.⁷⁹⁶

However, Blatchley failed to receive notice of the new sale date until a day after the actual sale took place.⁷⁹⁷ In addition, Blatchley only received Boatman’s motion to change the date on January 10.⁷⁹⁸ Blatchley motioned to vacate the sale, since he never received proper notice of the correct sale date.⁷⁹⁹ As such, he could not exercise his right of redemption or reinstatement, nor could he participate in the sale or protect his property interest.⁸⁰⁰ The trial court denied the motion to vacate the sale, but gave Blatchley fifteen days from the order date to pay the judgment amount.⁸⁰¹ Instead of taking advantage of the increased redemption period that was offered, Blatchley filed a notice of appeal.⁸⁰²

“Section 45.031 required that the final judgment of foreclosure specify a day for the sale and that the notice of sale be published for two weeks, the second of which publication ‘shall be at least 5 days before the

788. *Id.* at 410.

789. *Id.*

790. *Id.*

791. *See id.* at 418.

792. 706 So. 2d 317 (Fla. 5th Dist. Ct. App. 1997).

793. *Id.* at 317.

794. *Id.*

795. *Id.*

796. *Id.*

797. *Blatchley*, 706 So. 2d at 317.

798. *Id.*

799. *Id.*

800. *Id.*

801. *Id.* at 317–18.

802. *Blatchley*, 706 So. 2d at 318.

sale.”⁸⁰³ The requirements of this statute were not satisfied.⁸⁰⁴ However, even though Blatchley did not receive proper notice, the court remedied the error by extending the redemption period.⁸⁰⁵ “Foreclosure suits are governed by equitable principles.”⁸⁰⁶ The trial court “did equity” by extending the redemption period, and nothing would be accomplished by reversing for a new judgment and sale date.⁸⁰⁷

*Clearman v. Dalton.*⁸⁰⁸ The Clearmans recovered a judgment for \$150,000 against the Daltons.⁸⁰⁹ The Daltons filed for bankruptcy and revealed two secured mortgages against their homestead.⁸¹⁰ The first was in favor of their son in the amount of \$15,000, and the second was in favor of Monticello Bank for \$50,000.⁸¹¹ The mortgage in favor of their son was never recorded, while the bank’s mortgage was recorded but not delivered.⁸¹²

The trustee obtained an order from the Bankruptcy Court avoiding the mortgages, preserving the avoided obligations “for the benefit of the estate.”⁸¹³ The trustee assigned the mortgages to the Clearmans who recorded the assignment and judgments, avoiding the mortgages and preserving the avoided obligations.⁸¹⁴

The trial court denied the foreclosure petition filed by Clearman.⁸¹⁵ The appellate court agreed with the trial court that title 544 of the United States Code did not place the trustee in the place of the former mortgagees with the power to foreclose.⁸¹⁶ The appellate court believed the bankruptcy estate had an assignable interest in the mortgage subject to Daltons’ claim of homestead.⁸¹⁷ The assignees “can assert their interest and require the Daltons to establish the fact of homestead.”⁸¹⁸ Filing of judgments entered by the Bankruptcy Court does not constitute slander of title.⁸¹⁹ Since the Daltons deliberately filed their bankruptcy petition and submitted their property, subject to provable exemptions, they cannot complain if the

803. *Id.* (quoting FLA. STAT. § 45.031 (1997)).

804. *Id.*

805. *Id.*

806. *Id.*; see FLA. STAT. § 702.01 (1995).

807. *Blatchley*, 706 So. 2d at 318.

808. 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998).

809. *Id.* at 325.

810. *Id.*

811. *Id.*

812. *Id.*

813. *Clearman*, 708 So. 2d at 325.

814. *Id.*

815. *Id.*

816. *Id.*; see 11 U.S.C. § 544.

817. *Clearman*, 708 So. 2d at 325.

818. *Id.*

819. *Id.*

assignee of the estate's interest requires them to prove entitlement to homestead exemption.⁸²⁰

*Crane v. Barnett Bank of Palm Beach County.*⁸²¹ The court affirmed the amended final judgment as to the terms of rescission of the mortgage agreement, except as to the effective date the rate of interest charged to the borrower should run.⁸²² The court reversed the denial of the borrower's motion for partial summary judgment on liability, and vacated the provision for foreclosure of the subject mortgage, if the borrower failed to satisfy the conditions for rescission within forty-five days.⁸²³

The bank sought to foreclose when a construction loan matured and the borrower's wife refused to sign a modification of their mortgage agreement.⁸²⁴ The borrower had not defaulted under the construction loan phase of the agreement since the borrower's payments had been refused, preventing such borrower from performing under the agreement.⁸²⁵ "[T]he borrower's bank did not have a written agreement requiring the wife's signature on the mortgage."⁸²⁶ Liability against the borrower did not include the wife's refusal to sign a modification to the mortgage.⁸²⁷

On appeal, the borrower claimed that the trial judge erred in denying his motion for summary judgment because the borrower had offered to make payments but was refused.⁸²⁸ "The trial court should have granted the borrower's motion for partial summary judgment...[T]he bank's complaint... did not include allegations that the borrower defaulted by failing to have his wife sign the mortgage modification..."⁸²⁹ The sole basis for default was due to the borrower's failure to pay the mortgage.⁸³⁰ As such, no material issue of fact existed regarding the question of liability for foreclosure.⁸³¹

The second issue on appeal was whether the trial court's order authorizing rescission "ab initio" of the parties' mortgage agreement properly restored each party to the status quo.⁸³² "[T]he trial court erred in assessing two different rates of interest as a condition for rescission of the

820. *Id.*

821. 698 So. 2d 902 (Fla. 4th Dist. Ct. App. 1997).

822. *Id.* at 905.

823. *Id.* at 905-06.

824. *Id.* at 903.

825. *Id.*

826. *Crane*, 698 So. 2d at 903.

827. *Id.* at 903.

828. *Id.* at 904.

829. *Id.*

830. *Id.*

831. *Crane*, 698 So. 2d at 904.

832. *Id.*

parties' agreement 'ab initio.'"⁸³³ Since there was only one integrated mortgage agreement and its nullification is ab initio, the borrower should not be penalized with a higher interest rate.⁸³⁴ This is especially true if it was the bank's own refusal to accept payments that led to rescission, simply because the mortgage agreement provided for two phases of the loan.⁸³⁵

This court found no error in the imposition of a "costs of funds" rate of interest and payment required by the borrower as a cost of rescission.⁸³⁶ No record established the basis for foreclosure within forty-five days if the borrower failed to make rescission as required in the amended final judgment.⁸³⁷ Since "the trial judge erred in denying the borrower's motion for partial summary judgment on the bank's action for foreclosure, there is no basis for foreclosure under the mortgage agreement of the parties even if the borrower is unable to restore the bank to status quo in 45 days."⁸³⁸ "[F]oreclosure on an accelerated basis may be denied where . . . payment was not made due to . . . excusable neglect, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due."⁸³⁹ Acceleration of the balance and foreclosure of the mortgage agreement were declared premature on this record.⁸⁴⁰

*Culpepper v. Inland Mortgage Corp.*⁸⁴¹ The issue on appeal was "whether a mortgage lender's payment of a 'yield spread premium' to a mortgage broker violates the antikickback provision of the Real Estate Settlement Procedures Act ("RESPA")."⁸⁴²

The Culpeppers obtained a federally insured home mortgage loan from the Inland Mortgage Corporation ("Inland").⁸⁴³ However, rather than dealing directly with Inland, the Culpeppers dealt only with the mortgage broker, Premiere Mortgage Company ("Premiere").⁸⁴⁴ "On December 7, 1995, Premiere received a rate sheet from Inland and informed the Culpeppers that a 30-year loan was available at a 7.5% interest rate."⁸⁴⁵ The Culpeppers approved the given rate.⁸⁴⁶ However, the Culpeppers did not know that rate

833. *Id.*

834. *Id.*

835. *Id.*

836. *Crane*, 698 So. 2d at 904-05.

837. *Id.* at 905.

838. *Id.*

839. *Id.* (quoting *Campbell v. Werner*, 232 So. 2d 252, 256-57 (Fla. 3d Dist. Ct. App. 1970); *Lunn Woods v. Lowery*, 577 So. 2d 705 (Fla. 2d Dist. Ct. App. 1991)).

840. *Crane*, 698 So. 2d at 905.

841. 132 F.3d 692 (11th Cir. 1998).

842. *Id.* at 694; see 12 U.S.C. § 2601 (1994).

843. *Culpepper*, 132 F.3d at 694.

844. *Id.*

845. *Id.*

846. *Id.*

was higher than the par rate on Inland's 30-year loan, and it carried a yield spread premium of 1.675% of the loan amount.⁸⁴⁷ Also, they did not know that, as a result of the spread, Inland would be paying Premiere the premium for the higher rate, even though the Culpeppers paid Premiere a loan origination fee for assisting them in obtaining and closing their loan.⁸⁴⁸ Once the Culpeppers discovered this, they challenged the legitimacy of Inland's yield spread premium payment under RESPA.⁸⁴⁹

Noting that no federal circuit court had addressed this issue, and the federal district courts that had addressed it were divided, the Eleventh Circuit Court of Appeals presented its own analysis.⁸⁵⁰ In so doing, it determined that the yield spread premium under these facts was a nonexempt referral fee violating RESPA section 2607(a).⁸⁵¹

The court's analysis began with the statutory prohibitions and exemptions.⁸⁵² Section 2607(a) prohibits kickbacks and referral fees pursuant to an agreement regarding federally related mortgages.⁸⁵³ Section 2607(c) exempts from that prohibition payment for goods or services actually performed.⁸⁵⁴

The first question was whether the payment to Premiere was a referral fee.⁸⁵⁵ The court noted that the payment would constitute such "if (1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs."⁸⁵⁶ Here, Inland gave Premiere value by paying the spread premium.⁸⁵⁷ The payment was made pursuant to an agreement to refer settlement business, because the premium was to be paid for Premiere's "registered" loans with Inland which funded the loans.⁸⁵⁸ There was an actual referral when Premiere registered the loan with Inland.⁸⁵⁹

The next question was whether section 2607(c) exempted the transaction as a payment for goods or services.⁸⁶⁰ As to whether there was a payment for goods, the appellate court noted this was not satisfied, since

847. *Id.*

848. *Culpepper*, 132 F.3d at 694.

849. *Id.*

850. *Id.* at 695.

851. *Id.* at 695-96.

852. *See id.* at 695.

853. *Culpepper*, 132 F.3d at 695; *see* 12 U.S.C. § 2607(a).

854. *Culpepper*, 132 F.3d at 695; *see* § 2607(c).

855. *See Culpepper*, 132 F.3d at 695.

856. *Id.* at 696.

857. *Id.*

858. *Id.*

859. *Id.*

860. *See Culpepper*, 132 F.3d at 696.

Inland funded the loan from the beginning.⁸⁶¹ It was not one owned by Premiere and subsequently sold to Inland, which might be done with loans sold in the permitted secondary mortgage market sales.⁸⁶² The court noted that even if Premiere was selling to Inland its right to direct the loan's disposition to a number of wholesale lenders, it would not be an exempt sale of goods.⁸⁶³ Paying a referral fee for "directing" the business, violates RESPA, and the court concluded that the premium did not fit the sale of goods exemption.⁸⁶⁴

As to whether the premium was paid for Premiere's services, the appellate court first looked at the services Premiere provided the Culpeppers, which included both obtaining and closing the loan.⁸⁶⁵ It found the facts clearly showed the Culpeppers already paid Premiere for these services.⁸⁶⁶ It also identified logically that the premium paid to Premiere for generating a higher loan rate was not a service to the Culpeppers.⁸⁶⁷

Next, the court looked to whether the premium was for a service to Inland.⁸⁶⁸ However, there was no additional service to Inland.⁸⁶⁹ The premium was based solely on the higher interest rate.⁸⁷⁰ Premiere provided no additional service to Inland above what it would have provided them with a loan consisting of a lower interest rate.⁸⁷¹ Therefore, the payment did not fit the sale of services exemption.⁸⁷²

Having found the transaction violated RESPA's prohibitions, the court reversed and remanded the case to the district court.⁸⁷³ The court noted the market value test utilized by the trial court was inappropriate, since that test applies only to facially permissible transactions.⁸⁷⁴ The appellate court directed the trial court to consider the Culpeppers' motion for class certification *ab initio*.⁸⁷⁵

Dove v. McCormick.⁸⁷⁶ The court affirmed the trial court's order granting final summary judgment in favor of McCormick.⁸⁷⁷ Dove executed

861. *Id.*

862. *Id.*

863. *Id.*

864. *Id.*

865. *Culpepper*, 132 F.3d at 696.

866. *Id.*

867. *Id.* at 696-97.

868. *Id.* at 697.

869. *Id.*

870. *Culpepper*, 132 F.3d at 697.

871. *Id.*

872. *Id.*

873. *Id.*

874. *Id.*

875. *Culpepper*, 132 F.3d at 697.

876. 698 So. 2d 585 (Fla. 5th Dist. Ct. App. 1997).

a mortgage in favor of The First, F.A., that encumbered Orange County real property.⁸⁷⁸ The transaction was subject to The Truth in Lending Act, ("TILA") requirements.⁸⁷⁹ Afterwards, The First was declared "troubled," and the RTC was appointed as a receiver to liquidate The First's assets.⁸⁸⁰ Dove's mortgage was assigned by RTC to Blazer Financial Services, which later assigned the mortgage to McCormick.⁸⁸¹ Since Dove failed to make monthly payments, McCormick sued to foreclose.⁸⁸²

The trial court entered final summary judgment in McCormick's favor, concluding that Dove posed defenses pertaining to rescission and recoupment which were barred by the statute of limitations.⁸⁸³ "Dove sought to assert her statutory right to rescission based upon alleged violations of TILA and Regulation Z."⁸⁸⁴ Dove also argued for recoupment under section 1640(e).⁸⁸⁵ The appellate court affirmed the trial court's ruling in denying Dove's claim of rescission because "under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f)."⁸⁸⁶

Florida has historically recognized that "when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right."⁸⁸⁷ The court reasoned that Dove may not seek the remedy of rescission under the guise of an affirmative defense of recoupment outside the statutory three-year time frame.⁸⁸⁸

*Floyd v. Federal National Mortgage Ass'n.*⁸⁸⁹ Floyd appealed a post-judgment final order denying the "Motion to Vacate Final Judgment and Set Aside Foreclosure Sale."⁸⁹⁰ The Federal National Mortgage Company Association ("Federal National"), filed the complaint to foreclose a first mortgage against Pamela Johnson.⁸⁹¹ The mortgage encumbering the home

877. *Id.* at 586.

878. *Id.*

879. *Id.*

880. *Id.*

881. *Dove*, 698 So. 2d at 586.

882. *Id.*

883. *Id.*

884. *Id.* at 587.

885. *Id.*; see 15 U.S.C. § 1640(e) (1994).

886. *Dove*, 698 So. 2d at 588 (quoting *Beach v. Great Western Bank*, 692 So. 2d 146, 153 (Fla. 1997), *aff'd*, 523 U.S. 410 (1998)).

887. *Id.* (quoting *Bowery v. Babbit*, 128 So. 801, 806 (1930)).

888. *Id.* at 588.

889. 704 So. 2d 1110 (Fla. 5th Dist. Ct. App. 1998).

890. *Id.* at 1111.

891. *Id.*

was executed by Pamela and her then husband, Vernon Floyd in the original principal amount of \$11,000.⁸⁹² After their divorce and Pamela's subsequent death, Vernon resided in the home with their children.⁸⁹³ In the same year, the mortgage went into default with a remaining balance of \$3,045.96.⁸⁹⁴

Personal service of the complaint could not be completed because the sheriff's process server was unable to locate the property.⁸⁹⁵ The death of Pamela was never confirmed.⁸⁹⁶ Federal National filed an amended complaint naming Pamela Johnson or her heirs as the defendant.⁸⁹⁷ Federal National then filed an Affidavit of Constructive Service alleging that the heirs could not be found even after a diligent search was conducted.⁸⁹⁸

After a second letter was sent to Vernon, specifying the amount necessary to reinstate the mortgage, the trial court entered final summary judgment in favor of Federal National.⁸⁹⁹ Vernon was notified to vacate the premises after the foreclosure sale.⁹⁰⁰ In response, Vernon filed a motion to set aside the foreclosure sale, which was consequently denied by the trial court.⁹⁰¹

The appellate court agreed with Vernon that Federal National failed to conduct a diligent search.⁹⁰² Prior to constructive notice, a plaintiff must first file an affidavit showing that a diligent search was conducted to discover the names and addresses of the defendants.⁹⁰³ In this case, Federal National's affidavit states that a search was conducted of the Social Security Administration database, probate records, and Vital Statistics, all without success.⁹⁰⁴ The Social Security records confirmed that Pamela Johnson was, in fact, deceased.⁹⁰⁵ Federal National failed to locate the property, inquire of those in possession of the property, or talk with neighbors, relatives or friends.⁹⁰⁶

Federal National's failure to pursue Vernon after his previous inquiries about reinstating the mortgage showed that Federal National did not

892. *Id.*

893. *Id.*

894. *Floyd*, 704 So. 2d at 1111.

895. *Id.*

896. *Id.*

897. *Id.*

898. *Id.*

899. *Floyd*, 704 So. 2d at 1111.

900. *Id.*

901. *Id.*

902. *Id.* at 1112.

903. *Id.*; see FLA. STAT. §§ 49.031(1), .041(1), .071 (1995).

904. *Floyd*, 704 So. 2d at 1112.

905. *Id.*

906. *Id.*

“reasonably employ[] the knowledge at [its] command.”⁹⁰⁷ Federal National failed to conduct a diligent search and inquiry required by the constructive notice statute, by completely ignoring the parties in possession of the premises.⁹⁰⁸

“Strict compliance with constructive service statutes is required.”⁹⁰⁹ The record showed a diligent effort was not made to acquire the information needed to accomplish personal service on those in possession of the property.⁹¹⁰ The appellate court believed Federal National would have learned the additional facts necessary to accomplish personal service if someone located the property and went there to see who actually had possession.⁹¹¹

*Kirkland v. Miller.*⁹¹² Kirkland appealed final judgment of ejectment awarded in favor of Sportsmen’s Resort Clubs Inc., (“Sportsmen’s”), the original owner of the subject real property.⁹¹³ The trial court stated that Kirkland only had a beneficial interest in an Illinois land trust.⁹¹⁴ Thus, ejectment was a proper remedy.⁹¹⁵ The trial court determined there was only a personal property interest and foreclosure was unnecessary.⁹¹⁶ The appellate court reversed.⁹¹⁷

Miller was a trustee with legal and equitable title to the property identified in the trust.⁹¹⁸ Mary Shearer, the principal, and Sportsmen’s only shareholder, had a beneficial interest.⁹¹⁹ Miller explained the documents for closing to Kirkland, which included a contract showing Sportsmen’s sale of the beneficial interest to Kirkland for \$40,000.⁹²⁰ Kirkland executed a security agreement which assigned the beneficial interest back to Miller as security for the \$40,000 debt recognized as a “Purchase Money Mortgage,” and included a charge for “State Documentary Stamps on Deed.”⁹²¹ Kirkland

907. *Id.* (quoting *Batchin v. Barnett Bank of S.W. Fla.*, 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994)).

908. *Id.*

909. *Floyd*, 704 So. 2d at 1112 (citing *Tindal v. Varner*, 667 So. 2d 890, 890–91 (Fla. 2d Dist. Ct. App. 1996)).

910. *Id.*

911. *Id.* at 1113.

912. 702 So. 2d 620 (Fla. 4th Dist. Ct. App. 1997), *review denied*, 717 So. 2d 535 (Fla. 1998).

913. *Id.*

914. *Id.*

915. *See id.*

916. *Id.*

917. *Kirkland*, 702 So. 2d at 620.

918. *Id.*

919. *Id.*

920. *Id.*

921. *Id.* at 620–21.

was to make monthly payments for twenty years, and if default occurred, there would be an automatic assignment of the entire beneficial interest to Sportsmen's.⁹²² After default, Miller was to sell the trust property, and after costs and fees were paid out, the balance from the proceeds were to be delivered to Kirkland.⁹²³ Kirkland believed a mortgage was created.⁹²⁴

Pursuant to section 697.01 of the *Florida Statutes*, an instrument is said to be a mortgage if, when taken either alone or in conjunction with the surrounding facts, it seems to have been given for the purpose of securing payment of the money.⁹²⁵ "Whenever property belonging to one person is held by another as security for an indebtedness of the other, the transaction is in effect a mortgage."⁹²⁶

The transaction in this case was not a valid Illinois land trust, but a mortgage securing an indebtedness.⁹²⁷ If there was default, Kirkland's interest in the property reverted to Sportsmen's.⁹²⁸ Accordingly, the transaction was deemed a mortgage, subject to the rules of foreclosure.⁹²⁹

*Najera v. NationsBank Trust Co.*⁹³⁰ Najera appeals from a final summary judgment of foreclosure by NationsBank.⁹³¹ The appellate court reversed the trial court's decision because it believed issues of material fact remained on the record which could not be disposed of by summary judgment.⁹³²

Najera's deposition showed that he requested a copy of the property appraisal but never obtained it.⁹³³ General Development Corporation ("GDC") said it would take care of the appraisal because no bank would authorize a loan for more money than the property value.⁹³⁴ Najera paid a fee for the appraisal, with the understanding that it was being done in order to verify that the property would provide the lending institution with sufficient collateral for the loan.⁹³⁵

922. *Kirkland*, 702 So. 2d at 621.

923. *Id.*

924. *Id.*

925. *Id.*; see FLA. STAT. § 697.01 (1985).

926. *Kirkland*, 702 So. 2d at 621 (quoting *Williams v. Roundtree*, 478 So. 2d 1171, 1173 (Fla. 1st Dist. Ct. App. 1985)).

927. *Id.*

928. *Id.*

929. *Id.* at 621-22.

930. 707 So. 2d 1153 (Fla. 5th Dist. Ct. App. 1998), *review denied*, (Apr. 15, 1998).

931. *Id.* at 1154.

932. *Id.*

933. *Id.*

934. *Id.*

935. *Najera*, 707 So. 2d at 1154.

The appellate court believed “the allegations and record create[d] issues of fact concerning whether the Najeras relied upon the existence of a professional appraisal to support the loan values, and whether they would have entered into this transaction had those representations not been made.”⁹³⁶

The record established much more than the assertion of inflated values.⁹³⁷ GDC and General Development Financial Corporation, (“GDV”) collectively misrepresented

the value of the lot the Najeras already owned, the value of the condo for which they were induced to swap the lot, the fact that they were to have conventional financing . . . that the rental market in the area was sufficiently strong to cover their mortgage payments, that the resale market for GDC properties was strong at the false sales prices, and that there existed and would be provided a professional appraisal to back up the value of the property provided to them.⁹³⁸

The appellate court recognized that if the alleged course of fraudulent conduct by GDC and GDV was established at trial, and if it was shown that it was reasonably relied upon by Najeras, they would have a defense to the foreclosure action.⁹³⁹

*Southeast & Associates v. Fox Run Homeowners’ Ass’n.*⁹⁴⁰ The issue before the court was whether the owners may set aside a foreclosure sale where constructive service was “based on affidavits of diligent search and inquiry which were facially sufficient and complied with the statutory requirements.”⁹⁴¹

On July 1, 1995, an association assessment for semi-annual maintenance was due.⁹⁴² Albert and Rose Love received a notice of delinquency from the association.⁹⁴³ The notice stated that the association could file a lien against the home and foreclose at a later date.⁹⁴⁴ When the Loves failed to pay the assessment, a lien was filed against the property.⁹⁴⁵ The Loves paid a partial payment, which the association returned with a

936. *Id.* at 1155.

937. *Id.*

938. *Id.*; see *Watson v. Hahn*, 664 So. 2d 1083 (Fla. 5th Dist. Ct. App. 1995).

939. *Najera*, 707 So. 2d at 1155.

940. 704 So. 2d 694 (Fla. 4th Dist. Ct. App. 1997).

941. *Id.* at 695.

942. *Id.*

943. *Id.*

944. *Id.*

945. *Southeast & Assocs.*, 704 So. 2d at 695.

notice stating that if full payment was not made, a foreclosure suit would be initiated.⁹⁴⁶

When the association planned to foreclose, it hired a process server to serve the Loves.⁹⁴⁷ The server failed to recognize that the Loves were at their New York address and made numerous attempts to serve them at their Fox Run address, as well as another Florida address said to be attributed to them.⁹⁴⁸ Since personal service was not able to be performed, the association served by publication after filing an affidavit of diligent search and an affidavit of constructive service.⁹⁴⁹ Final summary judgment of foreclosure was filed against the Loves.⁹⁵⁰ Southeast and Associates, the successful bidder at the foreclosure sale, received a certificate of title.⁹⁵¹ In response, the Loves moved to set aside the sale due to an insufficient service of process.⁹⁵² The trial court entered an order finding lack of diligent search and inquiry by Fox Run, thereby setting aside the foreclosure sale.⁹⁵³

Section 49.041 of the *Florida Statutes* "provides that a person may be served by publication upon verified statement showing on its face that 'diligent search and inquiry have been made to discover the name and residence' of the person being served."⁹⁵⁴ If the court finds the verified statement to be defective, or considers the diligent search to be deficient, the court must then decide "whether the trial court's judgment of foreclosure would be void or voidable."⁹⁵⁵ If voidable, a foreclosure sale resulting from constructive service cannot be set aside as against a bona fide purchaser.⁹⁵⁶

The plaintiff here followed the favored approach.⁹⁵⁷ It filed a detailed affidavit which listed the various attempts to deliver personal service, "the contact with the neighbors, the two skip traces, and the trip to a retail establishment where the process server learned the lessee had moved out in the middle of the night."⁹⁵⁸

In addition, "where one of two innocent parties must suffer a loss as the result of the default of another, the loss shall fall on the party who is best

946. *Id.*

947. *Id.*

948. *Id.*

949. *Id.*

950. *Southeast & Assocs.*, 704 So. 2d at 695.

951. *Id.* at 695-96.

952. *Id.* at 696.

953. *Id.*

954. *Id.*

955. *Southeast & Assocs.*, 704 So. 2d at 696 (quoting *Batchin v. Barnett Bank of S.W. Fla.*, 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994)).

956. *Id.*

957. *Id.*

958. *Id.*

able to avert the loss and is the least innocent.”⁹⁵⁹ The Loves did not make the requisite maintenance payment and could have informed the Association of their move to New York.⁹⁶⁰ In addition, someone on the Loves’ behalf kept signing the certified letters and made partial payments.⁹⁶¹

*United Companies Lending v. Abercrombie.*⁹⁶² The issue presented was whether the “circuit court abused its discretion when it declined to set aside a mortgage foreclosure sale of real property.”⁹⁶³ The appellate court held that the circuit court was mistaken in its view of what its scope of discretion is in such a matter.⁹⁶⁴

The United Companies Lending Corporation (“United”) sued to foreclose its mortgage on the residence owned by the appellee.⁹⁶⁵ The circuit court entered a final judgment and subsequently scheduled a foreclosure sale to be held at the Sarasota County Courthouse.⁹⁶⁶ United’s counsel agreed to attend the sale, but due to an illness in the original attorney’s family, United sent another attorney to appear in his place.⁹⁶⁷ The replacement attorney arrived early for the foreclosure sale, however, he was at the wrong courthouse.⁹⁶⁸ He was informed that it was to be held in Sarasota only five minutes before the sale was to take place.⁹⁶⁹ The clerk in Sarasota “declined his request to delay the bidding.”⁹⁷⁰ By the time a substitute Sarasota attorney arrived, the property had already been sold to Darrell Crane for \$1000.⁹⁷¹

United filed an objection to the sale and a motion to have the sale set aside on the grounds of “gross inadequacy of price and the mistaken failure of its agent to attend.”⁹⁷² Evidence at the hearing proved that the property was worth over \$125,000 and that United was going to bid as high as \$181,898.⁹⁷³ The successful bidder, Crane, testified that he would have only bid up to \$115,00.⁹⁷⁴

959. *Id.* at 697 (quoting *Jones v. Lally*, 511 So. 2d 1014, 1016 (Fla. 2d Dist. Ct. App. 1987)).

960. *Southeast & Assocs.*, 704 So. 2d at 697.

961. *Id.*

962. 713 So. 2d 1017 (Fla. 2d Dist. Ct. App. 1998).

963. *Id.* at 1018.

964. *Id.*

965. *Id.*

966. *Id.*

967. *United Cos. Lending*, 713 So. 2d at 1018.

968. *Id.*

969. *Id.*

970. *Id.*

971. *Id.*

972. *United Cos. Lending*, 713 So. 2d at 1018.

973. *Id.*

974. *Id.*

The circuit court found that the price paid for the property at the sale was “grossly disproportionate.”⁹⁷⁵ However, it denied United’s motion, because the court found that the inadequate price resulted from the “unilateral mistake” of United’s counsel, “and not from any mistake, misconduct, or irregularity” on the part of anyone else involved in the sale.⁹⁷⁶ The circuit court cited *Wells Fargo Credit Corp. v. Martin*⁹⁷⁷ and *Sulkowski v. Sulkowski*⁹⁷⁸ for authority.⁹⁷⁹ The appellate court upon reviewing the transcript from the circuit court found that the circuit court mistakenly believed that the Second District, unlike the Third and Fourth Districts, holds that a mistake cannot be a unilateral mistake by the complaining party.⁹⁸⁰ However, the law of this appellate district does not differ from the other districts, and follows the holding in *Arlt v. Buchanan*.⁹⁸¹ In *Arlt*, the court stated the general rule that:

standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result.⁹⁸²

This court does not construe “person connected with the sale” to mean that it has to be a person who was physically present at the sale.⁹⁸³ Therefore, the circuit court mistakenly read this court’s past opinions to the contrary.⁹⁸⁴

“Whether the complaining party has made the showing necessary to set aside a [foreclosure] sale is a discretionary decision by the trial court, which may be reversed only when the court has grossly abused its discretion.”⁹⁸⁵ This court found that, in the present case, the circuit court’s discretion was restricted by a mistaken understanding of the law in this district, and

975. *Id.*

976. *Id.*

977. 605 So. 2d 531 (Fla. 2d Dist. Ct. App. 1992), *case dismissed*, 613 So. 2d 13 (Fla. 1993).

978. 561 So. 2d 416 (Fla. 2d Dist. Ct. App. 1990).

979. *United Cos. Lending*, 713 So. 2d at 1018.

980. *Id.*

981. 190 So. 2d 575 (Fla. 1966).

982. *Id.* at 577.

983. *United Cos. Lending*, 713 So. 2d at 1019.

984. *Id.*

985. *Id.* at 1018 (citing *RSR Invs., Inc. v. Barnett Bank of Pinellas County*, 647 So. 2d 874 (Fla. 2d Dist. Ct. App. 1994)).

reversed and remanded for a reconsideration.⁹⁸⁶ This court states no "opinion as to the balance of equities in this case."⁹⁸⁷ Rather, the court stated that "[i]n one set of circumstances, the fact that the inadequate sale price was caused by the complaining party's own mistake might tip the balance of equities in favor of the successful bidder; in another case, it might not."⁹⁸⁸

XVII. OPTIONS AND RIGHTS OF FIRST REFUSAL⁹⁸⁹

*Gonzalez v. Archer.*⁹⁹⁰ When the tenant tried to exercise the purchase option contained in the commercial lease, the seller claimed that the option had been nullified by the tenant's default in making late rent payments.⁹⁹¹ The tenant then brought this action for specific performance.⁹⁹² The trial court denied relief, but the Third District Court of Appeal reversed because the record revealed that the landlord had accepted the untimely rent payments without protest, and had, therefore, impliedly waived the right to declare the lease in default based on those breaches.⁹⁹³ The court also invoked estoppel to prevent the landlord from declaring the lease in default under these circumstances.⁹⁹⁴

The court rejected the defense that the tenant had failed to pay the deposits required upon exercising the option.⁹⁹⁵ The lease did not specify when the deposits had to be paid, and in the absence of an express term, the tenant had a reasonable time to comply, but the landlord had repudiated the option before a reasonable time had passed.⁹⁹⁶ The tenant was not required to make a tender that the landlord already indicated would be refused.⁹⁹⁷

*Indian River Colony Club, Inc. v. Bagg.*⁹⁹⁸ The Indian River Colony Club ("Club") was a nonprofit organization created to provide benefits to

986. *Id.*

987. *Id.*

988. *United Cos. Lending*, 713 So. 2d at 1018.

989. Rights of first refusal and, for that matter, rights of first sale, are merely options that are subject to conditions precedent. See Ronald Benton Brown, *An Examination of Real Estate Purchase Options*, 12 NOVA L. REV. 147, 172 (1987).

990. 718 So. 2d 889 (Fla. 3d Dist. Ct. App. 1998), *review denied*, (Oct. 14, 1998).

991. *Id.* at 890.

992. *Id.* at 889.

993. *Id.*

994. *Id.* at 890.

995. *Gonzalez*, 718 So. 2d at 890.

996. *Id.*

997. *Id.*

998. 727 So. 2d 1143 (Fla. 5th Dist. Ct. App. 1999).

former military officers.⁹⁹⁹ One of the benefits of membership was the ability to buy a residence in the Club's planned unit development.¹⁰⁰⁰ However, under the deed restrictions, nonmembers were unable to purchase a unit.¹⁰⁰¹ Furthermore, if an owner decided to sell, the residence had to be sold at a price agreed to when the unit was first acquired, and to another Club member on the waiting list.¹⁰⁰² If a Club member wanted to buy the unit, the Club was required to sell it at the agreed price.¹⁰⁰³ The Bagg's claimed that these restrictions violated the rule against restraints on alienation.¹⁰⁰⁴ The trial court agreed, based upon the Supreme Court of Florida's decision in *Inglehart v. Phillips*,¹⁰⁰⁵ which invalidated a fixed price repurchase option of unlimited duration.¹⁰⁰⁶

The Fifth District Court of Appeal disagreed, distinguishing *Inglehart* on the critical facts.¹⁰⁰⁷ The rule against restraints on alienation does not prohibit all restrictions that prevent sale of land on the open market.¹⁰⁰⁸ The rule prohibits only unreasonable restraints.¹⁰⁰⁹ The restriction in *Inglehart* had no stated purpose and the court found it would have a significant negative impact on the likelihood that the property would be improved, and on its general marketability.¹⁰¹⁰ In contrast, the restrictions in this case were shown not to have the same degree of negative impact.¹⁰¹¹ To the contrary, the restrictions were part of a rational plan to ensure continued success of the organization, and the planned unit development. Declaring the restrictions invalid would undermine the legitimate objectives of the members of the association.¹⁰¹² The dissent considered the case "squarely controlled by *Inglehart*."¹⁰¹³ The critical factor, in the dissent's opinion, was that there was no provision for an increase in the value of the property between purchase and resale.¹⁰¹⁴ The dissent would, however, have allowed

999. *Id.* at 1144.

1000. *Id.*

1001. *Id.*

1002. *Id.*

1003. *Bagg*, 727 So. 2d at 1144.

1004. *Id.*

1005. 383 So. 2d 610 (Fla. 1980).

1006. *Bagg*, 727 So. 2d at 1145.

1007. *Id.*

1008. *Id.* at 1145-46.

1009. *Id.*

1010. *Id.* at 1146.

1011. *Bagg*, 727 So. 2d at 1146.

1012. *Id.*

1013. *Id.* at 1146 (Thompson, J., dissenting).

1014. *Id.* at 1146.

the Club to seek relief based upon equitable principles for the loss of the benefit of its bargain.¹⁰¹⁵

*Taylor v. Cesery.*¹⁰¹⁶ Defendant was the trustee and executor of the property in dispute.¹⁰¹⁷ As such, he had the power to sell or grant an option on the land.¹⁰¹⁸ Cesery decided to sell the residence, but first offered it to one of the beneficiaries.¹⁰¹⁹ When the beneficiary did not accept the offer, the defendant gave her "a right of first refusal."¹⁰²⁰ He later received an offer from a third party and notified the beneficiary.¹⁰²¹ The beneficiary proposed that she receive the house in lieu of her cash distribution under the will.¹⁰²² When the defendant rejected that proposal, the beneficiary brought this suit and filed a notice of *lis pendens*.¹⁰²³

The trial court denied the motion for a preliminary injunction.¹⁰²⁴ The First District Court of Appeals affirmed the denial of the preliminary injunction, reasoning that the plaintiff had no likelihood of ultimate success on the merits.¹⁰²⁵ The claim was based upon having exercised the right of first refusal, but a matching cash offer was never made by the third party.¹⁰²⁶ Taking the house in lieu of a distribution from the estate was not the equivalent of a cash offer.¹⁰²⁷

XVIII. RIPARIAN RIGHTS

*Lee v. Williams.*¹⁰²⁸ This court resolved the issue of whether the appellant had a right to construct a boat lift, by looking at which neighbor owns the nonnavigable tidelands of Florida.¹⁰²⁹ In *Lee*, the two neighbors'

1015. *Id.* at 1147.

1016. 717 So. 2d 1112 (Fla. 1st Dist. Ct. App. 1998).

1017. *Id.* at 1113.

1018. *Id.*

1019. *Id.*

1020. *Id.*

1021. *Taylor*, 717 So. 2d at 1113.

1022. *Id.* at 1114.

1023. *Id.*

1024. *Id.* Plaintiff also filed a notice of *lis pendens* which the trial court ordered discharged. The district court reversed because there were issues remaining in the litigation that might affect the title. Consequently, the third party would take title subject to the ultimate outcome of this litigation. *Id.* at 1114-15.

1025. *Taylor*, 717 So. 2d at 1114.

1026. *Id.*

1027. *Id.*

1028. 711 So. 2d 57 (Fla. 5th Dist. Ct. App. 1998), *review denied*, 722 So. 2d 193 (Fla. 1998).

1029. *Id.* at 57.

lots were contiguous.¹⁰³⁰ The western boundary of the Williams' lot, Lot 13, was defined as the centerline of Butler's Branch, a small waterway shown on the plat of Butler's Replat, and the Lees' northern boundary of their lot, Lot 12, was Julington Creek, a navigable body of water.¹⁰³¹ The waters of Butler's Branch and Julington Creek joined at the northwest end of the Lees' property.¹⁰³²

In 1960, the owner of Lot 13 excavated a navigable canal to run through and across Lot 13, and through and across the conflux of Butler's Branch and Julington Creek and into Julington Creek.¹⁰³³ In 1961, when the Williams purchased Lot 13, the canal had been excavated.¹⁰³⁴ If in 1961, the boat lift had been erected where it is today, it would have been over dry land.¹⁰³⁵ Over the years, the canal bank eroded toward the common boundary line, and in the 1980's the owner of Lot 12 constructed a bulkhead along the, then existing, bank of the canal.¹⁰³⁶ Surveys show that a great portion of this bulkhead was built on Lot 13.¹⁰³⁷

In 1993, the Lees purchased Lot 12, and without the Williams' knowledge, constructed a boat lift in the canal adjoining the previously constructed bulkhead sometime in 1994.¹⁰³⁸ The boat lift was situated entirely within Lot 13, and the Williams, upon discovering this, protested the construction of the boat lift.¹⁰³⁹

The issue facing this court was whether the canal, which traverses nonnavigable tidelands within the Williams' lot, was privately owned by the Williams, or was sovereignty land available for public use.¹⁰⁴⁰ The trial court found that *Clement v. Watson*¹⁰⁴¹ was dispositive.¹⁰⁴² In *Clement*, the court found that Watson was able to exclude Clement from fishing privileges in a cove surrounded by property owned by Watson's wife.¹⁰⁴³ The Supreme Court of Florida affirmed the basis of the decision in *Clement*, when it defined navigable waters and "emphasized that waters are not navigable

1030. *Id.*

1031. *Id.* at 57-58.

1032. *Id.* at 58.

1033. *Lee*, 711 So. 2d at 58.

1034. *Id.*

1035. *Id.*

1036. *Id.*

1037. *Id.*

1038. *Lee*, 711 So. 2d at 58.

1039. *Id.*

1040. *Id.*

1041. 58 So. 25 (Fla. 1912).

1042. *Lee*, 711 So. 2d at 58.

1043. *Id.*

merely because they are affected by the tides.”¹⁰⁴⁴ The court distinguished between sovereignty and privately owned lands as follows:

“The shore of navigable waters which the sovereign holds for public uses *is the land that borders on navigable waters and lies between ordinary high and ordinary low water mark. This does not include lands that do not immediately border on the navigable waters, and that are covered by water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and lowlands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation.* Lands not covered by navigable waters and not included in the shore space between ordinary high and low water marks immediately bordering on navigable waters are the subjects of private ownership, at least when the public rights of navigation, etc., are not thereby unlawfully impaired.”¹⁰⁴⁵

The court concluded in *Clement* that a majority of states, including Florida, base the determination on whether water is navigable and not upon whether water is tidal.¹⁰⁴⁶ The appellants, however, argued that reliance on *Clement* was an error and that the 1988 decision by the United States Supreme Court in *Phillips Petroleum Co. v. Mississippi*¹⁰⁴⁷ governed.¹⁰⁴⁸ The appellants concluded that all of Florida’s tidelands are sovereignty lands of the state.¹⁰⁴⁹ In *Phillips Petroleum*, the United States Supreme Court held that the states, “upon entry into the Union, received ownership of all lands under waters subject to the daily tidal ebb and flow.”¹⁰⁵⁰ However, the Court also held “that the states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”¹⁰⁵¹

This court looked to see how Florida law defined the limits of the lands held in public trust, and what private rights in tidelands that Florida recognizes.¹⁰⁵² No Supreme Court of Florida case has overruled *Clements*, nor has any case held a nonnavigable tideland to be sovereignty land.¹⁰⁵³

1044. *Id.*

1045. *Id.* at 59 (quoting *Clement v. Watson*, 58 So. 25, 26 (Fla. 1912)) (emphasis in original).

1046. *Id.*

1047. 484 U.S. 469 (1988).

1048. *Lee*, 711 So. 2d at 59.

1049. *Id.* at 60.

1050. *Id.*

1051. *Id.*

1052. *Id.*

1053. *Lee*, 711 So. 2d at 62.

Therefore, the appellate court affirmed the trial courts decision that the land is not to be sovereignty land.¹⁰⁵⁴

XIX. SALES

*Anchor Bank, S.S.B. v. Conrardy.*¹⁰⁵⁵ Condominium buyers brought an action for damages for fraud and rescission based on claims that the seller had made fraudulent representations and failed to disclose known construction defects.¹⁰⁵⁶ The two claims were tried together. The court granted a directed verdict for the defendant on the fraud claim due to "deficiencies in proof as to the tort damages," but then granted rescission based on fraud in the inducement.¹⁰⁵⁷

Two points on appeal were noteworthy. First, the seller claimed that the buyers had an adequate remedy at law, so they should be denied any equitable relief.¹⁰⁵⁸ The crux of this argument seems to be based on the fact that the buyers could not simultaneously bring the tort suit without undermining their claim for rescission.¹⁰⁵⁹ The district court rejected that argument because the Supreme Court of Florida allowed such joinder in *Johnson v. Davis.*¹⁰⁶⁰ The seller also seemed to be arguing that losing the tort suit should bar the claim for rescission, but that argument was rejected because the elements for establishing damages for fraud were not the same as those for rescission for fraudulent concealment.¹⁰⁶¹

The seller also claimed that rescission should not be granted because the buyers could not restore the property to its condition at the time of the sale, as is ordinarily required.¹⁰⁶² The exception to the general rule is where restoration is prevented by the very fraud from which the victim seeks relief.¹⁰⁶³ The exception applied in this case because the deterioration was caused by the structural problems that the seller had failed to disclose to the buyers.¹⁰⁶⁴

1054. *Id.* at 64.

1055. 23 Fla. L. Weekly D1764 (4th Dist. Ct. App. 1998).

1056. *Id.*

1057. *Id.*

1058. *Id.*

1059. *Id.*

1060. *Anchor Bank*, 23 Fla. L. Weekly at D1764 (citing *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)).

1061. *Id.*

1062. *Id.*

1063. *Id.*

1064. *Id.*

Beach Higher Power Corp. v. Granados.¹⁰⁶⁵ The Buyer signed a contract to purchase a condominium unit "as is."¹⁰⁶⁶ The contract called for closing within sixty days but the buyer paid the entire purchase price at the time of signing the contract.¹⁰⁶⁷ Over fifteen months later, the buyer still did not have title despite repeated demands, and he thereafter filed this suit for specific performance and breach of contract.¹⁰⁶⁸ He alleged that the seller had been using the unit during that period and had damaged it.¹⁰⁶⁹

Before the seller had filed its answer the trial court granted the buyer's motion for partial summary judgment on the breach of contract claim.¹⁰⁷⁰ In support of the motion, the buyer had filed an affidavit which incorporated by reference a letter from the seller's attorney claiming the buyer had gotten the unit at a bargain price because he had orally agreed to allow the seller to use the unit as a sales office and model until all the other units had been sold.¹⁰⁷¹ The buyer, in his affidavit, denied any such agreement.¹⁰⁷²

The district court concluded that the partial summary judgment should not have been granted.¹⁰⁷³ Summary judgment should only be granted before an answer has been filed where it appears that no genuine issue or defense could possibly be raised by the answer.¹⁰⁷⁴ Here, at least one possible defense existed. The written contract could have been modified by a subsequent oral agreement, or the conduct of the parties, even if that was prohibited by an express term in the contract.¹⁰⁷⁵ The buyer's affidavit reveals that there was a dispute about the existence of an agreement under which seller could use the unit.¹⁰⁷⁶ If there was such a valid modification, then seller might not have breached the contract. Consequently, the motion should not have been granted at this stage of the proceedings.¹⁰⁷⁷

Bush v. Ayer.¹⁰⁷⁸ The land and the buyer were located in Florida, but the sellers were located in Ohio.¹⁰⁷⁹ An agreement in principle was reached

1065. 717 So. 2d 563 (Fla. 3d Dist. Ct. App. 1998), *review denied*, (Sept. 23, 1998).

1066. *Id.* at 564.

1067. *Id.*

1068. *Id.*

1069. *Id.*

1070. *Granados*, 717 So. 2d at 564.

1071. *Id.*

1072. *Id.*

1073. *Id.*

1074. *Id.* at 565.

1075. *Granados*, 717 So. 2d at 565.

1076. *Id.*

1077. *Id.*

1078. 728 So. 2d 799 (Fla. 4th Dist. Ct. App. 1999), *review denied*, *Ayer v. Bush*, 744 So. 2d 452 (Fla. 1999).

1079. *Id.* at 800.

during a telephone conversation.¹⁰⁸⁰ The buyer instructed his attorney to draft the contract and mail it to the sellers.¹⁰⁸¹ After reviewing the contract, the sellers wanted one change.¹⁰⁸² They wanted the buyer to pay the closing costs.¹⁰⁸³ They hand wrote their modifications onto the draft, signed it, and then faxed it to their attorney.¹⁰⁸⁴ Their attorney mailed the fax to the buyer with a cover letter that stated:

Please forward these counter-offers to your client, Mr. Bush, and explain the changes. If he is willing to consider the terms proposed by my clients, then please contact me and I will deliver the original signed contracts to your office for [your] review and execution. Once there is a complete bilateral contract . . . then we can discuss making preparations for the closing.¹⁰⁸⁵

That procedure was not followed.¹⁰⁸⁶ The original contract that the buyer had sent to the sellers was never delivered back to the buyer's attorney for review and execution, as the cover letter required for the completing of a bilateral contract.¹⁰⁸⁷ The buyer simply went to his attorney's office and agreed to the changes.¹⁰⁸⁸ He then signed the fax copy of the contract that his attorney had received.¹⁰⁸⁹ The buyer's attorney communicated those facts to the sellers and their attorney, and further stated that he was taking the contract to a title company so that the closing documents could be prepared.¹⁰⁹⁰ The title company sent the closing documents, including closing statements and proposed deeds, to the sellers.¹⁰⁹¹ The sellers objected to the tax proration, but that was worked out.¹⁰⁹² Anticipating closing, the buyer delivered checks to the title company.¹⁰⁹³ A further dispute broke out regarding minor discrepancies in the names of the sellers.¹⁰⁹⁴ Apparently frustrated over the delays, the sellers attempted to

1080. *Id.*

1081. *Id.*

1082. *Id.*

1083. *Bush*, 728 So. 2d at 800.

1084. *Id.*

1085. *Id.*

1086. *Id.* at 801.

1087. *Id.*

1088. *Bush*, 728 So. 2d at 800-01.

1089. *Id.* at 801.

1090. *Id.*

1091. *Id.*

1092. *Id.*

1093. *Bush*, 728 So. 2d at 801.

1094. *Id.* at 802.

rescind the contract, offering to return the buyer's deposit.¹⁰⁹⁵ The buyer responded with the threat of a lawsuit.¹⁰⁹⁶ Attempting to resolve the matter, the sellers' attorney stated, "Mr. and Mrs. Ayer are willing to meet their *contractual* requirements to sell Lot 13; however, there is a problem."¹⁰⁹⁷ When the negotiations again broke down, the sellers claimed, for the first time, that there was no contract because the buyer had never properly accepted the counteroffer.¹⁰⁹⁸

The trial court agreed with the sellers and found that there was no contract.¹⁰⁹⁹ The Fourth District Court of Appeal disagreed and reversed.¹¹⁰⁰ While the counteroffer required acceptance in a particular manner, strict compliance with those terms could be waived expressly or impliedly.¹¹⁰¹ Reviewing the facts, the district court found:

Prior to the date set for closing, the parties had proceeded in all respects as if a valid contract existed for the sale of Lot 13. [Sellers] did not simply fail to assert to the contrary—they actively conducted themselves in a manner that left no room for a reasonable inference to the contrary. It would be difficult to imagine a much stronger showing of waiver by conduct than that made in this record. We conclude that the only reasonable inference to be drawn from the undisputed evidence . . . is that they waived strict compliance with the designated manner of acceptance of their counter-offer.¹¹⁰²

The trial court had concluded otherwise. Because the facts were not in dispute, its findings were in the nature of a legal conclusion.¹¹⁰³ Thus, the district court was not required to defer to the trial court's findings.

*Midtown Realty, Inc. v. Hussain.*¹¹⁰⁴ The buyer sent a signed "Letter of Intent" to the sellers containing a proposal for the purchase of a gas station.¹¹⁰⁵ It included terms such as the proposed purchase price, financing plans, and an inspection period. It further provided, "[i]f these TERMS and CONDITIONS are acceptable to the Seller, Purchaser shall present to the

1095. *Id.*

1096. *Id.*

1097. *Id.*

1098. *Bush*, 728 So. 2d at 802.

1099. *Id.*

1100. *Id.*

1101. *Id.* at 801.

1102. *Id.* at 802.

1103. *Bush*, 728 So. 2d at 802.

1104. 712 So. 2d 1249 (Fla. 3d Dist. Ct. App. 1998).

1105. *Id.* at 1250.

Seller a more detailed and formal Purchase Agreement."¹¹⁰⁶ Before signing the letter of intent, the sellers' representative changed and added terms.¹¹⁰⁷ In response, the buyer sent a signed Purchase and Sale Agreement to the sellers.¹¹⁰⁸ The sellers responded by making several changes, executing it and sending it back to the buyer.¹¹⁰⁹ The buyer notified the sellers that he could not agree to two of the changes the Sellers had made, and that unless an agreement could be reached on these points, the transaction could not be consummated.¹¹¹⁰ An agreement could not be reached and the sellers withdrew the property from the market.¹¹¹¹

The buyer then brought this suit for breach of contract.¹¹¹² The sellers' defense was that there was no contract.¹¹¹³ The trial court dismissed the case and the Third District Court of Appeal affirmed.¹¹¹⁴ In order to have a contract, there must have been a meeting of the minds on the essential elements of the agreement. Several factors led the court to conclude that no contract existed. First, a letter of intent is customarily used to memorialize a preliminary understanding, rather than a contract.¹¹¹⁵ Second, this letter of intent included language making it clear that it was merely a proposal intended to further negotiations, rather than an offer.¹¹¹⁶ The sale of a gas station, necessarily involving many complicated details, such as environmental matters, licensing, permits and financing, would ordinarily be reduced to a detailed contract, rather than a brief document like the letter of intent.¹¹¹⁷ Furthermore, the buyer himself had stated that the transaction could not be consummated unless agreement could be reached on points not resolved by the letter of intent.¹¹¹⁸

Pressman v. Wolf.¹¹¹⁹ The buyer signed a contract that provided the central air conditioning, refrigerator, washer/dryer, hot water heater, stove

1106. *Id.*

1107. *Id.*

1108. *Id.* at 1251.

1109. *Hussain*, 712 So. 2d at 1251.

1110. *Id.*

1111. *Id.*

1112. *Id.*

1113. *Id.*

1114. *Hussain*, 712 So. 2d at 1251. The claim of the broker operating under an open listing contract was also dismissed and that was also affirmed by the district court. *Id.*

1115. *Id.* at 1252.

1116. *Id.*

1117. *Id.*

1118. *Hussain*, 712 So. 2d at 1252.

1119. 732 So. 2d 356 (Fla. 3d Dist. Ct. App. 1999), *review denied*, *Wolf v. Pressman*, 744 So. 2d 459 (Fla. 1999).

top and existing fixtures were "ALL IN 'AS IS' CONDITION."¹¹²⁰ The standard term warranting the septic tank, pool, major appliances, plumbing, and machinery to be in working condition was crossed out.¹¹²¹ The contract also provided that the buyer waived any defects not reported at least ten days before the closing.¹¹²² Furthermore, the contract provided the standard integration term that, "[n]o prior or present agreements or representations shall be binding upon [B]uyer or [S]eller unless included in this contract."¹¹²³ The buyer was clearly aware of these terms, but made a "business decision" to accept against the advice of her attorney.¹¹²⁴

Before closing, the buyer's inspectors warned her that the true extent of the problems could not be determined without further testing.¹¹²⁵ They warned her that there were reasons to be concerned about the home's structural integrity, whether the air conditioning system worked, and the presence of termites.¹¹²⁶ Furthermore, there were reasons to suspect that the pool leaked, or worse.¹¹²⁷ The buyer, however, decided to close anyway.¹¹²⁸ She later claimed that she went through with the closing because the sellers represented that a city owned building obstructing the view would be torn down and that a person they knew, Mr. Cruz, would be able to renovate the home for only \$100,000.¹¹²⁹

The buyer quickly became dissatisfied with Mr. Cruz's work, and fired him.¹¹³⁰ After spending \$225,000 on repairs, with the end not in sight, she became dissatisfied with her purchase and brought this suit claiming breach of contract and fraud.¹¹³¹ The trial court awarded her compensatory and punitive damages, but the Third District Court of Appeal reversed.¹¹³²

The Third District considered the contract as a whole, rather than relying on isolated terms.¹¹³³ It found that the agreement was to sell the home "as is," with no warranties because both parties knew it was in bad repair.¹¹³⁴

1120. *Id.* at 358 (The capitalization for emphasis reflects the way the term was typed into the contract).

1121. *Id.*

1122. *Id.*

1123. *Id.*

1124. *Pressman*, 732 So. 2d at 358.

1125. *Id.*

1126. *Id.* at 358-59.

1127. *Id.* at 359.

1128. *Id.*

1129. *Pressman*, 732 So. 2d at 359.

1130. *Id.*

1131. *Id.*

1132. *Id.* at 357.

1133. *Id.* at 360.

1134. *Pressman*, 732 So. 2d at 360.

Thus, there could be no recovery for breach of contract.¹¹³⁵ Nor could there be recovery for fraudulent misrepresentation based on *Johnson v. Davis* because that only gave relief from the seller's failure to disclose defects that "are not readily observable and are not known to the buyer."¹¹³⁶ Not only were hints of these defects observable, but the buyer was warned by the terms of the contract and by her own inspectors.¹¹³⁷

The buyer could also not recover based upon claims that she was misled by the sellers' statement that the property could be renovated for \$100,000, or that the publicly owned building would be torn down.¹¹³⁸ The buyer could not rely upon an obviously unreliable statement, she still had the duty to take reasonable steps to ascertain the material facts relating to the property.¹¹³⁹ In light of the seller's disclaimers and the warnings of her inspectors, she could not have reasonably relied upon such an unsupported estimate.¹¹⁴⁰ Furthermore, she should have known that the plans of a government might change, so she could not rely upon its unconfirmed plans to tear the building down.¹¹⁴¹

Finally, any claims that the buyer had been fraudulently induced to enter this contract were barred by the economic loss doctrine.¹¹⁴² Any representation about the condition of the land was inseparably embodied in the parties' subsequent agreement.¹¹⁴³ Consequently, she could not recover damages for purely economic injury.¹¹⁴⁴

*Spitale v. Smith.*¹¹⁴⁵ The buyer brought an action for, *inter alia*, fraudulent nondisclosure of construction defects.¹¹⁴⁶ The seller was the first owner of the home, but had never occupied it.¹¹⁴⁷ As the landlord, he had received a letter from the tenant to the seller specifying some minor problems, including water leaks above the garage door.¹¹⁴⁸ The tenant later testified that the leak over the garage door was the only one.¹¹⁴⁹ The seller hired a roofer to repair that leak.¹¹⁵⁰

1135. *Id.*

1136. *Id.* (quoting *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)).

1137. *See id.*

1138. *Id.* at 361.

1139. *Pressman*, 732 So. 2d at 361.

1140. *Id.*

1141. *Id.*

1142. *Id.*

1143. *Id.*

1144. *Pressman*, 732 So. 2d at 362.

1145. 721 So. 2d 341 (Fla. 2d Dist. Ct. App. 1998), *review denied*, (Nov. 12, 1998).

1146. *Id.* at 342.

1147. *Id.*

1148. *Id.* at 343.

1149. *Id.*

1150. *Spitale*, 721 So. 2d at 344.

During the four years after the closing, the buyer experienced repeated problems with the roof and had it repaired a number of times.¹¹⁵¹ Following a bench trial, judgment was entered for the buyer, but the district court reversed.¹¹⁵² “*Johnson [v. Davis]* does not convert a seller of a house into a guarantor of the condition of the house.”¹¹⁵³ What it did hold was that “where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.”¹¹⁵⁴ In this case, there simply was insufficient evidence that the seller knew of facts that would materially affect the value of the property.¹¹⁵⁵

*Tiburón Ltd. v. Minola, Inc.*¹¹⁵⁶ The buyer contracted to buy fifty acres of an approved development of almost eight hundred acres.¹¹⁵⁷ The contract of sale included a clause that required the recording of a covenant at closing that would obligate the buyer to pay its pro rata share of the construction, operation, maintenance, and repair of the water management system for the entire development.¹¹⁵⁸ The parties’ engineers were to jointly determine what that pro rata share would be, but if no agreement could be reached, “such issue shall be submitted to binding arbitration.”¹¹⁵⁹ The clause also provided that the buyer’s share would not exceed \$265,000.¹¹⁶⁰

Subsequently, the buyer signed an option to purchase up to an additional twenty-four acres adjacent to the original fifty.¹¹⁶¹ The buyer assigned its rights to a related entity, which we will identify as Buyer-2, who went through with the purchase.¹¹⁶² Buyer-2 exercised the option and the parties proceeded to closing.¹¹⁶³ Because they could not agree on Buyer-2’s pro rata share of the costs of the water management system for its combined purchases, they entered into an escrow agreement.¹¹⁶⁴ It provided that Buyer-2 would deposit \$395,000 in escrow as its maximum obligation, and the exact amount would be determined by an arbitrator.¹¹⁶⁵ The \$395,000

1151. *Id.*

1152. *Id.* at 345.

1153. *Id.* (citing *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)).

1154. *Id.* (quoting *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1986)).

1155. *Spitale*, 721 So. 2d at 345.

1156. 730 So. 2d 754 (Fla. 2d Dist. Ct. App. 1999), *review denied*, (Apr. 22, 1999).

1157. *Id.*

1158. *Id.*

1159. *Id.*

1160. *Id.*

1161. *Tiburón Ltd.*, 730 So. 2d at 754.

1162. *Id.* at 755.

1163. *Id.*

1164. *Id.*

1165. *Id.*

represented an increase of its original \$265,000 maximum proportional to the greater amount of land it was now purchasing.¹¹⁶⁶

Buyer and Buyer-2 during arbitration tried to collect from the seller its pro rata share of the cost of the water management system.¹¹⁶⁷ The seller objected on the grounds that imposing liability on the seller was beyond the scope of the arbitration to which they had agreed.¹¹⁶⁸ The trial court agreed, as did the district court.¹¹⁶⁹ The arbitration clause, as interpreted by looking at all the documents, clearly was limited to the question of what share of these costs buyer would have to pay.¹¹⁷⁰ While that necessarily involved calculating the total cost of the system, it did not extend to the question of the seller's responsibility for costs incurred by the buyer in regard to the system.¹¹⁷¹ The court acknowledged that the buyer and Buyer-2 might have a cause of action against the seller for contribution to the cost of the water management system, but pointed out that issue was not before the court.¹¹⁷²

XX. SLANDER OF TITLE

Clearman v. Dalton.¹¹⁷³ This opinion resulted from a motion for rehearing or clarification.¹¹⁷⁴ The Clearmans sought rehearing of the court's unpublished order that granted the Clearmans attorneys' fees.¹¹⁷⁵ This court withdrew the previous opinion and the order awarding the Clearmans appellate fees and substituted the following information.¹¹⁷⁶

The Clearmans recovered a judgment for \$150,000 against the Daltons.¹¹⁷⁷ The Daltons filed for bankruptcy and stated there were two secured mortgages against their homestead.¹¹⁷⁸ The first mortgage in favor of the Daltons' son was never recorded and the second mortgage to Monticello Bank was recorded but never delivered.¹¹⁷⁹ The Daltons never amended their bankruptcy petition to correct the "error."¹¹⁸⁰

1166. *Tiburon Ltd.*, 730 So. 2d at 755.

1167. *Id.*

1168. *Id.*

1169. *Id.* at 754.

1170. *Id.* at 755.

1171. *Tiburon Ltd.*, 730 So. 2d at 755-56.

1172. *Id.* at 756.

1173. 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998).

1174. *Id.* at 324.

1175. *Id.*

1176. *Id.* at 325.

1177. *Id.*

1178. *Clearman*, 708 So. 2d at 325.

1179. *Id.*

1180. *Id.*

The trustee in bankruptcy elected to avoid the liens and obtained an order from the bankruptcy court avoiding the mortgages, preserving the avoided obligations "for the benefit of the estate."¹¹⁸¹ The mortgages were assigned to the Clearmans.¹¹⁸² After they recorded the assignment and the judgments avoiding the mortgages, the Clearmans attempted to foreclose on the interest acquired from the trustee.¹¹⁸³ Dalton counterclaimed to quiet title and for slander of title.¹¹⁸⁴ The trial court denied foreclosure and found against the Clearmans on the Daltons' counterclaim for slander of title.¹¹⁸⁵ The court awarded the Daltons attorneys' fees, costs, and prejudgment interest.¹¹⁸⁶

The appellate court agreed with the trial court holding that "even though the obligations evidenced by avoiding the mortgages were preserved for the estate, 11 U.S.C. § 544 does not place the Trustee . . . in the place of the former mortgagees with the power to foreclose and avoid the Daltons' homestead claim."¹¹⁸⁷ It went on to hold "the bankruptcy estate did have an assignable interest in the mortgages subject to the Daltons' claim of homestead."¹¹⁸⁸ The court ruled that the assignees paid a fair price for the assignment, can assert their interest, and thus, can be required to establish the fact of homestead.¹¹⁸⁹

The appellate court determined that filing of judgments does not constitute slander of title even if the assignment of the estate's interest was in the nature of a quitclaim deed.¹¹⁹⁰ The Daltons willingly filed their bankruptcy petition and submitted their property to bankruptcy.¹¹⁹¹ Therefore, they cannot subsequently complain if the assignee of the estate's interest requires that they prove their entitlement to the homestead exemption.¹¹⁹²

1181. *Id.*

1182. *Id.*

1183. *Clearman*, 708 So. 2d at 325.

1184. *Id.*

1185. *Id.*

1186. *Id.*

1187. *Id.*

1188. *Clearman*, 708 So. 2d at 325.

1189. *Id.*

1190. *Id.*

1191. *Id.*

1192. *Id.*

XXI. TAXATION

Fuchs v. Robbins.¹¹⁹³ The issue here is whether the trial court properly held section 192.042(1), of the *Florida Statutes* to be unconstitutional.¹¹⁹⁴ Section 192.042(1) of the *Florida Statutes* requires that a zero valuation be placed on buildings under construction and not substantially completed on the taxing date, which is January first of each year.¹¹⁹⁵

The appellate court held that the trial court was correct and the statute was unconstitutional.¹¹⁹⁶ The court determined the statute violated the mandate of article VII, § 4, of the Florida Constitution (1968) that all real property (with some inapplicable exceptions) be assessed and taxed at just valuation.¹¹⁹⁷ According to the court, just valuation is synonymous with fair market value, and has been determined by the Supreme Court of Florida as "[t]he amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell."¹¹⁹⁸

This court held in *McNayr v. Claughton*¹¹⁹⁹ that there are three well recognized ways to appraise: 1) the cost approach; 2) the comparable sales approach; and 3) the income or economic approach.¹²⁰⁰ Here, the Master's Report states that the property appraiser's expert used the comparable sales approach and arrived at the \$3,790,227 tax assessment valuation on the improvements.¹²⁰¹ Therefore, on January 1, 1992 the incomplete hotel structure had an uncontested just valuation of \$3,790,227.¹²⁰² The court has previously held in *Interlachen Lake Estates v. Snyder, IIT Community Development Corp. v. Seay*, and *Valencia Center, Inc. v. Bystrom* that, except where the constitution specifically authorizes it that legislation which singles out classifications or properties for treatment that shows a tax assessment valuation at something other than fair market value violates article VII, section 4, of the Florida Constitution (1968).¹²⁰³

1193. 24 Fla. L. Weekly D1529 (3d Dist. Ct. App. June 30, 1999).

1194. *Id.* (citing FLA. STAT. § 192.042(1)(1991)).

1195. *Id.* (referring to the 1991 version of the *Florida Statutes*).

1196. *Id.*

1197. *Id.*

1198. *Fuchs*, 24 Fla. L. Weekly at D1530.

1199. 198 So. 2d 366 (Fla. 3d Dist. Ct. App. 1967).

1200. *Fuchs*, 24 Fla. L. Weekly at D1530 (citing *McNayr v. Claughton*, 198 So. 2d 366 (Fla. 3d Dist. Ct. App. 1967)).

1201. *Id.*

1202. *Id.*

1203. *Id.*; see *Snyder*, 304 So. 2d at 433; *Seay*, 347 So. 2d at 1024; *Bystrom*, 543 So. 2d at 214.

*Kuro v. Department of Revenue.*¹²⁰⁴ Kuro, Inc. (“Kuro”) appealed a final order which assessed an additional documentary stamp tax, collectively, on conveyances of eight unencumbered condominium units.¹²⁰⁵ Stock issued by Kuro in exchange for the condominiums was concluded in the final order to constitute consideration and that, pursuant to the applicable statutes and rules, this consideration was equal to the fair market value of the condominiums.¹²⁰⁶ The documentary stamp tax was based on the fair market value.¹²⁰⁷ This court reversed and found that levying the additional tax was error.¹²⁰⁸

The condominiums were owned by a father and son team in 1991.¹²⁰⁹ In 1994 the father and son incorporated Kuro.¹²¹⁰ They transferred the units’ titles to the corporation to avoid the potential personal liability for managing the eight rental units.¹²¹¹ The father and son transferred each condominium unit to Kuro by warranty deed.¹²¹² Each deed recited nominal consideration of ten dollars and Kuro paid the minimum documentary stamp tax on each transaction.¹²¹³

After conducting an audit, the Department of Revenue (“DOR”) determined that additional documentary stamp taxes were due.¹²¹⁴ The administrative law judge recommended the assessment of additional documentary stamp taxes and the DOR entered a final order adopting these recommendations.¹²¹⁵

The appellate court first looked at section 201.02(1) of the *Florida Statutes*, which states that “a purchaser of real estate is required to pay a documentary stamp tax of \$.70 on each \$100 of consideration” for the property.¹²¹⁶ It further states that when consideration given in exchange for real property or any interest therein is other than money, it is presumed that the consideration is an amount that is equal to the fair market value of the real property.¹²¹⁷

1204. 713 So. 2d 1021 (Fla. 2d Dist. Ct. App. 1998).

1205. *Id.*

1206. *Id.* at 1021–22.

1207. *Id.* at 1022.

1208. *Id.*

1209. *Kuro*, 713 So. 2d at 1022.

1210. *Id.*

1211. *Id.*

1212. *Id.*

1213. *Id.*

1214. *Kuro*, 713 So. 2d at 1022.

1215. *Id.*

1216. *Id.*; FLA. STAT. § 201.02(1) (1999).

1217. *Kuro*, 713 So. 2d at 1022.

The court found that Kuro was not a purchaser within the meaning of section 210.02(1).¹²¹⁸ Therefore, no additional taxes were due.¹²¹⁹ Section 210.02(1) applies to transfers of real estate for consideration to a purchaser and "purchaser" has been defined by the Supreme Court of Florida as "one who obtains or acquires property by paying an equivalent in money or other exchange in value."¹²²⁰ The DOR's rule deals with stock as consideration and the statute merely creates a rebuttable presumption.¹²²¹ In this situation Kuro successfully rebutted the presumption.¹²²²

The appellate court found the conveyances were for the benefit of the father and son, who were availing themselves of the advantages of incorporation, and that the father and son still were the beneficial owners although not the legal owners.¹²²³ At the time the deeds were recorded the father and son owned all of the real estate and Kuro's stock.¹²²⁴ The father and son did not receive anything that they did not already have.¹²²⁵ Therefore, all that occurred were book transactions and not sales to a purchaser.¹²²⁶ The court reversed the DOR's final order.¹²²⁷

*S & W Air Vac Systems, Inc. v. Department of Revenue.*¹²²⁸ The appellate court affirmed the final administrative decision which held S & W liable to the DOR for use taxes as the licensee of real property pursuant to section 212.031 of the *Florida Statutes*.¹²²⁹

S & W owned coin-operated air vac machines used to vacuum cars and add air to tires.¹²³⁰ Store owners having these machines received monthly compensation in the form of a percentage of the unit's gross receipts.¹²³¹ S & W had the responsibility to collect money from the machines, make repairs, and pay licensing fees and taxes on them.¹²³²

S & W described this agreement as a "revenue sharing arrangement."¹²³³ The hearing officer found that payment was based on the

1218. *Id.*

1219. *Id.*

1220. *Id.* (quoting Florida Dep't of Revenue v. De Maria, 338 So. 2d 838, 840 (Fla. 1976)).

1221. *Id.*

1222. *Kuro*, 713 So. 2d at 1022.

1223. *Id.*

1224. *Id.* at 1023.

1225. *Id.*

1226. *Id.* at 1022 (citing Palmer-Florida Corp. v. Green, 88 So. 2d 493 (Fla. 1956)).

1227. *Kuro*, 713 So. 2d at 1023.

1228. 697 So. 2d 1313 (Fla. 5th Dist. Ct. App. 1997).

1229. *Id.* at 1314; see FLA. STAT. § 212.031 (1999).

1230. *S & W Air Vac Sys.*, 697 So. 2d at 1314.

1231. *Id.*

1232. *Id.* at 1314-15.

1233. *Id.*

right to place the machine in these stores and store owners should not be gaining compensation when the machine was removed.¹²³⁴ The hearing officer concluded that S & W had been granted licenses for the use of real property.¹²³⁵ Section 212.031 of the *Florida Statutes* dictated that use taxes were owed to the Department.¹²³⁶

First, the facts showed that the air vac machines were not the subject of a bailment.¹²³⁷ A "bailment" is a contractual relationship among parties in which the subject matter of the relationship is delivered temporarily to and accepted by one other than the owner.¹²³⁸

Next, the arrangement with the store owners could not constitute joint ventures.¹²³⁹ To have a joint venture, five elements must be established in addition to those required to form a basic contract.¹²⁴⁰ These elements include: 1) a community of interest in the performance of the common purpose; 2) joint control or right of control; 3) joint proprietary interest in the subject matter; 4) a right to share in the profits; and 5) a duty to share in any losses which may be sustained.¹²⁴¹ Although the first element was met, the court recognized that the others were not.¹²⁴²

S & W also questioned whether convenience stores and gas stations met section 212.031's use requirement.¹²⁴³ The statute states "it is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property"¹²⁴⁴

The hearing officer and the Department of Revenue concluded the transactions between S & W and store owners were taxable under section 212.031 of the *Florida Statutes*.¹²⁴⁵ That statute defines "business" as "any activity engaged in by any person, or caused to be engaged by him, with the object of private or public gain, benefit, or advantage."¹²⁴⁶

In this situation, "the licensors operated a commercial premises designed to attract customers for revenue generating purposes."¹²⁴⁷ The

1234. *Id.*

1235. *S & W Air Vac Sys.*, 697 So. 2d at 1315.

1236. *Id.*

1237. *See id.*

1238. *See* 5 FLA. JUR. 2D *Bailments* § 1 (1978).

1239. *S & W Air Vac Sys.*, 697 So. 2d at 1315-16.

1240. *Id.*

1241. *Id.* (citing to *Conklin Shows, Inc. v. Department of Revenue*, 684 So. 2d 328, 332 (Fla. 4th Dist. Ct. App. 1996)); *See also* *Kislak v. Kredian*, 95 So. 2d 510, 515 (Fla. 1957).

1242. *S & W Air Vac Sys.*, 697 So. 2d at 1315.

1243. *Id.* at 1316.

1244. *Id.* at 1316 (citing FLA. STAT. § 212.031(1)(a) (1993)).

1245. *Id.*

1246. *Id.* (citing FLA. STAT. § 212.02(2) (1989)).

1247. *S & W Air Vac Sys.*, 697 So. 2d at 1317.

ventures included income derived from a range of premises activity.¹²⁴⁸ Therefore, it was not a clearly erroneous interpretation to determine that store owners were in the business of granting a license under section 212.02 and 212.031 of the *Florida Statutes*.¹²⁴⁹

Smith v. Welton.¹²⁵⁰ The issue this court heard on appeal was whether section 193.155(8)(a) of the *Florida Statutes*, is facially unconstitutional in light of article VII, section (4)(c) of the Florida Constitution.¹²⁵¹ In *Smith*, the court stated that article VII, section (4)(c) provides:

Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

.....

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 [1994]. This assessment shall change only as provided herein.

1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:

(A) three percent (3%) of the assessment for the prior year.

(B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. No assessment shall exceed just value.

3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

5. Changes, additions, reductions or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.

1248. *Id.*

1249. *Id.*

1250. 710 So. 2d 135 (Fla. 1st Dist. Ct. App. 1998).

1251. *Id.* at 136.

6. In the event of a termination of homestead status, the property shall be assessed as provided by general law.¹²⁵²

However, section 193.155(8)(a) of the *Florida Statutes* provides:

(8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any annual assessment under this section due to material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.¹²⁵³

The trial court found that section 193.155(8)(a) is unconstitutional because the constitution states clearly that the assessment of just value shall only change as provided by the statute and section 193.155(8)(a) permits changes to the assessment that are not found in the constitution.¹²⁵⁴ This court found that section 193.155(8)(a) of the *Florida Statutes* is facially unconstitutional because the purported exception to the three percent rule contained in section 193.155(8)(a) is not one provided for in the constitution.¹²⁵⁵

The Supreme Court of Florida has held that provisions of the Constitution cannot alter, contract or enlarge legislation.¹²⁵⁶ The court determined in this case that the statute in question would defeat the purpose of article VII, section (4)(c) by allowing constant reassessments of homesteads when the purpose of section (4)(c) of article VII is to encourage the preservation of homestead property in the face of increasing real estate development and rising property values and assessments.¹²⁵⁷

Furthermore, this court found no merit to appellant's argument that without section 193.155(8)(a) there would be inequitable taxation since the constitution expressly mandates the special or inequitable taxation.¹²⁵⁸ Only the homestead property receives the three percent cap and, therefore nonhomestead property, commercial, agricultural, and noncommercial recreational land are excluded from the three percent cap.¹²⁵⁹ Further, the constitution provides that assessments shall not exceed just value, but does

1252. *Id.* at 136–37 (quoting FLA. CONST. art. VII, § 4(c)).

1253. FLA. STAT. § 193.155(8)(a) (1999).

1254. *Smith*, 710 So. 2d at 136.

1255. *Id.* at 137.

1256. *Id.* at 138; *see Osterndorf v. Turner*, 426 So. 2d 539, 544 (Fla. 1982).

1257. *See Smith*, 710 So. 2d at 138.

1258. *Id.* at 137.

1259. *Id.*

not say that assessments shall not be below just value.¹²⁶⁰ Therefore, this court held that the trial court correctly granted summary judgment.¹²⁶¹

Legislative changes include, but are not limited to, the following:

The Florida Legislature enacted chapter 98-185 to be retroactive to January 1, 1998 and to be effective until it expired on July 1, 1999.¹²⁶² This chapter provides for a partial abatement of ad valorem taxation where property has been destroyed or damaged by tornadoes.¹²⁶³ The application for such abatement must be filed by the owner with the property appraiser before March 1 following the tax year in which the destruction or damage occurred.¹²⁶⁴ Chapter 6 discusses the detail and criteria to be included in the application and what events will occur if the property appraiser determines the applicant to be entitled to such partial abatement.¹²⁶⁵

Section 196.1977 of the *Florida Statutes* provides:

[e]ach apartment in a continuing care facility certified under chapter 651, which facility is not qualified for exemption under [section] 196.1975 or other similar exemption, is exempt to the extent of \$25,000 of assessed valuation of such property for each apartment which is occupied on January 1 of the year in which exemption from ad valorem property taxation is requested by a person holding a continuing care contract as defined under chapter 651 who resides therein and in good faith makes the same his or her permanent home.¹²⁶⁶

These provisions shall take effect January 1, 1999 and shall apply to the 1999 tax rolls and each subsequent year's tax rolls.¹²⁶⁷

XXII. TIMESHARES

Effective April 30, 1998 amendments to chapter 721 of the *Florida Statutes* became effective.¹²⁶⁸ Those changes include, but are not limited to, the following:

To section 721.05 the legislature added a definition of "regulated short-term product."¹²⁶⁹ That term is defined as

1260. *Id.*; see *Florida League of Cities v. Smith*, 607 So. 2d 397 (Fla. 1992).

1261. *Smith*, 710 So. 2d at 138.

1262. 1998 Fla. Laws ch. 98-185.

1263. Ch. 98-185, § 1(1), 1999 Fla. Laws 1616, 1616.

1264. *Id.* § 1(1)(a), 1999 Fla. Laws at 1616.

1265. *Id.*

1266. FLA. STAT. § 196.1977 (1999).

1267. *Id.* § 196.1979 n.1.

1268. FLA. STAT. § 721 (1999).

a contractual right, offered by the seller, to use accommodations of a timeshare plan, provided that:

- (a) The agreement . . . is executed in this state on the same day that the prospective purchaser receives an offer to acquire an interest in a timeshare plan and does not execute a purchase contract, after attending a sales presentation; and
- (b) The acquisition of the right to use includes an agreement that all or a portion of the consideration paid by the prospective purchaser for the right to use will be applied to or credited against the price of a future purchase of a timeshare interest, or that the cost of a future purchase of a timeshare interest will be fixed or locked in at a specified price.¹²⁷⁰

An item of consideration that the legislature deleted is section 721.075(4) of the *Florida Statutes*.¹²⁷¹ That paragraph required the developer to file an irrevocable letter of credit, surety bond, or other assurance acceptable to the director of the division where the aggregate represented value of all incidental benefits offered by a developer to a purchaser exceeded five percent of the purchase price paid by that purchaser.¹²⁷² However, that requirement has been deleted and is no longer a part of the statutory scheme.¹²⁷³

The legislature added subsection (c) to section 721.09(1) of the *Florida Statutes*.¹²⁷⁴ This new provision provides that "the seller must immediately cancel all outstanding reservation agreements, refund all escrowed funds to prospective purchasers, and discontinue accepting reservation deposits or advertising the availability of reservation agreements," where the time share plan subject to the reservation agreement has not been filed with the division as required by Florida law within ninety days after the date the division approves the reservation agreement filing.¹²⁷⁵

To that same statute the legislature added subsection (1)(d).¹²⁷⁶ This section permits the seller who has filed a reservation agreement and escrow agreement program as required by statute to advertise the reservation agreement providing the material meets the criteria prescribed by the subsections to subparagraph (d).¹²⁷⁷

1269. *Id.* § 721.05(27).

1270. *Id.*

1271. *Id.* § 721.075(4).

1272. *Id.*

1273. FLA. STAT. § 721.075(4) (1999).

1274. *Id.* § 721.09(1)(c).

1275. *Id.*

1276. *Id.* § 721.09(1)(d).

1277. *Id.*

Section 721.11 of the *Florida Statutes* added subsection (6) and its subparts.¹²⁷⁸ These provisions state that failing to provide cancellation rights or disclosures required in connection with the sale of a regulated short-term product automatically constitutes a misrepresentation in accordance with subsection (4)(a) of this statute.¹²⁷⁹ Section 721.11(6)(a) requires the filing within ten days prior to use of a standard form of any agreement relating to the sale of a regulated short-term product.¹²⁸⁰ Subsection (b) of that statute establishes the right of a purchaser of a regulated short-term product to cancel the agreement until midnight of the tenth calendar day following the execution date of the agreement.¹²⁸¹ It also provides that the right of cancellation may not be waived by the prospective purchaser or anyone on his or her behalf.¹²⁸² Subsection (c) and its subparts with respect to this same statute provide for statements that must be included in an agreement for purchase of a regulated short-term product.¹²⁸³ Further, subsection (d) of the same statute provides for a series of statements in conspicuous type that must be included in an agreement for the purchase of a regulated short-term product.¹²⁸⁴

Section (e) of the foregoing statute also provides for an exemption from the requirements of subsection (b), (c), and (d).¹²⁸⁵ Where the seller provides the purchaser with the right to cancel the purchase of a regulated short-term product for any time up to seven days before the purchasers reserved use of the accommodations, but never less than ten days, and if the seller refunds the total amount of all payments made by the purchaser reduced by the proportion of any benefits the purchaser has actually received prior to the effective date of the cancellation, the specific value of which has been agreed to by the purchaser and seller, the short-term product offer shall be exempt from the requirements of the aforementioned paragraphs.¹²⁸⁶

To section 721.15 the legislature added subparagraph (1)(b).¹²⁸⁷ This section provides for allocating total common expenses for a condominium or cooperative timeshare plan and allowing such to vary on a reasonable basis if "the percentage is any interest in the common elements attributable to each

1278. FLA. STAT. § 721.11(6) (1999).

1279. *Id.*

1280. *Id.* § 721.11(6)(a).

1281. *Id.* § 721.11(6)(b).

1282. *Id.*

1283. FLA. STAT. § 721.11(6)(c) (1999).

1284. *Id.* § 721.11(6)(d).

1285. *Id.* § 721.11(6)(e).

1286. *Id.*

1287. FLA. STAT. § 721.15(1)(b) (1999).

time share condominium parcel or timeshare cooperative parcel equals the share of the total common expenses allocable to that parcel."¹²⁸⁸

To chapter 721 the legislature added the Timeshare Lien Foreclosure Act. This act consists of sections 721.80 through 721.86 and should be read in detail to become familiar with the rights and procedures involved.

The legislature also added sections 721.96 through 721.98 to the *Florida Statutes*. These statutes provide for establishing a commissioner of deeds to take acknowledgments, proofs of execution, and oaths outside the United States in connection with the execution of any instruments relating to or being used in connection with a timeshare estate.¹²⁸⁹ These sections should be read in detail.

XXIII. TITLE INSURANCE

*Security Union Title Insurance Co. v. Citibank, N.A.*¹²⁹⁰ The First District Court of Appeal was asked to review a jury verdict finding the title insurance underwriter vicariously liable for fraud committed by its agent, an attorney, when he made fraudulent representations to the lender to obtain loans, some of which benefitted him personally and others of which benefitted his clients.¹²⁹¹ Noting that the agent was expressly authorized only to sign and issue title insurance commitments and policies and that the losses did not occur from his acting in such a capacity, the appellate court found no vicarious liability under that authority.¹²⁹²

Next, it considered whether there might be vicarious liability arising from the agent's acting within his apparent authority.¹²⁹³ In doing so, the appellate court noted that at least one element needed for this liability is that there must have been some representation by the principal.¹²⁹⁴ Here the facts showed only that the principal who represented the agent had the authority to issue title commitments and policies.¹²⁹⁵ The fraudulent acts involved the agent's representations made to obtain loans.¹²⁹⁶ There were no representations by the underwriter that the agent had any authority to make

1288. *Id.*

1289. *Id.* § 721.96.

1290. 715 So. 2d 973 (Fla. 1st Dist. Ct. App. 1998), *review denied*, (Aug. 25, 1998), *review dismissed*, *Citibank, N.A. v. Security Union Title Ins.*, 728 So. 2d 200 (Fla. 1998).

1291. *Id.*

1292. *Id.*

1293. *Id.*

1294. *Id.* at 975. Presumably this representation must be one that would lead the claimant to have relied reasonably on the appearance that the agent had the authority to commit the act that caused the harm.

1295. *Citibank*, 715 So. 2d at 975.

1296. *Id.*

statements as a closing agent to obtain loans.¹²⁹⁷ Also, it was clear that the loans were for both his personal benefit and his clients' benefit.¹²⁹⁸ Therefore, the appellate court reversed and remanded with instructions to enter a judgment in favor of the underwriter.¹²⁹⁹

Legislative changes include, but are not limited to the following: chapter 99-286 of the *Laws of Florida* provides such changes to sections 624 and 627 of the *Florida Statutes* as differentiated ratings and premium splits for real estate transactions exceeding \$1,000,000; legislative clarifications for such terms as "premium" and "primary title services;" and a restructuring of reserve requirements.¹³⁰⁰

XXIV. CONCLUSION

The foregoing survey presents selected materials of significance to real estate professionals.¹³⁰¹ There seems to be no consistent pattern to the case law or legislative developments, but, as always, there is plenty for the reader to ponder. Real estate law continues to evolve in interesting ways.

1297. *Id.*

1298. *Id.* at 975.

1299. *Id.* at 976.

1300. 1999 Fla. Laws ch. 99-286.

1301. Readers are also urged to read the article on zoning and land use controls.

