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Fall 1996

# Property Law: 1996 Survey of Florida Law

Ronald B. Brown  
Joseph M. Grohman

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Ronald Benton Brown; Joseph M. Grohman, Property Law:  
1996 Survey of Florida Law, 21 Nova L. Rev. 279  
(1996)

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# Property Law: 1996 Survey of Florida Law

Ronald Benton Brown\*

Joseph M. Grohman\*\*

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\* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. B.S.M.E., 1970, Northeastern University; J.D., 1973, University of Connecticut; LL.M., 1976, Temple University.

\*\* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. B.A., 1966, Glassboro State College; M.A., 1971, California State University, Long Beach; J.D., 1975, University of Miami.

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## I. INTRODUCTION

This survey covers the decisions of the Florida courts and Florida legislation produced during the period from July 1, 1995 through June 30, 1996, especially selected for this article as being of potential interest to the real estate practitioner.

## II. ATTORNEYS' FEES

*Jakobi v. Kings Creek Village Townhouse Ass'n.*<sup>1</sup> The Third District Court of Appeal reversed the trial court's denial of Jakobi's motion for attorneys' fees as prevailing party in a suit against his townhouse association under section 57.105(2) of the *Florida Statutes*.<sup>2</sup> The dispute arose from the Association's Architectural Control Committee's denial of Jakobi's request for permission to install screening on the front of his unit. Jakobi filed suit for an injunction against the Association and the parties stipulated to an agreement allowing Jakobi to build the enclosure. Jakobi then moved for attorney's fees, noting that the Association's bylaws contained a provision allowing attorneys' fees to the Association in any litigation with an owner, and arguing that the reciprocity mandated by section 57.105(2) entitled him to fees as the prevailing party.

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1. 665 So. 2d 325 (Fla. 3d Dist. Ct. App. 1995).

2. *Id.* at 328. The court also held that the 1992 townhouse deed, through which Jakobi had received title to the townhouse, constituted a novation of the bylaws and declaration of covenants and restriction as between the Kings Creek Village Association, Inc. ("Master Association"), the Kings Creek Village Townhouse Association, Inc. ("Association"), and the owner. Such a finding was crucial to Jakobi's case for fees because of the provision in the section declaring that "[t]his act shall take effect October 1, 1988, and shall apply to contracts entered into on said date or thereafter," while the bylaws and original declaration of restrictions and covenants came into existence prior to 1988. *Id.* at 327.

The appellate court determined “[t]his was an action ‘with respect to the contract’ as contemplated by Section 57.105(2),”<sup>3</sup> and cited *Ryan v. Town of Manalapan*<sup>4</sup> for the proposition that the declaration and bylaws are contractual. In holding that the 1992 townhouse deed, through which Jakobi was conveyed title, constituted a novation,<sup>5</sup> the appellate court noted that the essential elements were present,<sup>6</sup> since this requirement may be implied from the circumstances of the transaction and conduct of the parties.<sup>7</sup> Based on the finding of a novation, the appellate court determined Jakobi was entitled to claim the reciprocity benefits of section 57.105(2).<sup>8</sup> Thus, Jakobi was entitled to the fee award.<sup>9</sup>

*Seminole County v. Clayton*.<sup>10</sup> The Fifth District Court of Appeal reversed and remanded an attorneys’ fee award in this eminent domain action. Seminole County took a 2.8 acre tract of land owned by Pauline Arndt, which, at the inception of the action, had no direct access to a public road. Resolution of the case depended on the availability of feasible access. The County obtained three appraisals and based its first offer on the lowest. Arndt’s appraiser assumed availability of access to a highway interchange and, as might be expected, arrived at a higher appraisal. The parties settled without a trial, leaving the attorneys’ fees to Arndt’s attorneys to be decided by the court, which applied section 73.092 of the *Florida Statutes* and found a reasonable fee based on hourly rates to be \$25,425.<sup>11</sup> In addition, in what the Fifth District Court of Appeal labeled a “double decker” application of the statute, the trial court added a twenty percent “benefit” fee for the difference between the County’s initial offer and the eventual settlement yield which amounted to \$133,836, bringing the total fee to \$159,261, or \$1,276.64 an hour.<sup>12</sup>

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3. *Id.*

4. 414 So. 2d 193, 196 (Fla. 1982).

5. *Jakobi*, 665 So. 2d at 327.

6. *Id.* It decided so, in part because “[w]hen the current owner took title with record notice of [the provisions of the bylaws and declaration] he assumed a new personal contractual obligation with the master and townhouse associations and his seller was discharged of his personal contractual obligations,” thus meeting the requirements of mutual consent to the novation. *Id.* at 328 (citing *Prucha v. Guarantee Reserve Life Ins. Co. of Hammond*, 358 So. 2d 1155, 1157 (Fla. 3d Dist. Ct. App. 1978), *cert. denied*, 370 So. 2d 459 (Fla. 1979)).

7. *Id.* (citing *Sans Souci v. Division of Fla. Land Sales and Condominiums*, 448 So. 2d 1116, 1121 (Fla. 1st Dist. Ct. App. 1984)).

8. *Id.* at 327.

9. *Jakobi*, 665 So. 2d at 327.

10. 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995).

11. *Id.* at 364.

12. *Id.*

In rejecting the trial court's fee computation, the appellate court opined that "[w]hatever section 73.092 may mean, and it admittedly is lacking in specificity, it cannot reasonably have been intended by the Florida Legislature to produce this result."<sup>13</sup> The appellate court, in assessing attorneys' fees, is not required to abandon its own expertise or common sense, and it should closely scrutinize awards to ensure reasonableness.<sup>14</sup> Here it appeared that the fee had been intended as punishment for perceived low-balling by the County in its initial offer which, even if true, would not warrant "the imposition of exorbitant attorney fees."<sup>15</sup>

### III. BOUNDARIES

*Jones v. Rives*.<sup>16</sup> For lack of competent substantial evidence, the First District Court of Appeal reversed the jury finding of a boundary agreement between adjacent property owners.<sup>17</sup> Appellees purchased land adjacent to appellant's and had timber cut from a section south of an old fence on the land. The survey performed by both parties showed that appellant's property ran nearly 100 feet south of the old fence. Appellant filed suit for cutting the timber, alleging damages and trespass. Appellees counterclaimed, asserting several claims of title to the relevant land. Appellant prevailed on a motion for summary judgment on the issue of ownership and right to possession.<sup>18</sup> As to the purported boundary agreement, the jury accepted appellee's claim that the old fence marked the true boundary between the properties.<sup>19</sup>

The appellate court reiterated the essential elements of a boundary by agreement:

- (1) an uncertainty or dispute as to the true boundary;
- (2) an agreement, either oral or implied, between the adjacent landowners that a certain line will be treated by them as the true line; and
- (3) subsequent occupation by the parties in accordance with that agreement

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13. *Id.* at 364.

14. *Id.*

15. *Clayton*, 665 So. 2d at 365. The court also rejected County arguments that section 73.092 of the *Florida Statutes* is an unconstitutional "offensive encroachment" upon the judicial function of regulating attorneys' fees. *Id.*

16. 21 Fla. L. Weekly D236 (1st Dist. Ct. App. Jan. 19, 1996).

17. *Id.* at D237.

18. *Id.* at D236.

19. *Id.*

for a period of time sufficient to show a settled recognition of the line as a permanent boundary.”<sup>20</sup>

The court found the first element lacking because no testimony had been given that there was uncertainty or a dispute between the parties as to the true boundary until the appellant had the property surveyed.<sup>21</sup> In addition, the evidence of there being three conversations, only one of which involved the record landowners, regarding an agreement was legally insufficient.<sup>22</sup> As to the third element, although there is no set amount of time to show settled recognition of the agreed boundary,<sup>23</sup> evidence here was legally insufficient.<sup>24</sup>

#### IV. BROKERS

*Schwey v. Vara.*<sup>25</sup> A piece of land was subject to a right of first refusal when the broker contacted the owners with a possible buyer. The owners accepted an offer and signed a contract of sale that provided for a cash sale and the payment of a commission to the broker. However, the contract also provided that it would be void and that the broker would not receive a commission if the right of first refusal was exercised. The right of first refusal was exercised by submitting a contract for exactly the same cash price, but it did not contain a provision for a broker's commission. The broker's potential buyer did not question the validity of the right of first refusal or that it had been validly exercised, but the broker did. She sued for a commission. The trial court ruled in favor of the seller and the district court agreed.<sup>26</sup>

Apparently, there was no listing agreement with this broker. The only brokerage agreement was the provision for the payment of a commission in the first contract of sale. The district court stated that “[t]he broker has cited no authority to support its argument that it is entitled to complain about the terms or that it is entitled to a commission under these circumstances.”<sup>27</sup> What is meant by “under these circumstances” is not completely clear. Perhaps it

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20. *Id.* at D237 (citations omitted).

21. *Jones*, 21 Fla. L. Weekly at D237.

22. *Id.*

23. *Id.* (citing *Campbell v. Noel*, 490 So. 2d 1014, 1016 (Fla. 1st Dist. Ct. App. 1986)).

24. *Id.* In making this determination, the appellate court noted the appellees had purchased the land in 1988, appellant had a survey made in June 1989, and appellant filed suit in January of 1990. *Id.*

25. 674 So. 2d 935 (Fla. 4th Dist. Ct. App. 1996). Judge Klein wrote the opinion in which Judges Dell and Stevenson concurred.

26. *Id.* at 936.

27. *Id.*

means that if neither the seller nor the broker's possible buyer challenged the exercise of the right of first refusal, then the broker had no standing to do so either. This seems unlikely. Certainly the broker was either a party to the contract of sale or an intended third party beneficiary of that contract and, as such, had enforceable rights. On the other hand, perhaps the court meant that the broker was in no position to claim that the right of first refusal had not been validly exercised when it obviously had been. This seems more likely since the court pointed out that "[a] right of first refusal exercise need only be identical to the offer terms which are essential."<sup>28</sup> Under this interpretation it is apparent that the court thought that the brokerage term was not "essential." Neither interpretation feels entirely satisfying to this author.<sup>29</sup>

A better justification for the decision would be that this broker produced an unsolicited offer to buy the property. The broker's commission term in that offer was drafted by the broker. Under the general rules of contract interpretation, any ambiguity in a contract should be interpreted against the one who drafted it and in favor of the other party. Applying that rule, a reasonable person would interpret the provision to require the seller to pay a commission only if the broker's prospect purchased the property or was prevented from doing so by the breaching seller, not if the right of first refusal was exercised. If the broker wanted a commission regardless of who was the ultimate purchaser, she should have unambiguously provided for that in the contract.<sup>30</sup> The seller might not have accepted an offer with that unambiguous provision.

*South Pacific Enterprises, L.P. v. Cornerstone Realty, Inc.*<sup>31</sup> A hospital enlisted a real estate broker to help it look for a site on which to develop a medical facility. The broker showed the hospital's agent the land in question. At the request of the hospital, the broker even submitted a development plan for that land, and they entered into a client registration letter that provided the broker would get a commission if any of certain entities bought or leased the land. However, another developer heard about the hospital's interest in this land and submitted its own development to the hospital. They excluded the broker from the negotiations that followed. After reaching agreement, the

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28. *Id.*

29. Professor Brown.

30. *See City Nat'l Bank of Miami Beach v. Lundgren*, 307 So. 2d 870 (Fla. 3d Dist. Ct. App.), *cert. denied*, 316 So. 2d 286 (Fla. 1975) (explaining in dicta that a landowner could be required to pay a commission to a broker who had found a prospective purchaser who was ready, willing, and able even though another exercised a right of first refusal because that was what the brokerage agreement provided).

31. 672 So. 2d 568 (Fla. 4th Dist. Ct. App. 1996). Judge Shahood wrote the opinion. Judge Warner and Associate Judge Speiser concurred.

hospital and the developer created a limited partnership that acquired and developed the land. The broker sued for its commission, but the hospital defended on the grounds that the broker had neither introduced the eventual buyer to the seller nor participated in the negotiations that led to the sale. The broker prevailed in the trial court and the district court affirmed on this issue.<sup>32</sup>

The district court agreed that the broker was not entitled to recover its commission based upon the client registration letter.<sup>33</sup> Construing the letter against its drafter, the broker, the letter did not provide for a commission upon the sale to this buyer. The court, however, recognized that this was not the only theory under which this broker could recover. A broker who shows properties to a prospective buyer is entitled to a commission when the broker is the procuring cause of the sale.<sup>34</sup>

The term "procuring cause" has been defined as "one who initiates negotiations by doing any affirmative act to bring buyer and seller together such as placing signs on the property, promoting calls from prospective buyers, or showing the property to prospective purchasers."<sup>35</sup> No one specific act is essential. So, this broker's failure to introduce the buyer to the seller or participate in the negotiations did not preclude the court from finding that it was the procuring cause. Moreover, the seller could not rely on the broker's failure to participate in the sales negotiations because the buyer and seller had prevented the broker from participating. The court found ample evidence in the record to support the conclusion that the broker had played a significant role in bringing the parties together.<sup>36</sup>

The contract of sale had also contained certification by both parties that they had not employed or dealt with a real estate broker. It also provided an indemnity provision regarding any brokerage commission that might arise. The trial court had denied all cross claims for indemnification. On this issue, the district court reversed.<sup>37</sup> Under this contract provision, the developer and the buyer were entitled to indemnification from the hospital that had dealt with the broker.<sup>38</sup>

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32. *Id.* at 571. However, the case was reversed and remanded for the proper calculation of damages and on the issue of indemnification.

33. *Id.* at 570.

34. *Id.*

35. *Id.* (quoting *Ehringer v. Brookfield & Assocs.*, 415 So. 2d 774, 775-76 (Fla. 5th Dist. Ct. App. 1982)).

36. *South Pacific*, 672 So. 2d at 570.

37. *Id.*

38. *Id.*

## V. BUILDING CODE

*Martin County v. Indiantown Enterprises, Inc.*<sup>39</sup> The Fourth District Court of Appeal reversed a judgment against Martin County.<sup>40</sup> Martin County inspectors found the building in this case to be out of compliance with the building code, and it gave notice to the owner that the building would be demolished by the County if the owner failed to bring the premises into compliance with the provisions of the code. Then, the owner sold the building to a buyer who knew he had only thirty days to obtain a permit and keep the County from demolishing the building.<sup>41</sup>

Rather than complying with the County regulations providing for an extension of the time,<sup>42</sup> the owner had his architect contact County officials by telephone. The County's Building Administrator told the architect that an extension could be obtained by contacting the department and satisfying it "that the renovations would be accomplished within a short period."<sup>43</sup> The owner's architect showed a set of renovation plans to a technician at the Building Department, and, later, the owner's attorney was told by a code enforcement officer that "the status on this file is it's on hold."<sup>44</sup> However, after placing a temporary hold on demolition, the County Administrator told the code enforcement officer to proceed with the demolition since the owner made no progress on the property's renovations and "[t]he buyer made no attempt to appeal to the Board for an extension of the demolition order."<sup>45</sup> For the County's demolishing the building, the buyer recovered \$32,000 in damages on theories of negligence and promissory estoppel. Although the jury found the buyer thirty-five percent comparatively negligent, the trial court judge refused to reduce the award proportionately.<sup>46</sup>

The appellate court reversed, holding that Martin County was entitled to a directed verdict on both the negligence and promissory estoppel theories.<sup>47</sup> The court first noted that the buyer's negligence theory was based on his

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39. 658 So. 2d 1144 (Fla. 4th Dist. Ct. App. 1995).

40. *Id.* at 1146.

41. *Id.* at 1145.

42. The court noted that § 6-54 of the County regulations provides for such an extension only "for cause by appeal to the board of building adjustments and appeals." *Id.* at 1145 (quoting MARTIN COUNTY, FLA., REGULATIONS § 6-54 (1995)).

43. *Id.*

44. *Indiantown*, 658 So. 2d at 1145.

45. *Id.* at 1145.

46. *Id.*

47. *Id.*

contention that the County's employees supplied him with incorrect information regarding the extension of the demolition deadline.<sup>48</sup> The court apparently felt that the County was immune from liability for this conduct because the employees' acts were "discretionary functions peculiar to government and there can be no liability imposed upon . . . [the County] because of the manner of performance of those functions."<sup>49</sup> Furthermore, the buyer's reliance on the oral communications with the County employees was misplaced because "[t]he code of regulations plainly set out the exclusive method for seeking such extensions."<sup>50</sup>

The court also rejected the promissory estoppel theory, relying on *Alachua County v. Cheshire*,<sup>51</sup> stating that such a theory "requires 'affirmative conduct' by the governmental entity, not merely negligence."<sup>52</sup> Apparently, the County's employees' conduct failed to rise to that level, but the opinion failed to offer any explanation why. The appellate court also determined that the buyer's promissory estoppel theory was untenable because he could not reasonably rely on the actions of the County officials.<sup>53</sup> In light of the County's regulations regarding extensions, the court concluded that "[c]ourts usually shrink from finding an estoppel against a government entity where the actions of the official are unauthorized or unlawful."<sup>54</sup>

## VI. BUTLER ACT

*Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc.*<sup>55</sup> Beginning in 1942, Key West Conch Harbor's ("Key West") predecessor in title obtained several permits from the Army Corps of

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48. *Id.*

49. *Indiantown*, 658 So. 2d at 1145 (quoting *City of Tarpon Springs v. Garrigan*, 510 So. 2d 1198, 1199-200 (Fla. 2d Dist. Ct. App. 1987)).

50. *Id.* The court went on to declare that the failure of the "informal remedy" which the buyer had sought could not "create any enforceable duties to make out a cause of action in negligence." *Id.* No legal authority was cited by the court for this proposition of law, and it was not clear whether the court was fashioning its own proposition or basing this conclusion as an implication of the proposition quoted earlier in the *City of Tarpon Springs* opinion. See *City of Tarpon Springs*, 510 So. 2d at 1200.

51. 603 So. 2d 1334 (Fla. 1st Dist. Ct. App. 1992).

52. *Indiantown*, 658 So. 2d at 1145 (quoting *Cheshire*, 603 So. 2d at 1334).

53. *Id.* at 1145-46.

54. *Id.* at 1146. See, e.g., *Corona Properties of Fla. v. Monroe County*, 485 So. 2d 1314 (Fla. 3d Dist. Ct. App. 1986); *Enderby v. City of Sunrise*, 376 So. 2d 444 (Fla. 4th Dist. Ct. App. 1979)).

55. 21 Fla. L. Weekly D1430 (3d Dist. Ct. App. June 28, 1996).

Engineers for dredging and improving offshore submerged lands in Garrison Bight. The predecessor bulkheaded and filled a parcel ("Parcel B" of the exhibits), later receiving a 1951 Butler Act<sup>56</sup> deed. The Act allowed upland riparian owners to obtain title land "bulkheaded or filled in or permanently improved."<sup>57</sup> The question before the third district was whether the predecessor sufficiently improved another parcel ("Parcel A") contiguous and seaward of Parcel B "and should therefore have obtained title to that land as well."<sup>58</sup>

The predecessor had constructed a 373 foot pier on Parcel A prior to the effective date of the repeal of the Butler Act, May 29, 1951. A 138 foot extension was also added to the pier prior to that critical date. The Trustees produced no evidence to substantiate their claim that the improvements occurred after the date. The trial court held that the dredging of the entire dock was completed before May 29, 1951.<sup>59</sup> The trial court concluded fee simple title to Parcel A vested in Key West by virtue of those improvements.<sup>60</sup> The court entered judgment that Key West held fee simple title in the submerged lands within 500 feet of its concrete bulkhead.<sup>61</sup>

Affirming, the appellate court noted that "the dredged area is adjacent to the parcel of land that was filled."<sup>62</sup> The Butler Act would not have transferred title had the landowner dredged submerged lands out of the bight for the sole purpose of filling another parcel of land.<sup>63</sup> Noting that what constitutes an improvement under the Butler Act must be determined on a case-by-case basis, the court added that Key West's title was subject to a public navigational easement.<sup>64</sup>

Judge Gersten wrote a lengthy, provocative dissent highly critical of the majority, noting at the outset that he did not feel that the Butler Act confers Florida coastline to a private party.<sup>65</sup> Gersten eventually characterized the majority's holding as "this Great Land Giveaway."<sup>66</sup>

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56. 1921 Fla. Laws ch. 8537.

57. *Key West Conch Harbor*, 21 Fla. L. Weekly at D1430 (citations omitted).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Key West Conch Harbor*, 21 Fla. L. Weekly at D1430.

63. *Id.*

64. *Id.* at D1431.

65. *Id.* (Gersten, J., dissenting).

66. *Id.* at D1432.

## VII. CONDOMINIUMS

*Oakland East Manors Condominium Ass'n v. La Roza*.<sup>67</sup> The Fourth District Court of Appeal affirmed the trial court's denial of a condominium association's claim for foreclosure.<sup>68</sup> In doing so, the appellate court relied on the acceptance of benefits doctrine because, since entry of final judgment, the appellee paid the amount.<sup>69</sup> However, the court reversed the circuit court's refusal to award prejudgment interest of eighteen percent and attorneys' fees since the bylaws provided for unpaid assessments to bear interest at the highest rate permitted under Florida's usury laws, as well as for attorneys' fees.<sup>70</sup> The trial court simply lacked discretion to refuse these awards.<sup>71</sup>

*Scudder v. Greenbrier C Condominium Ass'n*.<sup>72</sup> In this case, the Fourth District Court of Appeal took a more current look at condominium associations' assessments for off-site transportation costs.<sup>73</sup> The Associations in these consolidated cases began assessing the unit owners for these services on January 1, 1988. The owners objected, claiming the assessment was improper under the court's decision in *Rothenberg v. Plymouth A Condominium Ass'n*<sup>74</sup> and a 1988 amendment to section 718.115(1) of the *Florida Statutes*, which provided that reasonable transportation services could be billed as a common expense if the services had been provided from the date control of the board of association was transferred from the developer to the unit owners or if the condominium documents or bylaws contained provisions stating as much.<sup>75</sup> Another point of dispute was the "one-rider rule" under which only one pass

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67. 669 So. 2d 1138 (Fla. 4th Dist. Ct. App. 1996).

68. *Id.* at 1139.

69. *Id.*

70. *Id.* at 1139-40 (citing FLA. STAT. § 718.303 (1993); *Sybert v. Combs*, 555 So. 2d 1313, 1314 (Fla. 5th Dist. Ct. App. 1990); *Brickell v. Bay Club Condominium Ass'n v. Forte*, 397 So. 2d 959, 960 (Fla. 3d Dist. Ct. App.), *review denied*, 408 So. 2d 1092 (Fla. 1981)).

71. *Id.*

72. 663 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1996). In this case, the court withdrew its prior opinion at 20 Fla. L. Weekly D2278 (4th Dist. Ct. App. Oct. 11, 1995) in order to correct a misstatement made at page 19 of the earlier slip opinion. This case consisted of two consolidated appeals from the Circuit Court for Palm Beach County. *Scudder*, 663 So. 2d at 1364. The two appellee condominium associations are situated in Century Village in West Palm Beach. *Id.* at 1364. The appellants are unit owners in the communities who objected to the disputed off-site transportation assessments. *Id.*

73. *Scudder*, 663 So. 2d at 1364.

74. 511 So. 2d 651 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1277 (Fla. 1987).

75. *Scudder*, 663 So. 2d at 1365. This amendment became effective July 1, 1988. *Id.* at 1364.

for use of the transportation was issued to unit owners so that only one resident per unit could use the system.<sup>76</sup>

From an earlier decision, the court remanded the case for the trial court<sup>77</sup> to determine:

(1) whether the transportation services had been continuously provided by the Associations from the date control was turned over to the Unit Owners; (2) whether the transportation service had to have been continuously paid for as a common expense; (3) whether the Associations [sic] "one-rider rule" was valid; and (4) whether Florida Statutes Chapter 88-148 was constitutional.<sup>78</sup>

On remand, the trial court found that the services had been continuously provided by the Associations; that the Associations were not required to prove that the system was specifically paid for as a common expense continuously during the relevant period; that limited seating provided a reasonable basis for the "one-rider rule;" and that chapter 88-148 was not constitutionally vague.<sup>79</sup>

The Fourth District Court of Appeal first addressed the issue of whether, as the unit owners contended, the services must have been provided "by the Associations" during the relevant period, and if so, whether the trial court's determination was supported by competent substantial evidence.<sup>80</sup> After conceding that, on its face, section 718.115(1) contained no identification of a required provider of services, the court suggested that such an interpretation of the statute would produce an unreasonable or absurd result.<sup>81</sup> The court felt that if services were assessed by associations but provided by an independent entity, condominium associations would somehow receive a windfall.<sup>82</sup> The court's interpretation was consistent in light of the 1988 amendment which was passed "in response to this court's opinion in *Rothenberg*."<sup>83</sup> The court submitted that the amendment was intended "to benefit those associations that

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76. *Id.* at 1368.

77. *Id.* at 1364 (citing *Scudder v. Greenbrier C Condominium Ass'n*, 566 So. 2d 359, 361 (Fla. 4th Dist. Ct. App. 1990)).

78. *Id.*

79. *Scudder*, 663 So. 2d at 1364.

80. *Id.* at 1365.

81. *Id.* See *State v. Egan*, 287 So. 2d 1 (Fla. 1973); *City of St. Petersburg v. Seibold*, 48 So. 2d 291 (Fla. 1950).

82. *Id.*

83. *Id.* In *Rothenberg*, the court held that transportation services were not assessable because they did not directly relate to operation, maintenance, repair or replacement of condominium property. 511 So. 2d at 652.

may have provided transportation services to their unit owners in the good faith belief that they were authorized to do so."<sup>84</sup> Therefore, it is reasonable to require the Association to be the provider of services.<sup>85</sup> The appellate court ultimately concluded that the trial court's finding that the services had been continuously provided by the Associations during the relevant period was supported by substantial competent evidence, and affirmed its decision on this issue.<sup>86</sup>

Next, it declared that section 718.115 does not require that the transportation costs had been continuously assessed as a common expense prior to the 1988 amendment.<sup>87</sup> The court based this conclusion on the distinction made in the amendment to that section between transportation services continuously provided by the Association and those provided for in the condominium documents or bylaws, noting that prior to 1988, these costs could only be assessed if provided for in the documents or bylaws.<sup>88</sup> Contrary to its prior interpretation in which the court abandoned a plain and obvious meaning of the statute, the court felt that, on this issue, the distinction required such an interpretation,<sup>89</sup> and it decided that an interpretation including such a requirement would "obliterate the legislature's use of the word 'or' in the amendment to section 718.115(1)(a)."<sup>90</sup>

The next issue that the appellate court addressed was the constitutionality of section 718.115(1)(a), a portion of which the unit owners contended was unconstitutionally vague and ambiguous.<sup>91</sup> The court opined that any doubts will be resolved in favor of constitutionality;<sup>92</sup> that the statute provides people

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84. *Scudder*, 663 So. 2d at 1366 (citing *Scudder v. Greenbrier C Condominium Ass'n*, 566 So. 2d 359, 361 n.1. (Fla. 4th Dist. Ct. App. 1990)).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1367.

89. *Scudder*, 663 So. 2d at 1367 (citing *Koplowitz v. Imperial Towers Condominium, Inc.*, 478 So. 2d 504, 505 (Fla. 4th Dist. Ct. App. 1985); *Martin v. Ocean Reef Villas Ass'n*, 547 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 1989), *review denied*, 557 So. 2d 35 (Fla. 1990)).

90. *Id.*

91. *Id.* The unit owners objected to the following language:

However, such common expenses must either have been services or items provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or must be services or items provided for in the condominium documents or bylaws.

*Id.*

92. *Id.* at 1367-68 (citing *Department of Legal Affairs v. Rogers*, 329 So. 2d 257, 263 (Fla. 1976)).

of common understanding and intelligence with fair warning of its requirements; and that, although it has been subject to conflicting interpretations, it was not unconstitutionally vague.<sup>93</sup> Accordingly, the court affirmed the trial court's determination of constitutionality.<sup>94</sup>

As to the "one-rider rule," the court noted that the rule permitted only one rider per unit be permitted to ride pursuant to the common assessment charged to that respective unit. Any additional rider from that unit was required to pay the Associations a surcharge. Section 718.115(2) explicitly requires that the share of common expenses be in the same proportion as their ownership interest in the common elements.<sup>95</sup> The court felt it was improper that the system was funded in two distinct methods, the common assessment per unit, which was proportional to the ownership interest in the common elements, and the per rider surcharge, which bore no relation to the ownership interest in the common elements.<sup>96</sup> This method of collection was held contrary to section 718.115(2), and the rule also failed under the reasonableness test provided in *Juno by the Sea North Condominium Ass'n v. Manfredonia*,<sup>97</sup> because its effect was unreasonable and discriminatory.<sup>98</sup> Under the rule, multiple resident unit owners were being penalized and were subsidizing the system for the benefit of single resident unit owners, and this was improper as a limited common expense under section 718.103(17).<sup>99</sup> Thus, the appellate court reversed on this issue.<sup>100</sup> It also ordered a remand on the attorneys' fees issue.<sup>101</sup>

*Winkelman v. Toll*.<sup>102</sup> The Fourth District Court of Appeal interpreted section 718.104(2) of the *Florida Statutes* in this quiet title action to determine when the property in question became subject to the declaration of condominium and its amendments.<sup>103</sup> Mission Lakes Condominium was created in 1980 by the recording of its declaration of condominium pursuant to the 1979 version of chapter 718 of the *Florida Statutes*. The declaration contemplated

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93. *Scudder*, 663 So. 2d at 1368 (citing *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 820 (Fla. 1983)).

94. *Id.*

95. *Id.* (quoting FLA. STAT. § 718.115(2) (1993)).

96. *Id.*

97. 397 So. 2d 297, 303 (Fla. 4th Dist. Ct. App. 1980), *review denied*, 402 So. 2d 611 (Fla. 1981) (citing *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181 (Fla. 4th Dist. Ct. App. 1975)).

98. *Scudder*, 663 So. 2d at 1369.

99. *Id.*

100. *Id.*

101. *Id.* at 1370.

102. 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).

103. *See* FLA. STAT. § 718.104(2) (1979).

nine phases, each to be submitted to condominium by amendment to the declaration.<sup>104</sup> Phase II was submitted to condominium upon the recordation of the original declaration. Phases I and III through VII were submitted by the recording of an amendment to the declaration eleven days after the original declaration had been recorded. The amendment stated that construction was not substantially completed and that upon substantial completion of each phase, a certificate of a registered land surveyor would be recorded as an amendment to the declaration in accordance with section 718.104(e).<sup>105</sup>

Additional amendments were later recorded, which attached land surveyor certificates evidencing completion of Phases I and II. However, the remaining proposed phases were never completed by the August 30, 1985 deadline contemplated in the declaration. Mission Lakes Condominium Association was involuntarily dissolved on November 1, 1985 by the Secretary of State.<sup>106</sup>

Appellant Winkelman purchased Phases I and II in 1985 and 1986, respectively, from the institutional mortgagee on the project, which also conveyed all of Phases III through VII to appellee ICON Development Corporation ("ICON"). The warranty deed through which ICON took title described the property by the description contained in the amendment to the declaration, and the deed was specifically subject to the declaration and amendments. The parties operated their respective units as separate entities. Two years after ICON purchased the remaining phases, Winkelman filed suit to reinstate the condominium association and, thereafter, filed an amended complaint seeking recovery from ICON for its share of the common condominium expenses which Winkelman had been paying. ICON counterclaimed to quiet title and to declare that it received title in fee simple and not subject to the condominium. ICON also raised laches, estoppel, and running of the statute of limitations as affirmative defenses to the Winkelman complaint. The trial court found that ICON took in fee simple, reasoning substantial comple-

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104. The court supplied language from the 1979 version of section 718.403. Subsection (1) of that section provides that a developer may develop a condominium in phases, provided that the initial declaration submitting the initial phase provides for and describes in detail the other contemplated phases, any impact which completion of those phases would have upon the initial phase, and the time period within which each phase must be completed. *Id.* at 104 (citing FLA. STAT. § 718.403(1) (1979)). Subsection (4) provides that "[i]f one or more phases are not built, the units which are built are entitled to 100 percent ownership of all common elements within the phases actually developed and added as a part of the condominium." *Id.* (quoting FLA. STAT. § 718.403(4) (1979)).

105. *Id.* at 104-05.

106. *Id.*

tion of the phases was a condition precedent to the phases becoming subject to condominium.<sup>107</sup>

The Fourth District Court of Appeal rejected this interpretation.<sup>108</sup> The court noted that, under section 718.104(2), “[i]t is the recording of the declaration in the public records that subjects the property to condominium ownership.”<sup>109</sup> The court also noted that prior to 1978 the statute required the surveyor’s certificate to be filed “in order to have a validly created condominium for conveyancing purposes,”<sup>110</sup> and that this provision had been deleted. On this reasoning, the court held that completion of construction was not a condition precedent to the creation of a valid condominium.<sup>111</sup> Moreover,

[j]ust as the failure to complete the construction prior to recording the declaration does not prevent the formation of the condominium on the subject property, the failure to complete the construction in a phase prior to recording the amendment does not prevent the inclusion of the land in the condominium, because the amendment is *effective* when recorded.<sup>112</sup>

Finally, the court noted that its decision made sense in light of the fact that Florida has a notice type recording statute, and that in the present case, an amendment submitting the property to condominium had been recorded, giving notice to the world that the property is subject to the declaration and amendments.<sup>113</sup>

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107. *Winkelman*, 661 So. 2d at 105.

108. *Id.*

109. *Id.* The court reasoned that although a requirement of a declaration of condominium is that it contain a certificate of substantial completion of improvements, where the property is subject to condominium prior to substantial completion of the construction, the developer may submit the required surveyor’s certificate by amendments to the declaration. *Id.* (citing FLA. STAT. §§ 718.104(4)(e), .105 (1979)).

110. *Id.* at 106 (quoting FLA. STAT. §718.104(4)(e) (1977)).

111. *Winkelman*, 661 So. 2d at 106.

112. *Id.*

113. *Id.* at 107.

## VIII. CONSTRUCTION

*Miracle Center Development Corp. v. M.A.D. Construction, Inc.*<sup>114</sup> A tenant named Theme leased space in a shopping center for use as a nightclub. Theme hired M.A.D., a contractor, for renovations that were permitted by the lease. However, before the renovations could be completed, the electricity was turned off because Theme failed to pay the electricity bill. Theme vacated the premises. The landlord leased to a new tenant who made only cosmetic improvements before opening the nightclub for business.<sup>115</sup>

M.A.D. sued Theme for breach of the construction contract and sued the landlord based on quantum meruit.<sup>116</sup> The trial court held in favor of the contractor and awarded damages against both defendants, but the district court reversed.<sup>117</sup> The court's logic began with the proposition that a plaintiff cannot seek both contract damages and quantum meruit damages against the same defendant because quantum meruit would apply only where no express contract existed.<sup>118</sup> The court then reasoned that the principle should also apply to prevent simultaneous actions on these inconsistent theories against these different defendants because that might give M.A.D. a double recovery.<sup>119</sup> That result would be unjust enrichment rather than the prevention of unjust enrichment, the proper role of quantum meruit. In addition, the court points out that M.A.D. had already received an adequate remedy at law, its judgment for damages against the tenant.<sup>120</sup> Probably the unstated point is that quantum meruit is an equitable remedy and an equitable remedy should be available only where the injured party has no adequate remedy at law. But, quantum meruit is a legal remedy, not an equitable one.<sup>121</sup>

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114. 662 So. 2d 1288 (Fla. 3d Dist. Ct. App. 1995). Judges Hubbard, Gersten, and Goderich concurred in the per curiam opinion.

115. *Id.* at 1290.

116. M.A.D. also claimed a construction lien but that was denied by the trial court. The denial was affirmed by the district court because, under section 713.10 of the *Florida Statutes*, the lease prohibited construction liens against the landlord's property and the lease neither required the improvements nor were the improvements the "pith of the lease." *Id.* at 1291 (relying on FLA. STAT. § 713.10 (1993)).

117. *Id.* at 1290.

118. *Id.*

119. *Miracle Center Dev. Corp.*, 662 So. 2d at 1290.

120. *Id.*

121. The proper common law action to recover in quantum meruit was *indebitatus assumpsit*. Furthermore, quantum meruit was one of the "common counts" pled in a traditional common law complaint alleging money due based upon a transaction. See JOSEPH H. KOFFLER & ALISON

The result may make logical sense, but it has the potential to produce unnecessary injustice. That the electricity was turned off suggests that the tenant was in financial trouble making the judgment against it worthless. Would the contractor have prevailed on the theory of quantum meruit if it had sued only the landlord? If so, then the contractor was harshly penalized for a tactical error by its lawyer. If the landlord reaped a windfall by getting its property so substantially enhanced that a higher rent could be charged without spending any money, there would be an unjust result. Conversely, the rent increase, if one existed, might not have been enough to offset what the tenant owed the landlord. Those are issues of fact that could have been determined on remand rather than adopting an absolute no-recovery rule. There is no justification for a rule that gives one party a windfall while another is left uncompensated for work done unless the court intends to punish the contractor for not getting a construction lien. That remote possibility could have easily been avoided by ruling that any recovery from the landlord would decrease the amount that the contractor could recover from the tenant on the contract judgment.

*Stinson-Head, Inc. v. City of Sanibel*.<sup>122</sup> The parties entered into a construction contract that contained an arbitration clause requiring the demand for arbitration be made within a reasonable time after the claim arose but, "in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim . . . would be barred by the applicable statute of limitations."<sup>123</sup> Subsequently, a dispute arose about alleged defects in the roof. When the City sought arbitration, the contractor responded that the statute of limitations had run out so arbitration was time barred. The trial court referred the timeliness issue to arbitration,<sup>124</sup> and the contractor appealed.

The district court affirmed ordering the case to arbitration, but certified that its decision created a conflict among the districts.<sup>125</sup> The court based its decision on the fact that the arbitration clause was very broad. Prior cases under the federal arbitration act had interpreted similar language to place the

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REPPY, HANDBOOK OF COMMON LAW PLEADING §§ 172-76 (1969). See also JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 1-11 (1987).

122. 661 So. 2d 119 (Fla. 2d Dist. Ct. of App. 1995). Judge Blue wrote the opinion in which Chief Judge Threadgill and Judge Whatley concurred.

123. *Id.* at 120.

124. *Id.*

125. See *Anstis Ornstein Assocs., Architects & Planners, Inc. v. Palm Beach County*, 554 So. 2d 18 (Fla. 4th Dist. Ct. App. 1989).

question of whether the arbitration was time barred before the arbitrator(s).<sup>126</sup> This court followed that lead, reasoning that the timeliness issue is very fact-oriented and requires an evidentiary hearing.<sup>127</sup> Requiring that the court hear these facts to determine this issue and then the arbitrator hear the same facts again to determine other issues would defeat the purpose of an arbitration agreement. Generally, issues are presumed to be the subject of arbitration. It would make no sense to interpret such a broadly worded arbitration clause not to assign this issue to arbitration.

## IX. CONTRACTS OF PURCHASE AND SALE

*Taines v. Berenson.*<sup>128</sup> Dahlia Taines, the seller, appealed from the Amended Final Judgment awarding Dr. Scott Berenson, the buyer, specific performance *and* damages totalling \$371,635. The Fourth District Court of Appeal held that, under the terms of the contract, Berenson could not recover both specific performance and damages and reversed the trial court accordingly.<sup>129</sup> The parties entered into a contract for the sale of the property. Due to a gap in the chain of title and liens against the property, Taines would be unable to provide clear title. The parties nevertheless entered into a second contract in which the sale price was reduced from \$215,000 to \$190,000. This contract also provided a ninety-day defective title cure provision. Berenson then offered Taines an addendum to the second contract which contained additional terms. Taines, viewing the addendum as an unfavorable modification, declined. Berenson filed a three count complaint alleging breach of contract, misrepresentation, and specific performance.<sup>130</sup>

The appellate court reasoned that "Berenson's remedies were limited by the terms of the contract itself."<sup>131</sup> Either of the remedies contained in Provi-

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126. *Wylie v. Investment Management & Research, Inc.* 629 So. 2d 898 (Fla. 4th Dist. Ct. App. 1993); *Marschel v. Dean Witter Reynolds, Inc.*, 609 So. 2d 718 (Fla. 2d Dist. Ct. App. 1992), *review denied*, 617 So. 2d 318 (Fla. 1993).

127. *Stinson-Head*, 661 So. 2d at 121.

128. 659 So. 2d 1276 (Fla. 4th Dist. Ct. App. 1995).

129. *Id.* at 1278.

130. *Id.* at 1277.

131. *Id.* The court quoted the following "pertinent" provision in the contract:

A. EVIDENCE OF TITLE . . . buyer shall have ten (10) days from the date of receiving the evidence [February 15, 1991] to examine same. If title is found to be defective, the buyer shall within said period notify the seller in writing specifying the defects. If the said defects render the title unmarketable, the seller shall have ninety (90) days from the receipt of such notice [February 19, 1991] to cure the defects and *if after said period seller shall not have cured the defects, buyer*

sion A of the contract were available to Berenson. However, Berenson exercised neither remedy. "He neither agreed to accept a deed for title as it existed, nor did he request a refund and cancellation of the contract."<sup>132</sup>

Instead, Berenson relied upon another paragraph of the contract which provided that if the seller failed to perform any of the contract's covenants, the deposit paid by the buyer, at the buyer's option, would be returned to the buyer or the buyer would have the right to specific performance.<sup>133</sup> This paragraph was inapplicable because Berenson filed suit before the expiration of the curative period provided in the contract.<sup>134</sup> Therefore, the seller did not default by not curing title because the contract already contemplated the seller's inability to cure title and the buyer's remedies for such. Therefore, the trial court erred by awarding Berenson both Provision A remedies.<sup>135</sup> So, the appellate court remanded the case "for a final determination as to which of the two provisions shall be applied."<sup>136</sup>

## X. DEEDS

*Jakobi v. Kings Creek Village Townhouse Ass'n.*<sup>137</sup> For rationale that a deed constituted a novation of the association's bylaws and the restrictive covenants binding the community, please see the discussion of this case at page 280 of this article.

*Sargent v. Baxter.*<sup>138</sup> The Fourth District Court of Appeal affirmed a trial court's judgment declaring two quitclaim deeds void.<sup>139</sup> One deed was from John Smith, now deceased, in favor of his daughter, Connie Sargent. Smith executed the deed but instructed his attorney not to record the deed, saying he would give further instructions later. There was testimony that Smith asked his nephew, Gerald Buscemi, to have the attorney record the deed, but Bus-

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*shall have the option of (1) accepting title as it then is or (2) demand a refund of all monies paid hereunder which shall forthwith be returned to the buyer, and thereupon the buyer and seller shall be released of all further obligations under this contract.*

*Id.*

132. *Taines*, 659 So. 2d at 1277.

133. *Id.*

134. *Id.* at 1277-78.

135. *Id.* at 1278.

136. *Id.* The court instructed that in making this determination, the trial court could rely on the existing record unless in his discretion determines that further evidence is necessary. *Taines*, 659 So. 2d at 1278.

137. 665 So. 2d 325 (Fla. 3d Dist. Ct. App. 1995).

138. 673 So. 2d 979 (Fla. 4th Dist. Ct. App. 1996).

139. *Id.* at 981.

cemi never complied before Smith's death. After Smith's death, the attorney mailed the unrecorded deed to Sargent who recorded it. Later, Smith's personal representative executed a quitclaim deed to the same property to himself, individually, and recorded it. The trial court found, after a non-jury trial, that the Sargent deed failed for lack of delivery, and it ultimately found both deeds void.<sup>140</sup>

The Fourth District Court of Appeal affirmed the trial court's finding of failure of the Sargent deed for lack of delivery, since Smith, by instructing his attorney not to record, had retained the "locus poenitentiae," or opportunity to change his mind.<sup>141</sup> The court did not consider whether delivery would have occurred had Buscemi advised the attorney of Smith's desire that the deed should be recorded because that had not occurred, and, further, because "[t]here [was] no indication that Buscemi had any authority other than as a simple messenger."<sup>142</sup>

## XI. EASEMENTS

*Brewer v. Flankey*.<sup>143</sup> The Fifth District Court of Appeal reversed the trial court's judgment for a prescriptive easement because the plaintiffs failed to produce any evidence that they or their predecessors had made actual, continuous, and uninterrupted use of the contested land for the full twenty-year prescriptive period.<sup>144</sup> Evidence that members of the general public had used the land during the 1970s did not suffice because it did not establish that plaintiffs' predecessors used the land.<sup>145</sup> Thus, the plaintiffs could not make a prima facie case as they had only used defendants' land for nine years.

*Farley v. Hiers*.<sup>146</sup> The First District Court of Appeal affirmed the trial court's determination that the appellee had a prescriptive easement to continue the use of a well, pump, and pump house on appellant's property.<sup>147</sup> In 1954, the Blounts subdivided this property, installed a well, pump, and pump house on the southeastern corner of Lot 23, and they began providing water service for profit to seventy-three customers, including the various owners of Lot 23,

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140. *Id.* at 980.

141. *Id.* at 981 (quoting *Smith v. Owens*, 108 So. 891, 893 (1926)).

142. *Id.*

143. 660 So. 2d 761 (Fla. 5th Dist. Ct. App. 1995).

144. *Id.* at 762 (citing *Supal v. Miller*, 455 So. 2d 593, 595 (Fla. 5th Dist. Ct. App. 1984)).

145. *Id.*

146. 668 So. 2d 248 (Fla. 1st Dist. Ct. App. 1996). Appellee Annie B. Hiers was named in the suit in the capacity of Guardian for Lottie M. Blount. *Id.*

147. *Id.* at 249.

operating the pumping system openly and continuously under lock and key. In 1993, Farley, the current owner of Lot 23, dissatisfied with the quality of water service, sought to obtain a consumptive use permit from the Northwest Florida Water Management District to build a well for his own use. He could not obtain that permit due to the presence of the Blount well on the lot. After obtaining the lot in 1974, Farley fenced in his property except for the corner on which the fifteen by twenty foot pump house was located.<sup>148</sup>

The appellate court noted that the elements of continuous use and knowledge were undisputed, but three issues required closer scrutiny: 1) whether the use of the well was adverse rather than permissive; 2) whether the operation of the water service for profit precludes a finding of easement; and 3) whether the exclusiveness of the appellee's use of the southeastern corner precluded finding an easement.<sup>149</sup> Concerning the first issue, the court found that use of the system had been adverse.<sup>150</sup> The appellee continuously maintained the pump house under lock and key, and Farley and his predecessors had, for the same period, paid the Blounts for water service.<sup>151</sup> The court rejected the argument that operating the system for profit resulted in a "profit a prendre" and precluded finding an easement.<sup>152</sup> The court noted that a "profit a prendre" is distinguishable from an easement, "since one of the features of an easement is the absence of all rights to participate in the profits of the soil charged with it."<sup>153</sup> In rejecting Farley's contention, the court merely commented that "[i]t appears, however, that water is not considered a product of the soil in this context."<sup>154</sup> Finally, the court concluded "[c]omplete dominion is inconsistent with a claim of easement,"<sup>155</sup> but the Blounts' use did not completely exclude the Farley from any use of his lot, noting "rather, appellee uses only so much of Lot 23 (a corner 15' x 25' in size) as is required to use the well."<sup>156</sup>

*Holloway v. Gargano.*<sup>157</sup> The First District Court of Appeal, in a declaratory decree action, reversed the trial court's conclusion that the appel-

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148. *Id.*

149. *Id.* at 250.

150. *Farley*, 668 So. 2d at 250.

151. *Id.*

152. *Id.* at 250-51.

153. *Id.* at 250 (quoting 25 AM. JUR. 2D *Easements and Licenses* § 7 (1966)).

154. *Id.*

155. *Farley*, 668 So. 2d at 251 (quoting *Platt v. Pietras*, 382 So. 2d 414, 416 (Fla. 5th Dist. Ct. App. 1980)).

156. *Farley*, 668 So. 2d at 251.

157. 657 So. 2d 1231 (Fla. 3d Dist. Ct. App. 1995).

lants/plaintiffs, two property owners, were entitled to access to their waterfront mobile home properties in Monroe County through an easement by necessity over the property owned by the appellees, and that reasonable ingress and egress had been provided by way of a road over the appellees' property.<sup>158</sup> The road had been used by appellants and their predecessors in interest since 1962. In 1992, the appellees erected a fence which narrowed the road to a width of eleven feet. The appellate court found that such a width, contrary to the trial court's finding, does not comply with the Monroe County Fire Code which requires a twenty-foot minimum access way.<sup>159</sup> Thus, it precluded access by fire and rescue equipment to plaintiffs' properties.

Further, the court noted access easements created by necessity "must be capable of accommodating traffic incident to the normal requirements of the property served by the easement 'consistent with the [reasonable] needs of the owners of the lands that are hemmed in.'"<sup>160</sup> In this case,

it is uncontradicted that whenever a car is parked in front of one plaintiff's property, access to the other plaintiff's property is totally blocked due to the narrow width of the road. . . . [T]he three decade use of the road by mail carriers, garbage collectors, meter readers and others has been either severely curtailed or prevented.<sup>161</sup>

The appellate court held the subject road legally insufficient under the above rule and reversed and remanded to the trial court.<sup>162</sup>

*Richardson v. Jackson*.<sup>163</sup> The Fifth District Court of Appeal affirmed the trial court's award of summary judgment and a mandatory injunction against

158. *Id.* at 1231.

159. *Id.*

160. *Id.* at 1232 (quoting *Hayes v. Reynolds*, 132 So. 2d 781, 782 (Fla. 1st Dist. Ct. App. 1961)).

161. *Id.* at 1231-32.

162. *Holloway*, 657 So. 2d at 1232.

163. 667 So. 2d 928 (Fla. 5th Dist. Ct. App. 1996). In affirming, the fifth district considered its decisions in *Diefenderfer v. Forest Park Servs.*, 599 So. 2d 1309 (Fla. 5th Dist. Ct. App.), *review denied*, 613 So. 2d 204 (Fla. 1992), and *Hoff v. Scott*, 453 So. 2d 224 (Fla. 5th Dist. Ct. App. 1984), to be controlling. In *Diefenderfer*, it was determined that in these types of cases, the initial inquiry is whether the grant of easement is for the width described or for the description of the property over which there is a right of ingress and egress, "[o]r put another way, is the right of ingress and egress coterminous with the area set aside for the easement or something less than the area." *Richardson*, 667 So. 2d at 929 (quoting *Diefenderfer*, 599 So. 2d at 1312). If coterminous, then there can be no encroachments. The 1986 final judgment contained language found to be consistent with *Diefenderfer*.

appellants to require them to remove improvements constructed on property subject to an easement by prescription which had been confirmed in a 1986 final judgment.<sup>164</sup> The appellants argued that as long as they left an eight foot path for a vehicle to enter and leave the appellee's property, improvements were permissible on the remainder of the property subject to the easement.

*Trammell v. Ward.*<sup>165</sup> The Trammells brought three counts in the trial court seeking access to the Wards' lands in order to obtain access to a land-locked forty acre parcel owned by the Trammells: 1) a prescriptive easement; 2) a statutory way of necessity; and 3) injunctive relief prohibiting the Wards from barring Trammells' use of an unpaved roadway. The Wards counter-claimed for a statutory way of necessity over the Trammells' lands for which the Wards were willing to pay reasonable compensation as determined by the court. The Wards acknowledged the Trammells' need for access to the parcel, but objected to a route through the middle of the Wards' lands, proposing instead an easement across a corner of the Ward property as determined by the court. This was objectionable to the Trammells because "much of the area was wet."<sup>166</sup>

The trial court indicated that upon finding a prescriptive easement, it would require that the Trammells hire a registered surveyor to survey the easement claimed.<sup>167</sup> In an effort to avoid survey costs, the Trammells told the trial court they would settle for a route of access proposed by the Wards. The trial court directed, in its final judgment, that the Trammells were to have an easement along the roadways marked E-1, E-2, and E-3, and the parties were directed to negotiate in good faith for another roadway marked E-4.<sup>168</sup> The Trammells moved for rehearing because "the access which the judgment purported to grant [them was] nonexistent, in that item 'E-1' . . . does not grant . . . access to their 40-acre parcel."<sup>169</sup> The trial court denied rehearing, and the First District Court of Appeal reversed on this issue.<sup>170</sup>

The district court noted that the Wards' counsel stipulated that, pursuant to section 704.01(2) of the *Florida Statutes*, the Trammells were indeed

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In *Hoff*, the language in the grant of easement contained clear language that the entire area had been granted for ingress and egress, and thus no obstructions could be placed in the easement. The final judgment in *Richardson* which confirmed the easement was deemed to be also consistent with the language in *Hoff*. *Richardson*, 667 So. 2d at 929.

164. *Id.*

165. 667 So. 2d 223 (Fla. 1st Dist. Ct. App. 1995).

166. *Id.* at 224.

167. *Id.*

168. *Id.* at 225.

169. *Id.*

170. *Trammell*, 667 So. 2d at 225.

entitled to a statutory way of necessity.<sup>171</sup> This section requires a “practicable route of egress or ingress.”<sup>172</sup> According to *Walkup v. Becker*,<sup>173</sup> “[a] roadway which is impassable after the rainy periods of the year is not practicably usable for egress or ingress within the contemplation of section 704.03.”<sup>174</sup> The only evidence presented on the practicability of E-1 was Mr. Trammell’s uncontradicted statement that the route was sometimes impassable.<sup>175</sup> Finding that on this basis the Trammells raised an appropriate ground for rehearing on the access question, the court concluded that the trial court abused its discretion in failing to grant rehearing, and it reversed “that portion of the final judgment which does not provide the Trammells with practicable access to their 40-acre parcel.”<sup>176</sup>

## XII. EMINENT DOMAIN

### A. Condemnation

*Brevard County v. Ramsey*.<sup>177</sup> The County filed an action to condemn a portion of property whose owners of record were the Ramseys. They were also the owner of a business, Ramsey Enterprises (“Enterprises”), that operated a business on the property. The Ramseys had signed, but had not acknowledged, witnessed, or recorded a declaration of trust that declared that they held the land in trust for Enterprises. They filed a motion to join Enterprises as an indispensable party so that Enterprises could recover business damages.<sup>178</sup>

The district court concluded that the trust declaration was valid.<sup>179</sup> The lack of witnesses was not fatal. Since the grantors were to be the trustees, it did not involve the transfer of title to the property.<sup>180</sup> Furthermore, the trust was not executed by the Statute of Uses even though it appeared to be a passive trust. To so rule would have the effect of vesting legal title in the beneficiary. Although that would be the traditional rule, it would defeat the

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171. *Id.*

172. FLA. STAT. § 704.01(2) (1995). Section 704.03 of the *Florida Statutes* defines “practicable” as used in section 704.01. FLA. STAT. § 704.03 (1995).

173. 161 So. 2d 893, 895 (Fla. 1st Dist. Ct. App. 1964).

174. *Trammell*, 667 So. 2d at 225 (citing *Walkup*, 161 So. 2d at 895).

175. *Id.*

176. *Id.* at 226.

177. 658 So. 2d 1190 (Fla. 5th Dist. Ct. App. 1995). Chief Judge Peterson wrote the opinion. Judge Danksch concurred. Judge W. Sharp dissented with a written opinion.

178. *Id.* at 1192.

179. *Id.*

180. *See* FLA. STAT. §§ 689.05–.06 (1993).

statutory scheme which now requires two subscribing witnesses to any inter vivos transfer of title.

Since the trust document did not specify the trustee's powers, the powers were supplied by statute,<sup>181</sup> which provided the trustee with all management power. Consequently, the trustee, not the beneficiary, would be the only necessary and proper party to the condemnation. Thus, the court concluded that this land belonged to the Ramseys, not Enterprises.<sup>182</sup> However, Enterprises was the owner of the business. A landowner may recover business damages if a public body takes part of a landowner's land for a right of way which in turn causes injury to that landowner's business located on the adjoining land that is not taken. Consequently, business damages could not be recovered unless Enterprises and the Ramseys were truly the same persons. The Ramseys did not present any convincing reason to pierce the corporate veil. The court reasoned that they chose the trust and the corporate entity for their own reasons.<sup>183</sup> Thus, they have to accept the disadvantages as well as the advantages of those forms.

Judge Sharp dissented.<sup>184</sup> The execution of passive trusts by the Statute of Uses has long been recognized in Florida as well as other states.<sup>185</sup> The legislature did not mean to subvert that traditional doctrine by requiring witnesses for deeds. The Statute of Uses should execute the passive trust vesting title in the beneficiary.<sup>186</sup> Enterprises, as the owner of the land and the business, should be able to recover business damages.<sup>187</sup>

*Broward County v. Conner.*<sup>188</sup> After the County filed an eminent domain action to take the Connors' land, the parties explored the possibility of settling the case by a real estate exchange. The parties met and reached an agreement in principle. The Connors' lawyer sent a letter to the County's private attorney which "confirmed the parameters" of the proposed settlement. The parties subsequently had further meetings, exchanged letters, and exchanged unsigned

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181. *Id.* § 737.401 (1993).

182. *Ramsey*, 658 So. 2d at 1197.

183. *Id.*

184. *Id.* at 1197-99 (Sharp, J., dissenting).

185. *Id.* at 1199.

186. *Id.*

187. *Ramsey*, 658 So. 2d at 1199.

188. 660 So. 2d 288 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 250 (Fla. 1996). Judge Klein wrote the opinion in which Chief Judge Gunther concurred. Judge Farmer wrote a special concurrence.

drafts of the settlement. Despite these negotiations, the County decided not to settle according to the proposed terms.<sup>189</sup>

The landowners filed a motion in the eminent domain proceeding to enforce the settlement. The trial court granted specific performance because it found that "the agreement had been partly performed; that [the landowners] had relied to their detriment based on the representation of the county's agents and employees; and, that the county was estopped to deny the settlement."<sup>190</sup> The district court reversed relying on two alternative grounds, the Statute of Frauds and the Sunshine Law.<sup>191</sup>

First, the court held that the settlement was a contract for the sale of land.<sup>192</sup> Consequently, the Statute of Frauds<sup>193</sup> requires that the contract be in writing and signed by the party to be charged; however, the County had not signed the settlement.<sup>194</sup> The landowners had not established sufficient part performance to take the contract out of the Statute of Frauds. The district court summarily dismissed the landowners' estoppel claim, stating that the landowners "cite[d] no authority which would support specific performance under these circumstances."<sup>195</sup> That really misses the point. If the County was estopped from denying the validity of the contract and the Statute of Frauds issue, then the landowners, who were to be the "buyers" of the exchanged property, might have been entitled to specific performance even if there was no precedent on all fours to that effect.

The court's alternative holding makes far more sense. There was no contract. The provisions of the Sunshine Law require that formal governmental action must take place in open meeting unless some specific exception applies.<sup>196</sup> There is an exception for settlement negotiations for pending litigation,<sup>197</sup> but there was no suggestion that it was met here. Consequently, this settlement could not have been entered except by action in an open meeting and that never occurred.

Judge Farmer points out in his concurring opinion that this decision may make the settlement of condemnation proceedings slower and more expen-

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189. *Id.* at 289.

190. *Id.* at 290.

191. *Id.* at 289.

192. *Id.* at 290.

193. FLA. STAT. § 725.01 (1993).

194. The Statute of Frauds issue is discussed in part XXV of this survey. *See* discussion *infra* p. 371.

195. *Conner*, 660 So. 2d at 290.

196. FLA. STAT. § 286.011(1) (1993).

197. *Id.* § 286.011(8) (1993).

sive.<sup>198</sup> Perhaps so, but every lawyer should be wary of relying on a settlement until it is actually signed by a person with clear authority to bind the other party.

*Caulk v. Orange County.*<sup>199</sup> Mrs. Caulk and her late husband owned land. In 1978, they conveyed it to R. T. Hibbard by a deed which "reserves and retains all rights, title, and interest in and to any and all proceeds arising out of eminent domain, condemnation, or similar proceedings."<sup>200</sup> Hibbard sold the land to Hibbard Oil Company which in turn sold the land to Amoco Oil Company, but neither of these deeds contained the covenant or anything similar. When Mrs. Caulk learned that the County had filed a condemnation action against Amoco, she intervened. The trial court denied her motion for compensation on the theory that the clause was a personal covenant between the Caulks and their immediate grantee.<sup>201</sup> The district court affirmed.<sup>202</sup>

The court did not explain how it concluded that the clause created a covenant rather than an interest in the land. It jumps right into the discussion of whether this covenant runs with the land, i.e., whether it would bind a remote grantee. But this author<sup>203</sup> agrees that it is a covenant. Nothing about the language used suggests that the grantor intended to retain any interest in the land.<sup>204</sup>

Not every covenant in a deed runs with the land. First, the covenant must touch and concern the land. That means the covenant must have a relation to the land. The court concluded that this covenant "has no effect whatever on the land."<sup>205</sup> What the covenant really concerned was the money, i.e., intangible personal property. Furthermore, there was no evidence that the covenant was intended to run with the land and that is also a requirement. The language that the parties used in the deed does not even suggest an intent for the covenant to run. It does not state that the covenant would be binding on grantees.<sup>206</sup> It refers only to the "grantor" and to the "Grantee herein,"<sup>207</sup> and

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198. *Conner*, 660 So. 2d at 291 (Farmer, J., concurring specially).

199. 661 So. 2d 932 (Fla. 5th Dist. Ct. App. 1995). Chief Judge Peterson wrote the opinion. Judges Goshorn and Thompson concurred.

200. *Id.* at 933.

201. *Id.*

202. *Id.*

203. Professor Brown.

204. *Caulk*, 661 So. 2d at 934.

205. *Id.*

206. Traditionally that would be expressed by the use of words of limitation and inheritance, e.g., heirs, successors, and assigns.

207. *Caulk*, 661 So. 2d at 933.

the court finds that the language "sounds personal."<sup>208</sup> Finally, the court finds that it would be "incongruous" that a subsequent purchaser would have to give a remote grantor the condemnation proceeds.<sup>209</sup> Perhaps the court was thinking that land burdened by such a covenant would almost certainly become unmarketable and, in all probability, that courts would find such a covenant void as it would violate the rule against restraints on alienation.

*City of Dania v. Broward County.*<sup>210</sup> Broward County began condemnation proceedings against several parcels of land for the purpose of airport expansion. The City moved to intervene alleging, *inter alia*, that the condemnation would harm the City by removing the subject properties from its tax base and depriving it of the benefits of money it had expended for infrastructure improvements. The trial court denied intervention and the district court affirmed.<sup>211</sup> In order to intervene, the proceeding must have a direct legal effect upon the intervenor. There was no statutory basis for a city to recover from a county for these losses, so this indirect harm does not satisfy the statutory requirement. Furthermore, the County's alleged failure to comply with the procedural requirements for condemnation would not be a proper basis for intervention.

*City of Ocala v. Red Oak Farm, Inc.*<sup>212</sup> The landowners' parcels were subject to a power company's 100-foot-wide easement for an electrical transmission facility before this action was commenced. In this case, the City took a fifty-foot-wide perpetual easement for a similar electrical transmission facility adjacent to the power company's easement. The power company had a formal written policy and permitting procedure by which landowners could get permission to make certain uses of the property. The City had no written policy but claimed to have a similar long-standing, unwritten policy. The City wanted to introduce the easement documents on which the power company's preexisting easement was based and the formal written policy into evidence. The landowners objected and the trial court rejected the City's proffer.<sup>213</sup> The district court reversed.<sup>214</sup>

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208. *Id.* at 934.

209. *Id.*

210. 658 So. 2d 163 (Fla. 4th Dist. Ct. App. 1995). Judges Dell, Farmer, and Stevenson concurred in the per curiam opinion.

211. *Id.* at 166.

212. 673 So. 2d 86 (Fla. 5th Dist. Ct. App.), *review denied*, Gold Land Corp. v. City of Ocala, No. 88,238, 1996 LEXIS 1752, at \*1 (Fla. Sept. 27, 1996). Judge Griffin wrote the opinion in which Chief Judge Peterson concurred. Judge Thompson dissented.

213. *Id.* at 86.

214. *Id.* at 87.

The court ruled that this evidence was relevant on the issues of valuation of the property and severance damages.<sup>215</sup> Surprisingly, the court based its conclusion, in part, on the intensity of the landowners' counsel's efforts to exclude this evidence. The rest of its logic is a little obscure. The court concluded that the jury might have been confused and misled by the fact that they were not informed about the parallels in the City's unwritten policy and the power company's written one.<sup>216</sup>

Judge Thompson's dissent provides some illumination.<sup>217</sup> Apparently, the jury was informed that the power company had an easement, that it had the written policy, and that the City had an unwritten policy. Part of the power company's written policy was read to the jury. The jurors viewed the land and the power company's transmission facilities. This made introduction of the easement documents and the written policy unnecessary, particularly in light of the prejudicial effect the documents might have since they contained the price the power company had paid for its easement thirty-five years earlier. Judge Thompson pointed out that the trial court had "the superior vantage," and the trial judge's decisions did not fail the reasonableness test.<sup>218</sup>

*Hartleb v. Department of Transportation*.<sup>219</sup> The Department of Transportation ("DOT") brought this eminent domain action and made an offer of judgment to the landowner for \$60,000. The jury verdict was \$60,971, but it was apportioned between the landowner, who got \$53,630, and his tenant. The trial judge denied the landowner attorney's fees and costs incurred after the offer of judgment based upon section 73.092(7) of the *Florida Statutes*<sup>220</sup> because he had received less than the offer of judgment.<sup>221</sup>

The district court disagreed for two reasons. First, the district court found that the offer of judgment was ambiguous.<sup>222</sup> It made no reference to apportionment of the award or compensation of the tenant, nor did it indicate that it

215. *Id.*

216. *Id.*

217. *Red Oak Farm*, 673 So. 2d at 87-88.

218. *Id.* at 88 (Thompson, J., dissenting).

219. 677 So. 2d 336 (Fla. 4th Dist. Ct. App. 1996). Judge Stone wrote the opinion. Judge Polen concurred. Judge Klein concurred specially.

220. FLA. STAT. § 73.092(7) (1987). The statute provides:

Where an offer of judgment made by the petitioner . . . is either rejected or expires and the verdict or judgment is less than or equal to the offer of judgment, no attorney's fees or costs shall be awarded for time spent by the attorney or costs incurred after the time or rejection or expiration of the offer.

*Id.*

221. *Hartleb*, 677 So. 2d at 336.

222. *Id.* at 337.

would be free of any claim by the tenant for compensation.<sup>223</sup> In fact, it purported to be a “complete and total settlement.”<sup>224</sup> So, it is unclear if the landlord’s recovery was actually less than the offer of judgment.

Second, the DOT made substantial changes to its construction plans after that offer of judgment had expired.<sup>225</sup> These changes reduced the scope of the taking.<sup>226</sup> Consequently, the jury verdict concerned a taking of a lesser magnitude than the earlier offer of judgment. If it was these subsequent changes that caused the jury verdict to come in under the offer, then “simple equity and the requirements of fair dealing”<sup>227</sup> would prevent the DOT from invoking this statute.

Judge Klein wrote a special concurrence to express his dismay with the DOT’s conduct in pursuing this appeal.<sup>228</sup> Although he did not use the word “frivolous,” it seems clear that was what he was thinking about the DOT’s position. Note that these merely compound the department’s earlier errors in making an ambiguous offer of judgment and failing to make an updated offer of judgment following a substantial change in plans.

*Morr v. Department of Transportation.*<sup>229</sup> Morr operated a salvage yard on land leased from Kreider. Morr had an occupational license from DeSoto County, but the salvage yard was not permitted by the County’s land use regulations. The DOT brought a condemnation action and obtained an order taking the property. Subsequently, the County brought an action to prevent the landlord and tenant from violating the land use regulations by operating the salvage yard there. The stipulated settlement provided that Morr would remove the salvage automobiles, but he could continue the salvage business on adjacent land if he complied with certain conditions.<sup>230</sup>

In the condemnation action, the trial judge decided that the above settlement conclusively established that the salvage yard had been operating illegally.<sup>231</sup> Consequently, Morr was not entitled to business damages. The district court disagreed and reversed.<sup>232</sup> The settlement had been entered after

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223. *Id.* at 336.

224. *Id.*

225. *Id.* at 337.

226. *Hartleb*, 677 So. 2d at 337.

227. *Id.*

228. *Id.* (Klein, J., concurring specially).

229. 667 So. 2d 888 (Fla. 2d Dist. Ct. App. 1996). Judge Blue wrote the opinion. Acting Chief Judge Patterson and Judge Altenbernd concurred.

230. *Id.* at 889.

231. *Id.*

232. *Id.*

the DOT had already taken the land. At that time, Morr no longer had any interest in the property that would enable him to continue operating the business there. At the critical time, the time of the taking, Morr did have an ongoing business. If Morr had a reasonable chance of continuing the business by obtaining rezoning or a variance, then he would be entitled to compensation for its loss. Whether he could have obtained a variance or rezoning would be a jury question unless there was no credible evidence to the contrary. Since the record does not establish that the county would have prevented its continuation if the DOT had not taken the land, the trial court should not have granted summary judgment that he could not recover business damages.<sup>233</sup>

*Seminole County v. Clayton*,<sup>234</sup> *Seminole County v. Delco Oil, Inc.*,<sup>235</sup> *Seminole County v. Butler*,<sup>236</sup> and *Seminole County v. Rollingwood Apartments, Ltd.*<sup>237</sup> Together, these four cases clarify the fifth district's approach to attorneys' fees in eminent domain cases. The statute provided:

(1) In assessing attorney's fees in eminent domain proceedings, the court shall give greatest weight to the benefits resulting to the client from the services rendered.

(a) As used in this section, the term "benefits" means the difference between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. . . .

(b) The court may also consider nonmonetary benefits which the attorney obtains for the client.

(2) In assessing attorney's fees in eminent domain proceedings, the court shall also give secondary consideration to:

(a) The novelty, difficulty, and importance of the questions involved.

(b) The skill employed by the attorney in conducting the cause.

(c) The amount of money involved.

(d) The responsibility incurred and fulfilled by the attorney.

233. *Id.* at 890.

234. 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995). Judge Cobb wrote the opinion in which Chief Judge Peterson and Judge W. Sharp concurred.

235. 669 So. 2d 1162 (Fla. 5th Dist. Ct. App. 1996) (replacing the original opinion at 21 Fla. L. Weekly D254 (5th Dist. Ct. App. Jan. 26, 1996)). Judges Cobb, Harris, and Griffin concurred in the per curiam opinion.

236. 676 So. 2d 451 (Fla. 5th Dist. Ct. App. 1996). Judge Antoon wrote the opinion. Chief Judge Peterson and Judge Dauksch concurred.

237. 678 So. 2d 370 (Fla. 5th Dist. Ct. App. 1996). Judge W. Sharp wrote the opinion in which Chief Judge Peterson and Judge Harris concurred.

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

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(4) In determining the amount of attorney's fees to be paid by the petitioner, the court shall be guided by the fees the defendant would ordinarily be expected to pay if the petitioner were not responsible for the payment of fees and costs.<sup>238</sup>

In *Clayton*, the compensation issue was settled without a trial.<sup>239</sup> The only issue before the circuit court was the amount of attorneys' fees. The court used a two tier approach, first figuring out a reasonable fee based upon an hourly rate and then adding twenty percent of the difference between the final agreed compensation and the initial offer, i.e., the betterment accomplished by the attorney. That produced a total attorney's fee of \$159,261.00, which worked out to \$1,276.64 per hour.<sup>240</sup> The district court reversed.<sup>241</sup>

First, the district court rejected the constitutional challenge to the attorneys' fee statute, section 73.092 of the *Florida Statutes*.<sup>242</sup> While the court agreed that a statute that mandated an unreasonable attorneys' fee would be unconstitutional, it concluded that the statute could be interpreted to comport with the *Florida Constitution*.<sup>243</sup> Furthermore, an excessive rate could not be justified as a punishment for a condemning authority which had made a bad faith initial offer as a bargaining ploy.<sup>244</sup> The case was remanded with an order that the trial court consider the statutory criteria rather than relying on a percentage approach.<sup>245</sup>

In *Delco*, the landowner had contracted to pay its attorney twenty-five percent of the benefits obtained. The parties quickly reached an agreement on the amount of compensation to be paid for the property, an amount \$270,000 higher than the County's original offer. The landowner's attorney worked 29.3 hours settling the case, and the time increased to 46.2 hours by including the

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238. FLA. STAT. § 73.092 (1993).

239. *Clayton*, 665 So. 2d at 364.

240. *Id.*

241. *Id.* at 366.

242. *Id.* at 365 (citing FLA. STAT. § 73.092 (1993)).

243. *Id.*

244. *Clayton*, 665 So. 2d at 365. Note, a low initial offer would already increase the attorney's fees under the statute if the attorney was able to successfully negotiate a fair price because it would increase the amount of "betterment" which the attorney could produce for his or her client.

245. *Id.* at 366.

time involved in recovering attorney's fees. The trial court awarded fees of \$67,500.<sup>246</sup> The district court reversed.<sup>247</sup>

The appellate court reasoned that Florida decisions provided what a reasonable attorneys' fee was and how it was to be calculated in most cases.<sup>248</sup> Condemnation is not a contingent fee case. Consequently, an attorneys' fee based upon a percentage of the recovery would be inappropriate. In eminent domain cases, the legislature has provided that the condemning authority pay a reasonable fee except as provided by section 73.092 of the *Florida Statutes*.<sup>249</sup> The district court interpreted that to mean that the fee reached by applying the factors in section 73.092 must still fit within the general parameters for a reasonable fee, i.e., the fee would be unreasonable if the effective hourly rate would be excessive after taking into account all relevant factors.<sup>250</sup> The fee awarded in this case, over \$2,000 per hour,<sup>251</sup> was excessive by this standard.

Moreover, applying the factors in section 73.092 would have also led the court to conclude that the attorney's fees had not been correctly calculated. The statute directed courts to give the greatest weight to the benefits resulting from the legal services and, secondarily, to consider a list of other factors.<sup>252</sup> Those factors were the same as used in the lodestar approach of *Florida Patient's Compensation Fund v. Rowe*.<sup>253</sup> Thus, the place to begin that calculation was with those statutory factors, using them to figure a lodestar amount. Then, that amount could be adjusted up or down in light of the benefits the attorney had obtained for this client, keeping in mind that the statute provides that the benefits should be the primary factor in the calculation. The recovery should not be controlled by what the condemnee has agreed to pay its attorney or what fees have become customary based upon a misunderstanding of the statutory criteria.

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246. *Delco*, 669 So. 2d at 1164.

247. *Id.* at 1163.

248. *Id.* at 1166.

249. FLA. STAT. § 73.092 (1993).

250. *Delco*, 669 So. 2d at 1166.

251. This \$2,000 figure was figured using the 29.3 hours it took to settle the case.

252. The secondary factors are:

- (a) The novelty, difficulty, and importance of the questions involved.
- (b) The skill employed by the attorney in conducting the cause.
- (c) The amount of money involved.
- (d) The responsibility incurred and fulfilled by the attorney.
- (e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

FLA. STAT. § 73.092(2)(a)–(e) (1993).

253. 472 So. 2d 1145 (Fla. 1985).

The trial court in *Rollingwood Apartments* also used an elaborate, but incorrect formula. In essence, “the court awarded a top hourly rate *plus* a generous percentage award, which resulted in a fee of over \$630 per hour.”<sup>254</sup> Because this was not consistent with the interpretations of section 73.092 above, the district court reversed.<sup>255</sup> It may, however, be noteworthy, that the district court did not say that \$630 per hour was per se unreasonable.

In *Butler*, the court faced three similar attorneys’ fees calculations and disapproved of them for the same reasons.<sup>256</sup> However, this case had an additional wrinkle. The landowner owned two buildings. Each was leased to a tenant. The land that the County was condemning did not include the two buildings; however, because the County admitted that the condemnation would make the buildings valueless, it agreed to compensate the condemnee for the loss. The County also agreed to allow the tenants to stay in the buildings during the eminent domain proceedings. The landowner informed the tenants that he expected them to keep paying rent during that period. They responded by filing successful motions with the court to abate their rent. The landowner filed a motion to set that order aside, but the parties eventually settled the matter. Under the settlement, the landowner received \$139,475. In calculating the attorney’s fees in the eminent domain action, the judge included that amount in the benefits that the attorney had obtained for his client.<sup>257</sup> The district court found that to be error.<sup>258</sup>

“Full compensation within the meaning of our constitution includes the payment of attorney’s fees necessary to enforce the property owner’s rights, including fees incurred in proceedings arising out of, and ancillary to, the original condemnation proceeding.”<sup>259</sup> Disputes arising out of the proceeding are such things as apportionment of the damages or enforcement of the condemnation award. Even the statute only provides attorneys’ fees incurred in the defense of the condemnation action.<sup>260</sup> That the landowner’s dispute with his tenants was triggered by the condemnation action does not make it a proceeding arising out of the condemnation. It was a private dispute between a landlord and his tenants, and there is no reason that the public should pay his attorney’s fees in resolving that dispute.

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254. *Rollingwood Apartments*, 678 So. 2d at 371.

255. *Id.*

256. *Butler*, 676 So. 2d at 455.

257. *Id.* at 454.

258. *Id.* at 455.

259. *Id.* at 454.

260. FLA. STAT. § 73.091 (Supp. 1994).

The County had also claimed the court erred in awarding attorneys' fees for time spent litigating the issue of attorneys' fees. The established rule is that attorneys' fees can be recovered for time spent litigating the issue of whether an attorney is entitled to fees, but they cannot be recovered for time spent litigating the amount of the attorney's fees. The record in this case was silent as to which issue the attorney's time was spent on, so the appellant cannot establish that an error occurred.<sup>261</sup>

*Department of Transportation v. Murray*.<sup>262</sup> The DOT was in the process of condemning part of a restaurant parking lot. On the issue of severance damages, DOT sought unsuccessfully to introduce expert testimony that the injury could be partially cured, arguing that the thirteen parking spaces that would be lost by the taking could be recovered if the landowner added spaces to existing parking bays and striped over a paved area then being used only for overflow parking. That ruling was made in an interlocutory order by the original trial judge.<sup>263</sup> When that judge was removed, his successor felt bound by the interlocutory order.<sup>264</sup> The district court held that the proffered testimony should have been excluded but for a different reason.<sup>265</sup>

The fatal flaw with the expert testimony was that it did not consider the effect the proposed cure would have on the value of the remaining property and business. Converting the overflow parking into regular marked parking would leave the landowner with the same number of striped parking spaces, but it would not make the landowners whole because the landowner would still have a smaller parking area. That would probably reduce the value of the restaurant, a factor which the expert testimony did not address. Therefore, the testimony was inadmissible as a matter of law.<sup>266</sup>

In addition, the landowners' expert had testified regarding the calculation of business damages. Business damages were, and still are, provided for by statute<sup>267</sup> rather than by constitutional authority, but the statute provides little guidance regarding how they are to be calculated. The expert had described his calculation as a "deprivation appraisal,"<sup>268</sup> but the court characterized it as

261. *Butler*, 676 So. 2d at 455.

262. 670 So. 2d 977 (Fla. 1st Dist. Ct. App.), *review granted*, 677 So. 2d 840 (Fla. 1996). This was a per curiam opinion in which Judges Ervin and Miner concurred. Judge Benton wrote an opinion concurring in part and dissenting in part.

263. *Id.* at 978.

264. *Id.*

265. *Id.*

266. *Id.* at 980.

267. FLA. STAT. § 73.071(3) (1991).

268. *Murray*, 670 So. 2d at 979.

a lost profit analysis.<sup>269</sup> The calculation of business damages should focus on lost profits and lost ability to make profits, but it should also consider business losses caused by the taking. This lost profit analysis must also include consideration of any fixed expenses that will be incurred despite the taking. In this case, the expert purposefully excluded fixed expenses such as advertising, depreciation, insurance, utilities, and the landowners' salaries. Since the expert's analysis here did not account for fixed expenses, it should not have been admitted into evidence.

The district court certified two questions as being of great public importance.<sup>270</sup> They are:

[1] IN AN EMINENT DOMAIN CASE IN WHICH AN ESTABLISHED BUSINESS IS NOT TOTALLY DESTROYED BY A TAKING, DOES SECTION 73.071(3)(b), FLORIDA STATUTES, CONTEMPLATE CALCULATION OF BUSINESS DAMAGES BY ANY MEANS OTHER THAN A LOST PROFIT ANALYSIS? [2] IN THE INSTANT CASE IS THE EXPERT'S BUSINESS DAMAGE CALCULATION A LOST PROFIT ANALYSIS REQUIRING THE DEDUCTION OF FIXED EXPENSES, SUCH AS SALARIES, INTEREST, DEPRECIATION, AND UTILITIES, OR AN ALTERNATIVE ANALYSIS, COGNIZABLE UNDER SECTION 73.071(3)(b), BASED ON DEDUCTION OF CERTAIN VARIABLE EXPENSES AND THE EXCLUSION OF FIXED EXPENSES FROM THE ANALYSIS?<sup>271</sup>

Judge Benton disagreed and, therefore, dissented in part.<sup>272</sup> The calculation of business damages would be different if the business is forced to shut down as a result of the taking rather than becomes less profitable. If the business shuts down, then the deduction of fixed expenses is appropriate because those expenses will cease. However, if the business continues, then the expenses will also continue as they had before the taking. Judge Benton argues that the majority applied the wrong standard to a business which would

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269. *Id.*

270. The same two questions were certified in *Department of Transp. v. Coleman*, 673 So. 2d 874 (Fla. 1st Dist. Ct. App. 1996), a per curiam opinion involving the same three judges as in *Murray*. The Supreme Court of Florida granted review of the certified questions on July 2, 1996. See *Murray v. Department of Transp.*, 677 So. 2d 840 (Fla. 1996).

271. *Murray*, 670 So. 2d at 980.

272. *Id.* (Benton, J., dissenting in part).

continue.<sup>273</sup> Moreover, the expert's testimony was sufficiently supported by the facts so that it could be left to the jury to decide whether to accept it or not.

*Tampa-Hillsborough County Expressway Authority v. Casiano-Torres*.<sup>274</sup> The condemnee sought and won severance damages.<sup>275</sup> Among the things it apparently claimed was damage to its business, which it could recover if the taking would "damage or destroy an established business of more than 5 years' standing."<sup>276</sup> The government appealed, *inter alia*, the trial court's submitting to the jury the question of whether the condemnee's business had been in existence for five years. The government's theory was that court had ignored the provision that: "[t]he jury shall determine solely the amount of compensation to be paid . . . ."<sup>277</sup> The district court held that the trial court had not erred, stating that "[s]uch an interpretation ignores the remainder of the statute which establishes what 'compensation' shall include and the requirements for arriving at the proper amount of compensation."<sup>278</sup> Apparently, the court's point was that whether the business was in existence for the requisite five years was only an element in determining the amount of damages, not whether damages should be paid.

*Weese v. Pinellas County*.<sup>279</sup> The sole issue in the case was the amount of business damages. The facts in the case were somewhat unusual. A used car lot occupied the land. The order "taking" part of it was entered on July 2, 1991, but the construction project did not actually get to that vicinity until September of 1993. Cars were displayed on the land until then. The project was completed in February of 1994. The first expert witness testified that the actual damage began in February of 1994, which is the date on which he began calculating the damages. Because the statute<sup>280</sup> provided that compensation shall be based on the earlier of the date of the taking or the date of the trial, the trial judge excluded this testimony.<sup>281</sup>

273. *Id.* at 981.

274. 659 So. 2d 1125 (Fla. 2d Dist. Ct. App.), *review denied*, 666 So. 2d 142 (Fla. 1995). Acting Chief Judge Campbell wrote the opinion. Judges Patterson and Fulmer concurred.

275. *Id.* at 1125. See FLA. STAT. § 73.071(3)(b) (1991) (governing the award of severance damages).

276. FLA. STAT. § 73.071(3)(b) (1991).

277. *Id.* § 73.071(3).

278. *Casiano-Torres*, 659 So. 2d at 1126.

279. 668 So. 2d 221 (Fla. 2d Dist. Ct. App. 1996). Acting Chief Judge Ryder wrote the opinion in which Judges Altenbernd and Lazzara concurred.

280. FLA. STAT. § 73.071(2) (1991).

281. *Weese*, 668 So. 2d at 222.

Then the trial court refused to allow the next witness to testify. He was the prior owner of the car business; he had continued to help the current owner; he was the owner of the underlying land; and he had the same last name as the current owner.<sup>282</sup> Exactly what it was about this combination of facts that led to the trial court's decision was not specified. Then, because of the lack of testimony on the amount of damages, the court entered a direct verdict in favor of the County.<sup>283</sup> The district court reversed.<sup>284</sup>

First, the court concluded that the first expert had complied with the statute.<sup>285</sup> He had begun his calculations at the correct date, the date of the taking, but had clearly stated that there were no business damages between the date of the taking in 1991 and the date when the project was complete in 1994. He merely continued his calculations from that date. Furthermore, the second expert was qualified to testify. "A witness may testify as an expert if he is qualified to do so by reason of knowledge obtained in his occupation or business."<sup>286</sup> He had knowledge of the used car business in general and also of the particular business that had been damaged. Implicit in the court's decision is that there is nothing inherent in this witness' connection to the claimant to disqualify him as an expert.

### B. Inverse Condemnation

*City of Riviera Beach v. Shillingsburg*<sup>287</sup> and *Taylor v. City of North Palm Beach*<sup>288</sup> involve contiguous submerged land, although in different cities. They involve similar facts and were decided by the same panel of judges from the Fourth District Court of Appeal. In *Shillingburg*, the City amended its comprehensive plan to include the following policy: "*It is the expressed policy objective of the City to preclude any development of submerged lands, including but not limited to mangroves, wetlands . . . to the maximum extent permissible by law. It is further the policy of the City to oppose any applications for dredge and fill permits . . .*"<sup>289</sup> The landowners claimed this affected a taking

282. The exact relationship, if any, was not mentioned in the decision.

283. *Weese*, 668 So. 2d at 223.

284. *Id.*

285. *Id.* at 222.

286. *Id.* at 223 (relying upon *Harvey v. State*, 129 Fla. 289 (1937) and FLA. STAT. § 90.702 (1991)).

287. 659 So. 2d 1174 (Fla. 4th Dist. Ct. App. 1995). Judge Pariente wrote the opinion in which Judge Warner and Associate Judge Fredericka Smith concurred.

288. 659 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1995). Judge Pariente wrote the opinion in which Judge Warner and Associate Judge Fredericka Smith concurred.

289. 659 So. 2d at 1177.

of their land. The trial court initially rejected the claims as not being ripe because there was no final decision as to what would be ultimately allowed, but stayed the proceedings for four months pending developments.<sup>290</sup> During that time, the land use plan was amended to allow a viewing dock, and one landowner's application for a permit to build a viewing dock was approved subject to stringent conditions and limits. The trial court concluded that this proved the highest level of development that would be allowed, but it was not enough.<sup>291</sup> It violated the landowner's reasonable investment-backed expectations which constituted a taking.<sup>292</sup> The district court disagreed and reversed.<sup>293</sup>

A land use ordinance that leaves open the possibility of reasonable use should not be found on its face to violate the Takings Clause.<sup>294</sup> This plan by its express language contemplated viable uses consistent with the policy objectives. The amendment to allow the viewing dock demonstrated that the plan has some flexibility and that further amendments were possible. So the facial challenge failed.<sup>295</sup>

The as applied challenge failed because it was not ripe.<sup>296</sup> The doctrine is intended to give the land use agency the chance to reach its own well-reasoned conclusion before a court will consider the matter. Getting permission to build a dock did not prove what the land use agency would ultimately allow or deny. While the landowners here asserted that any further applications would be futile, that was not conclusively established from the facts in the record.

In *Taylor*,<sup>297</sup> the landowner's family had held title since 1971. Back then the zoning was C-1A which permitted limited commercial uses and high density, multifamily residential uses. That it was in the midst of an environmentally sensitive area was gradually recognized by various levels of government, culminating with the zoning being changed in 1989 to a conservation/open space classification, consistent with the City's comprehensive use plan. Low density single family housing and passive recreation were permissible uses. The landowner sued on the theory that this reclassification affected

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290. *Id.* at 1178.

291. *Id.* at 1179.

292. *Id.*

293. *Id.* at 1176.

294. U.S. CONST. amend. V.

295. *Shillingsburg*, 659 So. 2d at 1179.

296. *Id.* at 1180.

297. *Taylor*, 659 So. 2d at 1167.

a taking of the property. The trial court rejected her claims and she appealed.<sup>298</sup>

The landowner's first claim was that the zoning classification was a per se taking of her property. Where a land use regulation leaves open the possibility of reasonable uses, a claim of a facial taking will fail. The district court found that the record did not preclude all reasonable uses of the land.<sup>299</sup> Furthermore, the plan had a mechanism for seeking amendments. So it was possible that the landowner could have gotten an amendment allowing a proposed use.

Any claim that the landowner would be deprived of all economically viable uses would depend on an as applied challenge based upon the facts of the case. However, that challenge failed because the landowner had failed to exhaust her administrative remedies by seeking the amendment.<sup>300</sup> She also had not submitted a development plan that had been rejected by the City. Whether there has been a taking depends on the extent to which the landowner will be deprived of her reasonable investment-backed expectations, but that depends on what development the government will allow. Until the government made a final determination, the takings issue could not be decided. Therefore, this case was not yet ripe.<sup>301</sup>

*City of St. Petersburg v. Bowen.*<sup>302</sup> The landlord brought this action for inverse condemnation after the City's Nuisance Abatement Board ordered his apartment house closed for a period of one year.<sup>303</sup> The landlord was not accused of any wrongdoing. The order was based upon a finding that there was drug use by tenants and other persons at the property. The trial court first granted a motion to dismiss filed by the City.<sup>304</sup> It ruled that the taking was temporary and, at the time, it was the accepted law that an inverse condemnation action could not be brought to recover for a temporary taking.<sup>305</sup> Because

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298. *Id.* at 1168.

299. *Id.* at 1171.

300. *Id.* at 1172-73.

301. *Id.* at 1174.

302. 675 So. 2d 626 (Fla. 2d Dist. Ct. App.), *review denied*, No. 88,373, 1996 LEXIS 1563, at \*1 (Fla. Aug. 29, 1996). Acting Chief Judge Campbell wrote the opinion in which Judges Frank and Blue concurred.

303. The order was based upon the authority of section 893.138 of the *Florida Statutes* and sections 19-66 to 19-71 of the St. Petersburg, Florida, City Code. See FLA. STAT. § 893.138 (1991); ST. PETERSBURG, FLA., CITY CODE §§ 19-66 to -71 (1989). There was no claim that the order was invalid.

304. *Bowen*, 675 So. 2d at 628.

305. *Id.*

the Supreme Court of Florida changed the law<sup>306</sup> after the trial court's decision was made, the district court reversed.<sup>307</sup> The trial court then granted summary judgment to the landlord.<sup>308</sup> The district court affirmed, adopting the opinion of Circuit Court Judge Horace A. Andrews which it found to be "complete, concise, scholarly and well-grounded."<sup>309</sup>

A regulation that denies all economically beneficial or productive use of the land is compensable without inquiry into the public interest advanced in support of the regulation. Ordering the apartment house closed for one year did deny all economically beneficial or productive use. The taking claim is not avoided by invoking the nuisance exception. The state may legitimately prohibit conduct which would be a common law nuisance, e.g., the use or sale of drugs. But the conduct prohibited goes far beyond that. This order prohibits the use of the premises for human habitation. In essence, the City is trying to force this landowner to disproportionately bear the cost of its war on drugs.

*Sarasota Welfare Home, Inc. v. City of Sarasota.*<sup>310</sup> The landowner's property was subject to a public easement. When the City buried a sewer and wastewater pipe in 1970, it extended beyond the public easement and encroached on the this landowner's land. The encroachment was discovered in 1988 when the landowner began a construction project. Due to the location of the pipe, the City refused to allow the construction according to the proposed plans. Just under four years after the discovery, the landowner filed this inverse condemnation action against the City. The trial court granted the City's motion for summary judgment on the basis that the action was barred by the statute of limitations, but the district court reversed.<sup>311</sup>

There is no specific inverse condemnation statute of limitations, but that does not mean that the action is not subject to a time limit. The district court ruled<sup>312</sup> that it is subject to the four year statute of limitations applicable to real property actions for which the legislature has not provided a specific limit.<sup>313</sup> The critical question in this case is when the four year period began to run.<sup>314</sup>

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306. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

307. *Bowen v. City of St. Petersburg*, 642 So. 2d 837 (Fla. 2d Dist. Ct. App. 1994).

308. *Bowen*, 675 So. 2d at 628.

309. *Id.* at 629.

310. 666 So. 2d 171 (Fla. 2d Dist. Ct. App. 1995). Chief Judge Threadgill and Judges Campbell and Fulmer concurred in this per curiam opinion.

311. *Id.* at 173.

312. On this point, the district court affirmed the trial court's ruling. *Id.*

313. *Id.* at 172 (citing FLA. STAT. § 95.11(3)(p) (1991)).

314. *Id.*

The trial court ruled that the four year period began in 1970 when the encroaching pipe was installed, but the district court concluded it was when the City refused to approve the development plan because of location of its own pipe.<sup>315</sup> The court's logic is that "a 'taking' occurs when an owner is denied substantially all economically beneficial or productive use of the owner's land."<sup>316</sup> Whether a taking has occurred is determined by a factual inquiry made on a case-by-case basis, so when it occurred must be determined the same way. Here, the court concluded that the landowner was not deprived of the use of the land taken until it was prevented from building according to its plans.<sup>317</sup>

The court also reversed the trial court's denial of the landowner's motion for leave to amend the complaint.<sup>318</sup> The landowner wanted to add a trespass claim, apparently on the theories that the encroaching pipe was a continuing trespass; damages for the preceding four years of encroachment would not be barred by the statute of limitations; and an injunction should be awarded against the encroachment's continuation. Such motions "shall be given freely when justice so requires."<sup>319</sup> Apparently nothing in the record justified the trial court's denial of the motion.

*Department of Environmental Protection v. Burgess.*<sup>320</sup> The landowner owned approximately 166 acres in the wetlands. His application for a dredge and fill permit was denied by the Department following an administrative hearing. Rather than appeal the Department's final order, he brought this suit in circuit court claiming that the denial constituted a taking for which compensation must be paid. He filed a motion for partial summary judgment supported only by his own affidavit and the Department's final order denying the permit. The Department responded by filing the landowner's deposition and an affidavit from a county official that the proposed development would require a county building permit. In his deposition, the landowner admitted that the Department had offered to issue the dredge and fill permit if he would give it a conservation easement, an offer he refused. The trial court granted the landowner's motion for partial summary judgment and the Department appealed.<sup>321</sup>

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315. *Sarasota Welfare*, 666 So. 2d at 173.

316. *Id.* (citing *Tampa-Hillsborough County Expressway Auth.*, 640 So. 2d at 58).

317. *Id.*

318. *Id.*

319. FLA. R. CIV. P. 1.190(a).

320. 667 So. 2d 267 (Fla. 1st Dist. Ct. App. 1995). Judge Van Nortwick wrote the opinion. Judges Ervin and Benton concurred.

321. *Id.* at 268.

The district court reversed.<sup>322</sup> A regulatory taking occurs when the landowner is deprived of substantially all economically beneficial or productive use of the property. Could the landowner still use the land productively? Would available uses be economically beneficial in light of his investment-backed expectations? Finally, would the proposed use be a nuisance? No compensation is required if the state prevents a landowner from engaging in nuisance activity. These fact-based questions remained. "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."<sup>323</sup> So the trial court erred in granting the summary judgment.<sup>324</sup>

The district court noted that the case presents an interesting question. The landowner never tested the validity of the Department's order by judicial review.<sup>325</sup> Does the Department's denial of the permit conclusively establish in this case that the landowner could not get a permit? The court declined to answer because the issue had not been raised in or ruled upon by the trial court.<sup>326</sup>

### XIII. ENVIRONMENTAL LAW

*Department of Community Affairs v. Moorman.*<sup>327</sup> In this case, the Supreme Court of Florida assessed the validity of a land use ordinance affecting Big Pine Key, enacted to protect the endangered Florida Key deer. The court noted, in an opinion authored by Justice Kogan,<sup>328</sup> that human development has "put the deer perilously close to extinction."<sup>329</sup> The respondent property owners were prohibited under the ordinance from erecting fences,<sup>330</sup> representing a threat to the Key deer which must roam freely in

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322. *Id.* at 271.

323. *Id.* (citing *Coastal Petroleum Co. v. Chiles*, 656 So. 2d 284, 285 (Fla. 1st Dist. Ct. App. 1995)).

324. *Id.*

325. *Burgess*, 667 So. 2d at 270.

326. *Id.* at 269-70.

327. 664 So. 2d 930 (Fla. 1995), *cert. denied*, No. 95-2035, 1996 WL 337490, at \*1 (U.S. Oct. 7, 1996).

328. Justices Overton, Shaw, Harding and Anstead concurred, while Chief Justice Grimes authored an opinion concurring in part and dissenting in part, with which opinion Justice Wells concurred. *Id.*

329. *Id.* at 931.

330. Interestingly, Respondent Charles Moorman not only owned lands affected by the ordinance, but also owns Your Local Fence, a company that was also a respondent in the litigation. *Id.*

search of food and water. The ordinance, a blanket prohibition on fencing, was intended as an interim effort which would "be replaced within a year by a more comprehensive regulation that would better identify where fence restrictions would be proper and where they were unnecessary."<sup>331</sup> However, the ordinance had been in place for five years before the relevant dates in this litigation.<sup>332</sup>

Notwithstanding the ordinance, Monroe County officials granted Moorman a permit to build a six-foot-high, 400-foot-long fence, and Justice Kogan noted that "[t]he record contains evidence that Moorman's fence is in a location that will adversely affect the Key deer."<sup>333</sup> The Department of Community Affairs ("DCA") appealed the County's decision under its "authority over areas of critical state concern."<sup>334</sup> Moorman's lots are located in an area which was designated as a critical state concern in 1979.<sup>335</sup> Upon referral, a Department of Administrative Hearings' hearing officer found the permits improper, noting that the permits were issued as a matter of right.<sup>336</sup> The hearing officer recommended that the Cabinet (sitting as the Florida Land & Water Adjudicatory Committee) rescind the permits, which it did.<sup>337</sup> Moorman then appealed to the Third District Court of Appeal, which found the ordinance facially unconstitutional.<sup>338</sup>

The Supreme Court of Florida held that such a finding of facial unconstitutionality was improper because it promotes the valid public policy interests in protecting the environment.<sup>339</sup> Zoning ordinances are to be upheld unless they bear no substantial relation to legitimate societal policies.<sup>340</sup> Nevertheless, the court questioned whether any valid basis existed for denying the

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331. *Id.* at 932.

332. *Moorman*, 664 So. 2d at 932.

333. *Id.*

334. *Id.* (citing FLA. STAT. § 380.07(2) (1993)).

335. *Id.* Justice Kogan added in a footnote that this fact was "crucial to the result in this case, because it identifies an environmental concern unique to Big Pine Key." *Id.* at 932 n.1.

336. *Moorman*, 664 So. 2d at 932.

337. In a footnote, Justice Kogan noted that "the Cabinet sitting as the Florida Land & Water Adjudicatory Commission may rescind land use permits in the Florida Keys or 'may attach conditions and restrictions to its decisions.'" *Id.* at 933 n.2 (citing FLA. STAT. § 380.07 (1993)). Justice Kogan further noted that the record was unclear as to why the Cabinet had not attached such conditions or restrictions, instead rescinding the permit altogether. *Id.*

338. *Id.* at 932.

339. *Id.* at 933.

340. *Moorman*, 664 So. 2d at 933. For this proposition, the court cited Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth., 111 So. 2d 439 (Fla. 1959), one of the cases with which the third district's opinion was thought to conflict with. *Id.* at 931.

Moormans a permit.<sup>341</sup> That the blanket prohibition was intended as an interim measure meant that it was never regarded as an essential feature of public policy.<sup>342</sup> However, the DCA's expert testified that there were "good fences and bad fences" and that the blanket prohibition extended beyond the expert's "specific recommendations."<sup>343</sup> "[T]he uncontroverted expert evidence clearly indicated that the Moormans' fence—the only one at issue here today—was harmful to Key deer habitat."<sup>344</sup> On the basis of this testimony, the supreme court quashed the third district's decision and remanded.<sup>345</sup>

*Kaplan v. Peterson.*<sup>346</sup> The current landowner purchased the land in 1986. In 1989, an environmental site assessment report showed that a leaking underground storage tank had contaminated the land. The current landowner cleaned up the land and sued his seller to recover his costs and expenses.<sup>347</sup> The parties agreed that the complaint did not make any claim based on a recognized exception to the doctrine of caveat emptor. It only claimed that the landowner can recover under a new cause of action impliedly created by chapter 376 of the *Florida Statutes* (1989).<sup>348</sup> The second district had already decided that such a cause of action was not impliedly created,<sup>349</sup> but the fifth district disagreed.<sup>350</sup>

The court found sufficient reasons to overcome a general judicial reluctance to read a private cause of action into a statute.<sup>351</sup> The statute requires current owners to clean up a polluted site. If the current owner had failed to do it, the state could have handled the clean up and then recovered from the prior owner who caused the pollution. The state could not, however, have recovered from the current owner who purchased without notice of the pollution.

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341. *Id.* at 933.

342. *Id.*

343. *Id.*

344. *Moorman*, 664 So. 2d at 934.

345. *Id.* Justice Wells joined in Chief Justice Grimes' opinion, concurring in part and dissenting in part, failing to agree that the ordinance "was necessarily constitutional as applied." *Id.* These justices would have remanded for a determination of whether the ordinance was constitutionally applied or, alternatively, whether modification of the permit would be proper. *Id.*

346. 674 So. 2d 201 (Fla. 5th Dist. Ct. App. 1996). Judge W. Sharp wrote the majority opinion. Judge Thompson concurred. Judge Griffin wrote an opinion concurring in part and dissenting in part.

347. This action was consolidated with an action against his tenant, but that does not affect the outcome of this decision.

348. *See Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

349. *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d Dist. Ct. App.), *review denied*, 626 So. 2d 207 (Fla. 1993).

350. *Kaplan*, 674 So. 2d at 206.

351. *Id.*

Neighbors injured by the pollution could recover from a prior owner who caused it. A city could recover from a nearby landowner who had caused contamination of its well field. Any person injured by the prior owner's release of hazardous materials could recover for their injury. It would not make sense to hold that the only one who could not recover was the current owner who had obeyed the statute and cleaned up the mess caused by its seller. Consequently, the court concluded that chapter 376 does create a private cause of action against a prior owner who polluted.<sup>352</sup>

The court also recognized that the doctrine of caveat emptor had been rejected in residential real estate sales.<sup>353</sup> The Supreme Court of Florida had not yet addressed the question of whether that holding should be expanded to include commercial real estate transactions, and the third district had expressly refused to do so.<sup>354</sup> However, this court simply ruled that caveat emptor was not a bar to this cause of action.<sup>355</sup> Apparently, the court felt it was clear enough that the cause of action would have little applicability if it could be barred by caveat emptor, so if the legislature had intended to give a buyer the cause of action, it must have also intended to exempt it from the reaches of that doctrine.

The court concluded by certifying the following question to the Supreme Court of Florida:

DOES THE DOCTRINE OF *CAVEAT EMPTOR* BAR A CURRENT LANDOWNER OF COMMERCIAL REAL PROPERTY FROM SUING THE PRIOR LANDOWNER TO RECOVER THE COST AND EXPENSES OF CLEAN UP OF THE PROPERTY, WHICH WAS CAUSED BY THE PRIOR OWNERS UNLAWFUL DISCHARGE OF POLLUTANTS ON THE SITE, CONTRARY TO CHAPTER 376?<sup>356</sup>

Judge Griffin dissented from the finding that a private cause of action was created for buyers by chapter 376.<sup>357</sup> Applying the purpose approach to this problem, the judge points out that "this legislation was not designed to protect subsequent purchasers of polluted property."<sup>358</sup> What it was designed to do

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352. *Id.* at 203.

353. *Id.*

354. *Id.*

355. *Kaplan*, 674 So. 2d at 205.

356. *Id.* at 205-06.

357. *Id.* at 206 (Griffin, J., dissenting in part).

358. *Id.*

was protect people who had been harmed by a discharge of pollutants, not indirectly harmed by the purchase of polluted property.

#### XIV. EQUITY

*Bauerle v. Weisman.*<sup>359</sup> Landowners sought to rescind the conveyance by which they had acquired their title and the contract of sale which led to the conveyance. Their theory was mutual mistake. Their action was triggered by the failure of the Department of Environmental Resources ("DER") to approve their application for construction of a house and access road. The trial court granted the relief after concluding that the DER would prevent the property from ever being used as a residence, as was contemplated by the parties to the conveyance.<sup>360</sup> The grantors/sellers appealed.

In order to prevail on the merits, the party seeking rescission must prove its right to relief by clear and convincing evidence.<sup>361</sup> A surveyor had testified that the location of the line established the DER's wetlands jurisdiction over this land, but that testimony was based upon the surveyor's assumption that the DER's jurisdiction had already been established. The uncontradicted testimony of a former DER permit processor was that the DER had never made a jurisdictional determination because the plaintiffs had failed to provide certain essential information. Consequently, there was not competent, substantial evidence that DER had the power to prevent the plaintiffs from building a residence on this property as planned.<sup>362</sup>

*Metropolitan Dade County v. O'Brien.*<sup>363</sup> The O'Briens opened a business knowing that they were violating some County ordinances and had not secured the appropriate permits, so the County sued. The trial court denied the County's motion for a preliminary injunction, allowing the O'Briens ninety days to get a variance.<sup>364</sup> When the time was up, the County again moved for a temporary injunction, but the trial court again denied it, giving the O'Briens

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359. 664 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995). Judge Dauksch wrote the opinion. Chief Judge Peterson and Judge Antoon concurred.

360. *Id.* at 364.

361. *Id.* at 365. See *Rosique v. Windley Cove, Ltd.*, 542 So. 2d 1014 (Fla. 3d Dist. Ct. App. 1989).

362. *Id.*

363. 660 So. 2d 364 (Fla. 3d Dist. Ct. App. 1995). Judges Hubbard, Jorgenson, and Gersten concurred in the per curiam opinion.

364. *Id.* at 365.

another sixty days.<sup>365</sup> This time the County appealed and the Third District Court of Appeal reversed.<sup>366</sup>

It has long been the settled rule that “[w]here the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed.”<sup>367</sup> The O’Briens knowingly violated the ordinances and continued to violate the ordinances. In these “extreme circumstances,” it was an abuse of discretion for the trial court to deny the temporary injunctions.<sup>368</sup>

*Dorton v. Jensen.*<sup>369</sup> The sellers testified that under heavy rains, water would rush from the street, into their yard, and hit the side of the house leaving a water mark on the wall. On three or four occasions water had come under the back door sill. To prevent that, they had caulked the bottom of the door sill with silicone, a fix that had worked, but they never told the buyers about the water problem. In fact, when the buyers asked if they should buy flood insurance, the sellers had answered it was unnecessary as they had never experienced a flooding problem.<sup>370</sup>

After moving in, the buyers experienced severe flooding after several heavy rainfalls. The buyers eventually stopped making the purchase money mortgage payments to the sellers. This suit followed with the buyers seeking rescission and the sellers seeking foreclosure. After a non-jury trial, the circuit court, applying the principle of *Johnson v. Davis*,<sup>371</sup> ruled in favor of the sellers because the buyers had experienced only “minor water damage.”<sup>372</sup> The district court reversed.<sup>373</sup>

*Johnson* required sellers to disclose any material fact that would materially affect the value of the property and that was not readily observable to the buyers.<sup>374</sup> A latent flooding problem might be such a material fact, but the court had not addressed that question. The court focused instead on the amount of damage the buyers suffered when the house flooded.<sup>375</sup> There was

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365. *Id.*

366. *Id.*

367. *Id.*

368. *O’Brien*, 660 So. 2d at 365.

369. 676 So. 2d 437 (Fla. 2d Dist. Ct. App. 1996). Judge Lazzara wrote the opinion. Acting Chief Judge Parker and Judge Blue concurred.

370. *Id.* at 438.

371. 480 So. 2d 625 (Fla. 1985).

372. *Dorton*, 676 So. 2d at 439.

373. *Id.* at 440 (relying on *Johnson*, 480 So. 2d at 625).

374. *Johnson*, 480 So. 2d at 629.

375. *Dorton*, 676 So. 2d at 439.

evidence that it was a material fact affecting the value in that the buyers had testified that they would not have bought the house if they had known about this flooding problem. Consequently, the case was remanded for a new trial.<sup>376</sup>

*KCIN, Inc. v. Canpro Investments, Ltd.*<sup>377</sup> Canpro Investments filed an action against KCIN for breach of a commercial lease. Canpro filed an answer and a counterclaim. The trial court found all claims to be without merit and refused to award attorney's fees to Canpro on the theory that there was no prevailing party.<sup>378</sup> Canpro appealed based on the argument that the trial court is required to name a prevailing party, a position supported by other districts.<sup>379</sup> The district court affirmed on this issue, but noted the conflict with the other circuits and certified the conflict to the Supreme Court of Florida.<sup>380</sup>

*Wiborg v. Eisenberg.*<sup>381</sup> The buyers brought an action for specific performance of a contract to buy land. The seller refused to convey the land. At issue was whether there was a contract and, if so, whether it failed to satisfy the Statute of Frauds. The trial judge awarded relief to the buyers because it found that the seller had

demonstrated a lack of candor in his dealings with the BUYERS and has testified untruthfully in the course of the trial. This court can not and will not allow the utilization of the Statute of Frauds as a shield to perpetuate unfair dealings, when the party invoking its protection has perjured himself on multiple material points.<sup>382</sup>

However, the trial judge refused to award damages to the buyers.<sup>383</sup>

The district court affirmed the judgment of specific performance, although on the grounds that there was a valid and enforceable contract under

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376. *Id.* at 440.

377. 675 So. 2d 222 (Fla. 2d Dist. Ct. App. 1996). Judge Blue wrote the opinion. Acting Chief Judge Campbell and Judge Fulmer concurred.

378. *Id.* at 223.

379. *Id.* See also *Green Cos. v. Kendall Racquetball Inv. Ltd.*, 658 So. 2d 1119 (Fla. 3d Dist. Ct. App. 1995); *Lucite Ctr., Inc. v. Mercede*, 606 So. 2d 492 (Fla. 4th Dist. Ct. App. 1992).

380. The case was reversed on the issue of whether attorneys' fees should have been awarded under section 768.79 of the *Florida Statutes* (1991) based upon Canpro's offer of judgment. *KCIN*, 675 So. 2d at 223. The case was remanded so the trial court could reconsider the issue in light of *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995), which was decided after the trial court's decision in this case. *Id.*

381. 671 So. 2d 832 (Fla. 4th Dist. Ct. App. 1996). Associate Judge Patti Englander Henning wrote the opinion. Chief Judge Gunther and Judge Shahood concurred.

382. *Id.* at 834.

383. *Id.*

any of the three possible interpretations of the facts.<sup>384</sup> However, the district court reversed on the trial court's failure to award the damages to the buyer.<sup>385</sup> It ruled a court of equity may award compensation to parties who have succeeded in a specific performance action when that is necessary "to place them in a position [the parties] would have occupied had the contract been timely performed."<sup>386</sup> This is really an adjusting of the equities between the parties rather than the award of damages for breach of contract.<sup>387</sup>

## XV. FORECLOSURE

*Barnes v. Resolution Trust Corp.*<sup>388</sup> The Resolution Trust Corporation ("RTC"), as receiver for City Federal Savings Bank ("CFSB"), received a favorable judgment of foreclosure, and the Barneses appealed.<sup>389</sup> The Barneses sold the property to James and Florence Marsh who executed a promissory note and first mortgage in favor of CFSB, as well as a second mortgage in favor of the Barneses. After the Marshes defaulted on the second mortgage, the Barneses continued making payments to CFSB and requested that CFSB send appropriate paperwork for assumption of the mortgage by the Barneses. CFSB accepted some payments (totalling about \$15,000), but the RTC refused to accept payments when it took over. Although the RTC returned their payments, the Barneses made expenditures on the property for maintenance, including roof upkeep and painting, as well as taxes and hazard insurance.<sup>390</sup> Moreover, the Barneses rented the property and retained income in contradiction of a court order directing them to deposit such income into the court registry. The CFSB loan went into default, and the RTC obtained judgment of foreclosure.<sup>391</sup>

The Barneses contended that, based on CFSB's acceptance of the installment payments, the RTC is estopped from refusing payment and forcing default of an otherwise current mortgage. The Fourth District Court of Appeal held that the RTC had a contractual right to foreclose on the mortgage when the Marshes defaulted, and it was not obligated to the Barneses as they were

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384. *Id.*

385. *Id.* at 835.

386. *Wiborg*, 671 So. 2d at 835.

387. *Id.*

388. 664 So. 2d 1171 (Fla. 4th Dist. Ct. App. 1995).

389. *Id.* at 1172.

390. An RTC representative testified that CFSB records indicated that CFSB had responded to the Barneses inquiry, but the Barneses claimed that the bank never responded.

391. *Barnes*, 664 So. 2d at 1172.

not parties to the first mortgage and had never assumed that mortgage.<sup>392</sup> Also, there was no evidence that either CFSB or the RTC had induced the Barneses to make payments on the first mortgage.<sup>393</sup> However, although the RTC was not estopped from accelerating the mortgage according to the acceleration clause, it was not entitled to retain the Barneses' earlier payments.<sup>394</sup> The court remanded the case for an evidentiary hearing to determine the amount that the Barneses had paid in satisfaction of the first mortgage, which the Barneses would be entitled to receive from the RTC, plus interest.<sup>395</sup>

## XVI. HOMESTEAD

*Miskin v. City of Fort Lauderdale.*<sup>396</sup> In this case, the trial court granted the City's motion for summary judgment, and the Fourth District Court of Appeal affirmed.<sup>397</sup> The City recorded a favorable final order issued by the Code Enforcement Board as a lien against Miskin's homestead property pursuant to section 162.09 of the *Florida Statutes* (1993). The Board had found for the City for two code violations on the property and gave Miskin until January 26, 1992 to comply; thereafter, he was subject to a \$150.00 fine for each day of noncompliance. Miskin filed for a declaratory judgment that the order did not exist as a lien on the property.<sup>398</sup>

The court quoted section 162.09(3) and explained that the order underlying the lien was not a "judgment, decree or execution," as prohibited by Article X, section 4 of the *Florida Constitution*.<sup>399</sup> The court believed that section 162.09(3) demonstrates legislative recognition of this fact by declaring that these orders not be deemed to be court judgments except for enforcement purposes, and that no lien created under that part of the statute may be enforced against real homestead property.<sup>400</sup> Although unenforceable, the lien

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392. *Id.* at 1173.

393. *Id.* See *Department of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981) (citing *Greenhut Constr. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517, 524 (Fla. 1st Dist. Ct. App. 1971) (stating that "to prevail under estoppel theory, movant must demonstrate that (1) defendant or an agent made a representation with regard to a material fact; (2) movant relied on the representation; and (3) changed his position to his detriment in reliance on the representation.")).

394. *Id.*

395. *Id.*

396. 661 So. 2d 415 (Fla. 4th Dist. Ct. App. 1995).

397. *Id.*

398. *Id.* at 416.

399. *Id.*

400. *Id.*

was not invalid.<sup>401</sup> The court noted that “the prohibition of the constitutional provision is a prohibition against the use of process to force the sale of homestead property and does not invalidate the debt or lien.”<sup>402</sup> Thus, if the property lost homestead status in the future, the City would be able to enforce the lien.<sup>403</sup>

## XVII. LAND USE PLANNING

*City of New Smyrna Beach v. Andover Development Corp.*<sup>404</sup> In 1970, the City passed Ordinance 797 that created a special planned unit development zoning classification. Under it, a developer could submit a plan for a large development that had to satisfy large scale guidelines rather than the traditional zoning rules for each lot or unit. The developer, the plaintiff in this case, did submit such a plan and the City Commission approved it. Pursuant to the plan, the City Commission rezoned the land to an R-R Pud zone that incorporated the project plan into the zoning. The citizens of the City reacted by repealing Ordinance 797 in a referendum vote. However, in earlier litigation, the district court determined that the referendum did not revoke the ordinance as to this development, the R-R Pud zone, or the developer’s approval to develop this land.<sup>405</sup> It merely prevented the City Commission from approving any more plans.

Eighteen years later, the developer sought to amend its project plans by increasing the height of some buildings from twenty to twenty-nine stories and relocating some buildings. The City Commission rejected the proposed amendments, so the developer sued to enforce the earlier judgment on the theory that Ordinance 797 did not have any fixed height limitations or location limitations. The trial court granted relief, but the district court reversed.<sup>406</sup>

Although Ordinance 797 did not have these limitations, once the details of the project plan were incorporated into the R-R Pud zone, its details became the limits under the zoning classification of this land.<sup>407</sup> The plan did specify the location and heights of the buildings and provided that all except minor

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401. *Miskin*, 661 So. 2d at 416.

402. *Id.*

403. *Id.*

404. 672 So. 2d 618 (Fla. 5th Dist. Ct. App. 1996). Judge Harris wrote the opinion. Judges Dauksch and Sharp concurred.

405. *See Andover Development Corp. v. City of New Smyrna Beach*, 328 So. 2d 231 (Fla. 1st Dist. Ct. App.), *cert. denied*, 341 So. 2d 290 (Fla. 1976).

406. *Andover*, 672 So. 2d at 622.

407. *Id.* at 621.

changes had to be approved by the City Commission. If the developer wanted to modify the plan, it would have to follow the amendment procedures provided by Ordinance 797.<sup>408</sup>

*DSA Marine Sales & Service, Inc. v. County of Manatee.*<sup>409</sup> DSA Marine Sales & Services, Inc. ("DSA") wanted to build a marina and dry boat storage facility. The County Commission approved the needed zoning change but disapproved the construction proposal. DSA reacted by filing a petition for a writ of certiorari in the circuit court. Simultaneous with the petition, it moved to supplement the record as the documents became available. A short time later, DSA filed an amended petition with an expanded appendix. Although the appendix was still not complete, the circuit court summarily denied the amended petition on the grounds that the petitioner failed to make a prima facie case.<sup>410</sup> Later, the circuit court also denied DSA's motion for rehearing.<sup>411</sup> On review, the district court determined that DSA had been denied procedural due process.<sup>412</sup>

Procedural due process requires that the litigants have a reasonable opportunity to be heard. To obtain review, DSA had to file its certiorari petition within thirty days of the order's rendition, but the court noted that, in such circumstances, "it is sometimes impossible to compile and contemporaneously file the entire record as an appendix to the petition."<sup>413</sup> Consequently, procedural due process required that DSA be afforded a reasonable opportunity to complete the appendix. On the record, it did not appear that DSA had been given that reasonable opportunity. The court also pointed out that the circuit court order failed to explain in detail why the petition was dismissed.<sup>414</sup> Such detail would have been helpful to the parties and the appellate court.<sup>415</sup> Implicit is the suggestion that the court provide such details in the future.

*Board of County Commissioners v. Karp.*<sup>416</sup> Pursuant to the County's comprehensive plan, the Board of County Commissioners of Sarasota County ("Board") adopted a plan for the University Parkway Corridor. Under this

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408. *Id.* at 621-22.

409. 661 So. 2d 907 (Fla. 2d Dist. Ct. App. 1996). Acting Chief Judge Ryder and Judges Frank and Parker concurred in the per curiam decision.

410. *Id.* at 908.

411. *Id.*

412. *Id.* at 909.

413. *Id.*

414. *DSA Marine*, 661 So. 2d at 908.

415. *Id.* at 909.

416. 662 So. 2d 718 (Fla. 2d Dist. Ct. App. 1995). Acting Chief Judge Campbell wrote the opinion. Judges Blue and Whatley concurred.

plan, respondents' property was designated for "office" use despite respondents' demands that their land be designated commercial so it could be used more intensely. The circuit court's writ of certiorari ordered, *inter alia*, that the property be designated commercial, but that was reversed by the district court.<sup>417</sup>

The critical issue was whether the Board's adoption of the corridor plan was quasi-judicial or quasi-legislative. The circuit court, relying on *Board of County Commissioners v. Snyder*,<sup>418</sup> had concluded that the decision was quasi-judicial, i.e., it involved the application of a general rule or policy to specific facts.<sup>419</sup> The plan applied to only forty-eight parcels of land covering 179 acres, and it conditioned development approvals on the reservation of a waterline easement. The district court, however, pointed out that *Snyder*, unlike this case, involved a rezoning request.<sup>420</sup> Adopting the plan was a quasi-legislative action, i.e., it involved the formulation of a general rule or policy, because it involved a plan for a substantial, although finite, number or parcels of land. Moreover, conditioning development approvals on the reservation of a waterline easement did not convert this decision into a quasi-judicial one because that condition was invalid.

A quasi-legislative decision that is "fairly debatable" should not be disturbed by a reviewing court. The Board's decision here met that standard given the evidence before it. The circuit court should not have, in essence, ordered the property rezoned where there has never been a rezoning application. Such a rezoning application would not necessarily be a futile act; even though a property is designated "office" in the plan, rezoning (or a variance) for a particular parcel may be obtainable.<sup>421</sup>

*Metropolitan Dade County v. Blumenthal*.<sup>422</sup> The Third District Court of Appeal, sitting *en banc*, revisited an earlier decision by a three judge panel.<sup>423</sup> A landowner wanted his land rezoned to RU-4L (Residential Limited Apart-

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417. *Id.* at 720.

418. 627 So. 2d 469 (Fla. 1993).

419. *Karp*, 662 So. 2d at 719.

420. *Id.*

421. *Id.* at 720.

422. 21 Fla. L. Weekly D464 (3d Dist. Ct. App. Feb. 21, 1996), *review dismissed*, No. 88,405, 1996 LEXIS 1580 (Fla. Aug. 29, 1996). Chief Judge Schwartz and Judges Barkdull, Nesbitt, Cope, Levy, and Gersten concurred in this per curiam opinion. Judge Hubbard wrote a lengthy dissent.

423. *Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 1st Dist. Ct. App. 1995). See Ronald B. Brown et al., *Property Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 257, 313-14 (1995).

ment House with a maximum of twenty-three units per acre) so he could develop a 360-unit apartment complex. A neighboring federation of homeowners' associations objected, claiming that a trend had begun to limit density in the area. The only opposition testimony was from neighbors who did not want the apartment complex there. The Dade County Commission denied the rezoning application because the application was inconsistent with the trend. The circuit court granted a petition for a writ of certiorari, finding that the Commission's decision was arbitrary and not based on substantial competent evidence.<sup>424</sup>

The petition to the district court for a writ of certiorari was denied by the three judge panel which noted that the standard of review in such situations was limited to whether procedural due process was afforded and whether the circuit court applied the correct law.<sup>425</sup> There was no claim of a denial of due process. After concluding that the correct law was applied, the decision was affirmed.<sup>426</sup> Judge Cope wrote a lengthy dissent stating that the circuit court had applied incorrect law in that: 1) it should have determined whether the commission's resolution was based upon substantial competent evidence rather than whether the comments of an individual commissioner were based upon such evidence;<sup>427</sup> 2) the circuit court's inquiry should not have been whether it would have made the same choice as the commission, but whether there was sufficient evidence in the record to support the choice that the commission did make;<sup>428</sup> and 3) the circuit court should not have denigrated citizen testimony because it was fact-based and the material facts were not in dispute.<sup>429</sup> He argued that the majority was applying the wrong scope of review, i.e., the scope of review for administrative decisions, rather than the review a district court should exercise over circuit court decisions.<sup>430</sup> The district court may determine whether the law has been correctly applied to the facts in the record. Upon reconsideration by the court *en banc*, Judge Cope's dissent was adopted as the majority opinion.<sup>431</sup>

Judge Hubbard, author of the original opinion, was the dissenter this time.<sup>432</sup> He emphasized that when the circuit court sits as an appellate court,

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424. *Blumenthal*, 675 So. 2d at 600-01.

425. *Id.* at 601.

426. *Id.*

427. *Id.* at 604 (Cope, J., dissenting).

428. *Id.* at 605.

429. *Blumenthal*, 675 So. 2d at 607 (Cope, J., dissenting).

430. *Id.*

431. *Blumenthal*, 21 Fla. L. Weekly at D464.

432. *Id.* (Hubbard, J., dissenting).

review of its decisions should be more limited.<sup>433</sup> A petitioner should not be entitled to a second appeal once he has had one before the circuit court except on the issues of denial of due process, lack of jurisdiction, or commission of an error so fundamental as to render the decision a miscarriage of justice. From the standpoint of judicial economy, he has a point, but then from the standpoint of judicial economy, a second appeal to the district court makes no sense at all. In total, the logic of having the circuit court have an appellate function has always escaped this author.<sup>434</sup> The mixture of trial and appellate jurisdiction in one court seems certain to result in confusion, as this case proves.

*Lee County v. Zemel*.<sup>435</sup> In 1990, the Lee County Comprehensive Plan was amended to create a category called "Density Reduction/Groundwater Resource." To their extreme displeasure, the plaintiffs' land was included in that category. They claimed that their land did not fit the criteria for that classification. They utilized their remedies under section 163.3213 of the *Florida Statutes*<sup>436</sup> which resulted in a hearing before the Division of Administrative Hearings, but the hearing officer concluded that there was adequate data and analysis to support the decision. The Department of Community Affairs adopted the hearing officer's ruling and that decision was affirmed by the First District Court of Appeal.<sup>437</sup>

The landowners brought this action for a declaratory judgment and injunction in circuit court on the theories that the classification of their land violated their substantive due process rights, their procedural process rights, and constituted a temporary or permanent taking without compensation. The district court interpreted this as a claim that the ordinance had been unconstitutionally applied to their land because their expert testified that land was incorrectly classified.<sup>438</sup> However, the proper forum for such a challenge was the district court when it reviewed the agency's action. The circuit court was presented with the same evidence that the hearing officer and the district court had already reviewed. Having lost there, the landowner is not entitled to relitigate the issue. The only proper claim before the circuit court was that the classification had somehow worked a taking entitling this landowner to

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433. *Id.*

434. Professor Brown.

435. 675 So. 2d 1378 (Fla. 2d Dist. Ct. App. 1996). Judge Quince wrote the opinion. Acting Chief Judge Parker and Judge Whately concurred.

436. FLA. STAT. § 163.3213 (1989).

437. *Zemel v. Department of Community Affairs*, 642 So. 2d 1367 (Fla. 1st Dist. Ct. App. 1994).

438. *Zemel*, 675 So. 2d at 1380.

compensation, and the case was remanded to the circuit court to consider that issue.<sup>439</sup>

*Martin County v. Section 28 Partnership, Ltd.*<sup>440</sup> The landowner wanted to develop its land as a mixed use golf course community, but that would first require a zoning change. However, a zoning change was impossible without first obtaining an amendment to the County's comprehensive land use plan so that the adjoining county could provide utility services. Following a series of hearings, the County refused to take the steps necessary to amend the plan. Therefore, the landowner sued.<sup>441</sup>

The developer claimed that the County's action was a violation of its substantive due process rights. The trial court decided that the County's action involved the application of an existing policy, i.e., that it was a quasi-judicial decision.<sup>442</sup> The court applied the strict scrutiny standard of review and concluded that the County's action was arbitrary and capricious.<sup>443</sup> It enjoined the County for enforcing the development restrictions, ordered the County to approve the application for the zoning change, and awarded damages to the landowner.<sup>444</sup> The district court reversed, reasoning that a decision not to amend a comprehensive plan based upon the large size of the proposed amendment, the pristine state of the land, and the possible impact of the proposed development on the public because of the proximity to a state park and a state preserve was quasi-legislative.<sup>445</sup> Since the correct standard of review of a quasi-legislative decision is the fairly debatable test,<sup>446</sup> the circuit court erred. The case was remanded so the trial court could apply the correct test.<sup>447</sup> The trial court's award of damages and injunctive relief were accordingly vacated, but the court stated that the opinion should not be read to

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439. *Id.* at 1381-82.

440. 676 So. 2d 532 (Fla. 4th Dist. Ct. App. 1996). Judge Stevenson wrote the opinion in which Chief Judge Gunther and Judge Dell concurred. This opinion replaced the original opinion at 668 So. 2d 672 (Fla. 4th Dist. Ct. App. 1996) which was withdrawn after the district court granted a motion for rehearing.

441. *Section 28 Partnership*, 676 So. 2d at 535.

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.* at 536.

446. *Section 28 Partnership*, 676 So. 2d at 535. The district court relied upon its earlier decision in *Section 28 Partnership, Ltd. v. Martin*, 642 So. 2d 609 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 654 So. 2d 920 (Fla. 1995), which the court refers to as "*Section 28 Partnership I*," but pointed out that it was issued after the trial court decision in the case being discussed. *Section 28 Partnership*, 676 So. 2d at 536.

447. *Id.* at 535-36.

suggest that the trial court could not reach the same conclusion when it applies the correct test.<sup>448</sup>

*Martin County v. Yusem.*<sup>449</sup> A landowner's fifty-four acres were part of a 900-acre tract. Under the Martin County Comprehensive Land Use Plan, the landowner was allowed up to two units per acre. However, under the future land use map, the landowner was allowed only one unit per two acres, i.e., one quarter the density allowed by the plan. The landowner filed an application for an amendment to the map raising the use to match that allowed by the plan, but the application was denied. The landowner sought relief by common law certiorari, but the County moved to dismiss claiming that certiorari was the wrong method of obtaining relief; it is the method for reviewing a quasi-judicial decision and this decision was legislative. The landowner voluntarily dismissed that petition. Then, the landowner filed this action seeking declaratory and injunctive relief. Applying the strict judicial scrutiny standard of review, the circuit court held in favor of the landowner, and the County appealed, arguing that the court had applied the wrong standard of review, i.e., it should have used the fairly debatable standard because the decision was legislative, not quasi-judicial.<sup>450</sup>

The district court clearly framed the issue to be "whether Martin County was making a legislative or quasi-judicial decision when it denied the appellee/landowner's request to amend the county's future use map to allow more residential units on his property."<sup>451</sup> It decided the decision was quasi-judicial.<sup>452</sup> Because it was quasi-judicial, the only way to get judicial review was by common law certiorari.<sup>453</sup> Consequently, the circuit court did not have jurisdiction and this action should be dismissed.<sup>454</sup> The landowner should have stuck to his guns in his original certiorari action. To avoid injustice, the court noted that the judgment would be without prejudice to the landowner, once again beginning his quest for an amendment to the map.<sup>455</sup>

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448. *Id.* at 537. This is the point on which the new opinion differs from the earlier one which has been withdrawn. The earlier opinion concluded that the zoning did not violate substantive due process requirements.

449. 664 So. 2d 976 (Fla. 4th Dist. Ct. App. 1995), *review granted*, 678 So. 2d 339 (Fla. 1996). Judge Kelin wrote the opinion in which Judge Glickstein concurred. Judge Pariente dissented in a written opinion.

450. *Id.* at 977.

451. *Id.* at 976.

452. *Id.*

453. *Id.* at 978.

454. *Yusem*, 664 So. 2d at 978.

455. *Id.*

The court reached its conclusion by following the logic in *Snyder*.<sup>456</sup> Amending the map to increase the density on this landowner's land was a determination of the appropriate land use designation for a particular piece of property that "will have a limited impact on the public."<sup>457</sup> Thus, this was not a decision on what should be the policy but how to apply existing policy. Such a decision is quasi-judicial.

Judge Pariente provided an extensive and well-reasoned dissent. Briefly, she argued that amendments to a land use plan should, due to logic and statutory mandate, receive the same careful consideration process as the adoption of the plan received.<sup>458</sup> Once that process has been followed, the decision to amend or not should get the same judicial deference as the legislative decision to adopt the plan. That amending the plan may be legislative in some cases and quasi-judicial in others creates confusion about what procedure must be followed by a board in making the decision, what method must be followed by a disgruntled applicant in seeking judicial review of the decision, and what standard must be applied by the reviewing court. That confusion has already wasted, and will continue to waste, the time and resources of the courts and the parties. Judge Pariente is correct in arguing that this uncertainty should be eliminated.

### XVIII. LANDLORD AND TENANT

*City of St. Petersburg v. Bowen*.<sup>459</sup> The City's Nuisance Abatement Board ordered an apartment house closed for a period of one year based upon a finding that there was drug use by tenants and other persons at the property.<sup>460</sup> The landlord was not accused of any wrongdoing. The landlord did not contest the validity of the order, but brought this action seeking compensation based upon the theory of inverse condemnation, i.e., that his property had been taken for public use. The trial court first granted summary judgment for the City, ruling that because the taking was temporary no recovery was allowed.<sup>461</sup>

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456. Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

457. *Yusem*, 664 So. 2d at 977.

458. *Id.* at 979 (Pariente, J., dissenting).

459. 675 So. 2d 626 (Fla. 2d Dist. Ct. App. 1996). Acting Chief Judge Campbell wrote the opinion in which Judges Frank and Blue concurred.

460. The order was based upon the authority of section 893.138 of the *Florida Statutes* and sections 19-66 through 19-71 of the St. Petersburg, Florida, City Code. See FLA. STAT. § 893.138 (1991); ST. PETERSBURG, FLA., CITY CODE §§ 19-66 to -71 (1989). There was no claim that the order was invalid.

461. *Bowen*, 675 So. 2d at 628.

Based on a Supreme Court of Florida decision rendered after the trial court's decision,<sup>462</sup> the district court reversed.<sup>463</sup> The trial court then granted summary judgment to the landlord.<sup>464</sup> The district court affirmed.<sup>465</sup>

The court adopted the trial opinion of Circuit Judge Horace A. Andrews which it found to be "complete, concise, scholarly and well-grounded."<sup>466</sup> A regulation that denies all economically beneficial or productive use of the land is compensable without inquiry into the public interest advanced in support of the regulation. Ordering the apartment house closed for one year did deny all economically beneficial or productive use. The taking claim could not be avoided by invoking the nuisance exception. The state may legitimately prohibit conduct that would be a common law nuisance, e.g., the illegal use or sale of drugs, but this order prohibits conduct which is clearly not a nuisance, e.g., the use of the premises for human habitation. In essence, the city was trying to force this landowner to disproportionately bear a common expense, the cost of its war on drugs. That is what the Takings Clause prohibits.

*Coastal Fuels Marketing, Inc. v. Leasco Investments.*<sup>467</sup> In June 1977, the tenant leased real property for an oil terminal. Under the terms of the twenty-year lease, referred to as a "terminalling agreement," the fee for the first three years would be \$54,400 per month. After that, the base fee would be \$30,000 per month, but that fee would be adjusted in the fifth, tenth, and fifteenth years of the lease according to a formula based on the Consumer Price Index ("CPI"). The formula was:

[T]he monthly payment shall be adjusted upward or downward using the percentage change in the Consumer Price Index for urban Wage Earners and Clerical Workers (CPI-W)—U.S. City Average and Selected Areas (Base Period 1967=100) for the previous five (5) year period (for September 7, 1982 [the first adjustment], the monthly payment shall be calculated by multiplying \$30,000 times the resultant of dividing the CPI-W for June 1982 by the Consumer Price Index for June 1977).<sup>468</sup>

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462. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

463. *Bowen v. City of St. Petersburg*, 642 So. 2d 837 (Fla. 2d Dist. Ct. App. 1994).

464. *Bowen*, 675 So. 2d at 628.

465. *Id.* at 632.

466. *Id.* at 629.

467. 662 So. 2d 375 (Fla. 5th Dist. Ct. App. 1995). Judge Thompson wrote the opinion in which Chief Judge Peterson and Judge Harris concurred.

468. *Id.* at 376.

The dispute arose at the time of the second adjustment. The landlord claimed that the denominator in the above fraction should be the CPI for June, 1977. The tenant claimed that the denominator should be the CPI for June, 1982. The trial court was convinced by the landlord's arguments and reformed the contract accordingly, but the district court reversed.<sup>469</sup> It held that reformation could not be granted where the terms of the contract were clear and unambiguous.<sup>470</sup> The contract here anticipated that the rent would be adjusted every five years according to the changes in the CPI during that five-year period, so the fraction should reflect that change. The adjustment in 1982 should have been based on the CPI for 1977, the adjustment for 1987 on the CPI for 1982, and the adjustment for 1992 on the CPI for 1987.<sup>471</sup>

*Inglesia Bautista de "Renovacion Cristiana" v. Tamiami Baptist Church of Miami, Inc.*<sup>472</sup> Plaintiff's suit for damages on the theory of wrongful eviction included a claim for special damages. The circuit court granted summary judgment to the landlord, ruling that special damages were non-recoverable as a matter of law.<sup>473</sup> The district court reversed, holding that if the premature eviction necessitated the rental of a substitute church site, that expense could be recovered as special damages.<sup>474</sup>

*Marquez-Gonzalez v. Perera.*<sup>475</sup> The commercial lease at issue in this case provided that the tenant would take the premises "as is" and refurbish it. After taking possession, the tenant learned that part of the structure was illegal because it had been built without the necessary permits. When the landlord did nothing to fix that problem, the tenant sued for rescission. The trial court held for the landlord because the tenant had taken the premises "as is," but the district court reversed.<sup>476</sup> The landlord had not disclosed that the permits were lacking. There was no way that the tenant could have discovered it from an inspection of the premises. There was nothing from which the tenant would get inquiry notice, i.e., there was nothing to make a reasonably prudent person

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469. *Id.* at 377.

470. *Id.*

471. *Id.*

472. 678 So. 2d 1 (Fla. 3d Dist. Ct. App. 1996). Judges Jorgenson, Goderich, and Green constituted the panel that issued this per curiam opinion.

473. *Id.* at 2. The circuit court also ruled in the alternative that the tenant had waived its special damages claim, but the district court reversed on this point because the record lacked any evidence of waiver. *Id.*

474. *Id.*

475. 673 So. 2d 502 (Fla. 3d Dist. Ct. App. 1996). Judges Jorgenson, Cope, and Gersten concurred in this per curiam opinion.

476. *Id.* at 503.

suspicious that there was a permit problem. The permit problem was "a matter which the landlord was obliged to correct, not the tenant."<sup>477</sup> Under these circumstances, rescission should have been granted.<sup>478</sup>

*Sontag v. Department of Banking and Finance.*<sup>479</sup> Landlords prevailed in an eviction action and were also awarded very substantial compensatory and punitive damages. A Florida statute provided that the state is entitled to sixty percent of any punitive damage award.<sup>480</sup> Subsequently, the landlords and tenant reached a settlement agreement which was structured without any punitive damages. By cutting out the State, both the landlords and tenant would come out ahead. The State did not give up this windfall so easily. It sued and received a summary judgment in its favor.<sup>481</sup> The district court affirmed.<sup>482</sup> Judge Baskin disagreed about the reading of the statute, concluding that since no punitive damages were paid, the State was not entitled to any payment.<sup>483</sup> The statute was amended in 1992<sup>484</sup> to require that the parties provide for the state's share in any settlement agreement, but that amendment was too late to apply to this case. The case is included primarily to remind parties seeking punitive damages, and their defendants, that the state has an interest and a claim on the outcome.

*Statutory Changes.* The Florida landlord-tenant statutes were amended during the survey period.<sup>485</sup> Now, a real estate broker planning to disburse a tenant's security deposit is not required to follow the notice requirements in chapter 475,<sup>486</sup> which regulates real estate brokers. He or she need only follow the notice requirements in chapter 83<sup>487</sup> which governs landlords and tenants. The statute has been clarified to specify that the landlord's agent may remove the personal property of the tenant after the writ of possession has been served by the sheriff.<sup>488</sup> Previously, the statute had only specified that the landlord could remove the tenant's personal property at the time when the writ of possession was served. Finally, the lease may now contain a provision that the

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477. *Id.*

478. *Id.*

479. 669 So. 2d 283 (Fla. 3d Dist. Ct. App. 1996). Judges Levy and Goderich concurred in the per curiam opinion. Judge Baskin dissented.

480. FLA. STAT. § 768.73(2) (1991).

481. *Sontag*, 669 So. 2d at 284.

482. *Id.*

483. *Id.* (Baskin, J., dissenting).

484. FLA. STAT. § 768.73(4) (Supp. 1992).

485. 1996 Fla. Laws ch. 96-146.

486. *See* FLA. STAT. § 475.25(1)(d) (1995).

487. Ch. 96-146, § 1, 1996 Fla. Laws at 131 (amending FLA. STAT. § 83.49).

488. *Id.* § 2, 1996 Fla. Laws at 131 (amending FLA. STAT. § 83.62(2)).

landlord is not responsible for storing, or liable for disposing of, the tenant's personal property where the tenant has surrendered or abandoned the premises.<sup>489</sup> Previously, such an agreement was permissible, but only if it appeared in an agreement separate from the lease.

In addition, a change in the nuisance abatement statute is worth noting. As of October 1, 1996,

[i]n a proceeding abating a public nuisance pursuant to s. 823.10<sup>[490]</sup> or s. 823.05,<sup>[491]</sup> if a tenant has been convicted of an offense under chapter 893<sup>[492]</sup> or s. 796.07,<sup>[493]</sup> the court may order the tenant to vacate the property within 72 hours if the tenant and owner of the premises are parties to the nuisance abatement action and the order will lead to the abatement of the nuisance.<sup>494</sup>

Dealing with drugs and prostitution is a landlord's nightmare, but it is a very hot topic between landlords and decent tenants. This act provides a landlord an additional tool to deal with these troublesome tenants. The eviction process may be too cumbersome, particularly if it requires relitigation of issues already decided in a nuisance abatement action. Perhaps it will provide a better alternative if it is interpreted to allow a court to order an offending tenant off the premises while leaving the innocent family members in place. Whether that will be possible under the cryptic words of this statute will have to be determined in the future.

## XIX. LIENS

*BancFlorida v. Hayward*.<sup>495</sup> In this case, the Third District Court of Appeal affirmed a final summary judgment for the contract purchasers of new homes<sup>496</sup> and certified the following question as being of great public importance:

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489. *Id.* § 3, 1996 Fla. Laws at 131–32 (amending FLA. STAT. § 83.67(3)).

490. "Place where controlled substances are illegally kept, sold, or used."

491. "Places declared a nuisance."

492. "Drug abuse prevention and control."

493. "Prohibiting prostitution."

494. 1996 Fla. Laws ch. 96-237 (amending FLA. STAT. § 60.05).

495. 659 So. 2d 1329 (Fla. 3d Dist. Ct. App. 1995). This per curiam opinion, upon granting a motion for rehearing, revised and substituted the original panel opinion published at 20 Fla. L. Weekly D761 (4th Dist. Ct. App. Mar. 29, 1995).

496. *BancFlorida*, 659 So. 2d at 1333.

Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, does the contract purchaser's prior equitable lien against the purchase money mortgagor have priority over the lender's subsequent purchase money mortgage?<sup>497</sup>

In this case the developer, Shores Contractors, Inc., held an interest in undeveloped lots, being an equitable owner under an option contract with American Newlands in some lots and having bought others as inventory for future development. BancFlorida extended Shores a line of credit for use in construction loans. When developed, lots were sold to individual purchasers under purchase and sale agreements, which contained express terms prohibiting recordation. Once in their respective contracts, the purchasers would obtain a mortgage commitment for the home to be built by Shores. Under the contract, the purchasers paid deposits to Shores. On the lots owned by Shores and secured by a mortgage from BancFlorida, each contract purchaser subsequently entered into a separate construction loan agreement with BancFlorida under which the purchasers were required to make four progress payments during construction, a portion being used to pay off BancFlorida's mortgage. On the lots held under the option contract, monies from the construction loan were used to pay the balance owed to American Newlands.<sup>498</sup>

"At some point the developments at issue failed."<sup>499</sup> Shores and others assigned fault for the failure to alleged breach of the construction loan agreements committed by BancFlorida and filed suit. The contract purchasers intervened as plaintiffs. The parties agreed to sell the properties and create a fund from which damages could be paid, necessitating foreclosure on the lots to extinguish all liens. Final summary judgment of foreclosure was stipulated to by the parties, with the stipulation that "all liens or claims by each party were directed solely to the entire fund and not solely to the specific sales price of an individual lot."<sup>500</sup> The contract purchasers then proceeded against BancFlorida with motion for final summary judgment, asserting superior equitable liens on their respective lots over BancFlorida's construction loans. The trial court entered final summary judgment and BancFlorida appealed.<sup>501</sup>

The trial court, noting that the question of who was a purchase money mortgagee was a question of law, held that BancFlorida could not be a pur-

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497. *Id.*

498. *Id.* at 1330.

499. *Id.*

500. *Id.* at 1331.

501. *BancFlorida*, 659 So. 2d at 1331.

chase money mortgagee in this situation.<sup>502</sup> It found that, before it loaned any money to Shores for construction, BancFlorida had actual notice of the purchase and sale agreements and the deposits paid thereon.<sup>503</sup> Such agreements and deposits were prerequisites without which BancFlorida would not make the construction loans.

The Third District Court of Appeal affirmed the orders of the trial court, which it stated "was solely concerned with the equities of the case and, for the trial court, the equities favored the contract purchasers as members of the general public less knowledgeable in these matters over the sophisticated bank and the sophisticated builder."<sup>504</sup> These facts "set[] up a clash between two competing theories of real property law. BancFlorida is a purchase money mortgagee but it is also a subsequent creditor with notice of the contract purchasers' equitable claims against the property."<sup>505</sup>

According to the court,<sup>506</sup> the "tension" between these theories is epitomized by *Carteret Savings Bank v. Citibank Mortgage Corp.*<sup>507</sup> and *Caribank v. Frankel*,<sup>508</sup> which the court went on to compare. In *Caribank*, the Fourth District Court of Appeal held that actual knowledge of a prior unrecorded conveyance or mortgage is the equivalent to the recording of the instrument.<sup>509</sup> In *Carteret*, the parties agreed that the purchase money mortgage held by Carteret had priority, but disagreed over the portion of the construction loan constituted the purchase money mortgage.<sup>510</sup> The Supreme Court of Florida affirmed the district court's holding that "only the portion of the proceeds used to acquire the land constituted a purchase money mortgage. The balance of the loan proceeds were not protected by the purchase money mortgage."<sup>511</sup>

BancFlorida relied on *Carteret* for the proposition that it was a purchase money mortgagee and thus "automatically has priority under *Carteret* over the contract purchasers."<sup>512</sup> The court first assigned error to the trial court, agreeing that BancFlorida was a purchase money mortgagee, at least on those

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502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

506. See *BancFlorida*, 659 So. 2d at 1331.

507. 632 So. 2d 599 (Fla. 1994).

508. 525 So. 2d 942 (Fla. 4th Dist. Ct. App. 1988).

509. *BancFlorida*, 659 So. 2d at 1332 (citing *Caribank*, 525 So. 2d at 944).

510. *Id.* (citing *Carteret*, 632 So. 2d at 599).

511. *Id.*

512. *Id.* (relying on *Carteret*, 632 So. 2d at 599).

lands which Shores held under the option with American Newlands.<sup>513</sup> The court determined that whether BancFlorida was a purchase money mortgagee was not dispositive, and it distinguished *Carteret* as involving no dispute over the priority of the liens.<sup>514</sup> The court reasoned that, since "Florida has adopted a notice provision as the benchmark for assessing the priority of liens on real property,"<sup>515</sup> "purchase money mortgage priorities may be subject to the equities of the particular transaction."<sup>516</sup> The court adopted the reasoning of *Caribank* and held that because BancFlorida had actual notice of the contract purchasers' prior equitable liens against Shores, those equitable liens were superior in interest to BancFlorida's purchase money mortgages.<sup>517</sup> The court affirmed the orders of final summary judgment in favor of the contract purchasers.<sup>518</sup>

*Beckham v. Rinker Materials Corp.*<sup>519</sup> The Third District Court of Appeal reversed a summary judgment in favor of defendant Rinker in an action brought by trustees in a two count action to quiet title and recover damages for slander of title.<sup>520</sup> In 1985, land was conveyed to Michael Edelman and Aaron Podhurst as trustees. Under the unrecorded trust agreement, the property was held in trust for several beneficiaries, with Edelman holding a twenty percent interest, which he assigned to the remaining beneficiaries after resigning. The deed neither named the beneficiaries of the trust nor declared the nature and purpose of the trust. The resignation and assignment were not recorded. In 1992, Rinker obtained two judgments against Edelman, unrelated to the property, and had the judgments recorded as liens on the property. When Beckham, another trustee, and Podhurst attempted to sell the property, they discovered the judgment liens in a title search and brought the action.<sup>521</sup>

Rinker asserted that the plaintiffs were not entitled to relief because Edelman owned a fee simple estate under section 689.07(1) of the *Florida Statutes*.<sup>522</sup> The court agreed that the statute was implicated because Edelman

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513. *Id.*

514. *BancFlorida*, 659 So. 2d at 1332.

515. *Id.* The court went on to quote from section 695.01 of the *Florida Statutes* (1989).

516. *Id.* at 1333 (citing *Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 129 So. 892 (Fla. 1930)).

517. *Id.* at 1333 (relying on *Caribank v. Frankel*, 525 So. 2d 942 (Fla. 4th Dist. Ct. App. 1988)).

518. *Id.*

519. 662 So. 2d 760 (Fla. 3d Dist. Ct. App. 1995).

520. *Id.* at 762.

521. *Id.* at 761.

522. *Id.*

took title “as trustee” through a deed that neither names the beneficiaries nor set forth the nature and purpose of the trust, and because the declaration of trust was not recorded.<sup>523</sup> However, it disagreed with Rinker’s assertion that Edelman’s trustee capacity was immaterial.<sup>524</sup> The court relied on *First National Bank of Arcadia v. Savarese*,<sup>525</sup> from which it quoted the following passage:

[I]t is also generally recognized that a judgment creditor cannot have his debt satisfied out of property held by his judgment debtor under a resulting trust for another, no matter how completely his debtor has exercised apparent ownership over it, unless it is made to appear that it was on the faith of such ownership that the credit was given which resulted in the judgment sought to be satisfied.<sup>526</sup>

The contemplated exception did not apply in the present case because Rinker extended the credit to Edelman on the basis of his personal guarantee, not relying on the record title, having no specific knowledge of the property at issue.<sup>527</sup> Thus, the beneficiaries were not equitably estopped from asserting their interests in the property against Rinker, and the judgment liens did not attach to the property.<sup>528</sup> Accordingly, the summary judgment in favor of Rinker was reversed, and the case was remanded.<sup>529</sup>

*Beason-Simons v. Avion Technologies, Inc.*<sup>530</sup> The Fourth District Court of Appeal reversed the circuit court’s determination that an unpaid seller’s right to reclaim equipment was superior to a landlord’s statutory lien.<sup>531</sup> Appellee sold and installed electronic equipment on premises leased to appellee Avion by appellant landlord Beason-Simons, providing in the sales contract that title to the goods would remain in the seller until full payment was made. However, the seller did not record the purchase agreement or file a UCC financing statement. When Avion abandoned the leased premises, the landlord claimed it was entitled to the equipment on the basis of a statutory landlord’s lien under section 83.08(2) of the *Florida Statutes*, while the seller claimed the same through a right of reclamation under section 672.507(2) of

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523. *Id.*

524. *Beckham*, 662 So. 2d at 761.

525. 134 So. 501, 504 (1931).

526. *Beckham*, 662 So. 2d at 761 (quoting *Savarese*, 134 So. at 504).

527. *Id.* at 761.

528. *Id.* at 762.

529. *Id.*

530. 662 So. 2d 1317 (Fla. 4th Dist. Ct. App. 1995).

531. *Id.* at 1318.

the *Florida Statutes*.<sup>532</sup> Section 83.08(2) expressly states that the statutory landlord's lien "shall be superior to any lien acquired subsequent to the bringing of the property on the premises leased."<sup>533</sup> The court noted that a landlord's statutory lien need not be filed or recorded to be perfected; rather, it attaches at the commencement of tenancy or as soon as the property is brought onto the premises.<sup>534</sup>

The appellate court then analyzed section 672.507(2) and found that although that section gives an unpaid seller an interest superior to that of a buyer, the statute does not determine priorities between an unpaid seller and a third party such as the landlord.<sup>535</sup> The seller could have perfected its security interest in the equipment under the UCC before delivery,<sup>536</sup> and failure to do so rendered the landlord's statutory lien superior. The appellate court reversed the circuit court.<sup>537</sup>

*Gordon v. Ruvin*.<sup>538</sup> Robert Gordon appealed from an adverse summary judgment of foreclosure which found an equitable lien on real property was transferable to a bond under section 55.10(6) of the *Florida Statutes*.<sup>539</sup> The Third District Court of Appeal affirmed.<sup>540</sup> Gordon obtained a judgment foreclosing his mortgage on property owned by appellee Flamingo Holding Partnership ("Seller").<sup>541</sup> The judgment provided that should the sale produce insufficient funds to satisfy the amount due Gordon, an equitable lien of \$962,000 would be imposed upon the Seller's adjacent property. The property was purchased in 1995 by appellee First Equitable Realty III, Ltd. ("Buyer") for \$24.1 million, which intended to convert the apartment complex into condominiums. Apparently, pursuant to the contract of purchase and sale, the

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532. *Id.*

533. *Id.* (citing FLA. STAT. § 83.08(2) (1993)).

534. *Id.* (citing *Lovett v. Lee*, 193 So. 538, 542 (Fla. 1940); *Florida E. Coast Properties, Inc. v. Best Contract Furnishings, Inc.*, 593 So. 2d 560, 562 n.6 (Fla. 3d Dist. Ct. App. 1992)).

535. *Beason-Simons*, 662 So. 2d at 1318 (citing *Florida E. Coast Properties*, 593 So. 2d at 562; *Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co.*, 385 So. 2d 1151 (Fla. 4th Dist. Ct. App. 1980)). In *Suburbia*, the district court held that a construction mortgage on real property was superior in priority to the claim of a seller of air conditioning equipment which had been installed on the property, where the seller's claim was only by virtue of a retain title contract and not by a perfected security interest. 385 So. 2d at 1153-54.

536. *Beason-Simons*, 662 So. 2d at 1318-19 (citing *Florida E. Coast Properties*, 593 So. 2d at 562 n.8).

537. *Id.* at 1319.

538. 664 So. 2d 1078 (Fla. 3d Dist. Ct. App. 1995).

539. *Id.* at 1078.

540. *Id.* at 1080.

541. *Id.* at 1078.

Seller was required to post a bond allowing the Buyer to take title unencumbered by Gordon's equitable lien. After the Seller obtained the bond for two million dollars, appellee Harvey Ruvin, Clerk of the Circuit Court for the Eleventh Judicial Circuit ("clerk"), issued a clerk's certificate transferring Gordon's lien to the bond, after which the sale was closed with title passing to the Buyer in February of 1995.<sup>542</sup>

Gordon sued the Buyer, the Seller, and the clerk. The Third District Court of Appeal disagreed with Gordon's assertion that an equitable lien is a constitutionally protected right which cannot be extinguished by substituting security without the lienholder's consent.<sup>543</sup> The court noted that the "transfer to bond" provision of section 55.10(6) was added in 1977 and amended in 1987 to provide that any lien claimed under subsection (1) of that section may be transferred from the real property to security.<sup>544</sup> The amendment, according to the court, furthers an important public policy in favor of free alienability of property.<sup>545</sup> The statute, by specifically stating that the bond must be executed by a surety licensed by the Florida Insurance Department to do business in Florida, protects the valid substantive property rights of the lienholder while also furthering the legislature's intent of providing for free transferability of real estate.<sup>546</sup> The court distinguished the present case from *White v. White*,<sup>547</sup> a case relied upon by Gordon, because of the change in statutory law in the sixteen years since that decision, and because *White*, unlike the present case, involved a transfer to government securities rather than a corporate surety bond as required by the present statute.<sup>548</sup>

*Hanley v. Kajak*.<sup>549</sup> The Fourth District Court of Appeal reversed the circuit court's finding of a valid mechanic's lien in favor of the subcontractor, Kajak, and the corresponding award of statutory attorneys' fees under section 713.29 of the *Florida Statutes*.<sup>550</sup> The circuit court had concluded that Hanley's commencement of an action pursuant to section 713.21(4) of the *Florida Statutes* resulted in a waiver of the section 713.06(3)(d)(1) requirement that Kajak file a contractor's final affidavit.<sup>551</sup> The Fourth District Court

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542. *Id.* at 1079.

543. *Gordon*, 664 So. 2d at 1079.

544. *Id.*

545. *Id.*

546. *Id.*

547. 129 So. 2d 148 (Fla. 1st Dist. Ct. App. 1961).

548. *Gordon*, 664 So. 2d at 1079.

549. 661 So. 2d 1248 (Fla. 4th Dist. Ct. App. 1995).

550. *Id.* at 1249.

551. *Id.* at 1248.

of Appeal disagreed, holding that the affidavit requirement is a condition precedent to the maintenance of a lien foreclosure action under chapter 713, and the fact that the foreclosure was filed as a counterclaim did not alter that requirement.<sup>552</sup> The court felt that Kajak had not shown good cause or a justifiable excuse for failure to comply with the statutory requirements and held the lien invalid.<sup>553</sup>

*Holly Lake Ass'n v. Federal National Mortgage Ass'n.*<sup>554</sup> The Supreme Court of Florida, reviewing *Federal National Mortgage Ass'n v. McKesson*,<sup>555</sup> asserted jurisdiction under Article V, section 3(b)(4) of the *Florida Constitution* and answered the following certified question in the negative, approving the decision of the Fourth District Court of Appeal:

WHETHER A CLAIM OF LIEN RECORDED PURSUANT TO A DECLARATION OF COVENANTS BY A HOMEOWNERS' ASSOCIATION HAS PRIORITY OVER AN INTERVENING RECORDED MORTGAGE WHERE THE DECLARATION AUTHORIZES THE ASSOCIATION TO IMPOSE A LIEN FOR ASSESSMENTS BUT DOES NOT OTHERWISE INDICATE THAT THE LIEN RELATES BACK OR TAKES PRIORITY OVER AN INTERVENING MORTGAGE.<sup>556</sup>

Holly Lakes is the homeowners' association ("Association") for a mobile home park. The Association's predecessor recorded a declaration of covenants covering the real property within the park in 1974, requiring residents to pay monthly assessments for maintenance of their sites, and including the following provision:

In the event the monthly mobile type home site charge is not paid when due, Owner, or its designee, shall have the right to a lien against said site and the improvements contained thereon for any such unpaid charges; and shall have the right to enforce said lien in any manner provided by law for the enforcement of mechanics' or

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552. *Id.*

553. *Id.* at 1249. See *Timbercraft Enters., Inc. v. Adams*, 563 So. 2d 1090 (Fla. 4th Dist. Ct. App. 1990). See also *Holding Elec., Inc. v. Roberts*, 530 So. 2d 301 (Fla. 1988)).

554. 660 So. 2d 266 (Fla. 1995).

555. 639 So. 2d 78 (Fla. 4th Dist. Ct. App. 1994), *review granted*, 650 So. 2d 990 (Fla. 1995).

556. *Holly Lake Ass'n*, 660 So. 2d at 267.

statutory liens, but Owner shall not be restricted to such procedure in the collection of said overdue charges.<sup>557</sup>

John and Denise McKesson became the owners of a Holly Lakes site and executed a mortgage thereon, recorded in 1983, which was assigned to Federal National Mortgage Association ("FNMA"), the respondent.

In 1991, the Association recorded a claim of lien against the McKessons' site for failure to pay the monthly maintenance fee. Then in 1992, FNMA commenced a foreclosure action against the McKessons for failure to pay the promissory note secured by the mortgage, and the Association filed a counterclaim against FNMA, asserting superiority of lien because its lien related back to the 1974 declaration of covenants. FNMA answered that its mortgage lien, having been recorded eight years before that of the Association, was superior, but the trial court found for the Association and granted summary judgment in its favor.<sup>558</sup> The Fourth District Court of Appeal subsequently reversed, reasoning that the 1974 declaration, rather than creating an ongoing automatic lien, merely created a right to a lien and that because FNMA's mortgage lien was recorded before the Association's maintenance fee lien, FNMA's lien had priority.<sup>559</sup>

The Association relied on *Bessemer v. Gersten*<sup>560</sup> for the proposition that its lien related back to the date the declaration was recorded. The court found *Bessemer* inapplicable.<sup>561</sup> Unlike the present dispute between two creditors, *Bessemer* involved a dispute over a creditor's lien and the property owner's homestead right.<sup>562</sup> Also, the language of the present declaration differed significantly from that in *Bessemer*, which "put all parties on notice that an ongoing, automatic lien had been created at the time that the property was purchased, and that this lien would continue each month until the owner paid the monthly assessment fee."<sup>563</sup> The court concluded that the present declaration failed to put FNMA on such notice and that FNMA could not be charged with constructive notice because the Association had not yet filed its lien when FNMA's mortgage was recorded in 1983.<sup>564</sup> After commenting on the similar

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557. *Id.*

558. *Id.* at 268.

559. *Id.*

560. 381 So. 2d 1344 (Fla. 1980).

561. *Holly Lake Ass'n*, 660 So. 2d at 268.

562. *Id.*

563. *Id.*

564. *Id.*

factual situation and holding in the Illinois case of *St. Paul Federal Bank for Savings v. Wesby*,<sup>565</sup> the court also declared a general rule that:

in order for a claim of lien recorded pursuant to a declaration of covenants to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the lien relates back to the date of filing of the declaration or that it otherwise takes priority over intervening mortgages.<sup>566</sup>

*Lamchick, Glucksman & Johnson, P.A. v. City National Bank of Florida*.<sup>567</sup> Appeal was taken from an adverse final summary judgment awarding diligent creditors a priority lien over the appellants' prior recorded lien. The Third District Court of Appeal, per curiam, reversed, ruling that unlike personal property, the diligent creditor rule does not apply to liens on real property.<sup>568</sup> The court found that section 695.11 of the *Florida Statutes* governs judgment liens on real property, as in this case, and further noted that "because of the different concerns involved in the context of real property," the diligent creditor rule did not apply.<sup>569</sup>

Appellants obtained a judgment and filed it in the official records of Dade County on June 28, 1988, creating a lien on the property. Pursuant to section 695.11, appellants' lien, recorded before appellee's, had priority. The court noted further that appellants' "lien had neither expired nor been satisfied, and there is no evidence in the record, and no allegation in the pleadings, that the judgment lien was void or voidable."<sup>570</sup> Thus, relying on *Sharpe v. Calabrese*,<sup>571</sup> the court held that appellant's lien "must be accorded its legal effect."<sup>572</sup>

*Pappalardo v. Buck*.<sup>573</sup> Pappalardo, the principal on a preexisting lien transfer bond, was ordered by the trial court to increase the face amount of that bond to add coverage for attorneys' fees and costs incurred by the claimant in

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565. 501 N.E.2d 707 (Ill. App. Ct. 1986).

566. *Holly Lake Ass'n*, 660 So. 2d at 269.

567. 659 So. 2d 1118 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 937 (Fla. 1996).

568. *Id.* at 1119.

569. *Id.* at 1120.

570. *Id.* at 1119.

571. 528 So. 2d 947, 950 (Fla. 5th Dist. Ct. App. 1988).

572. *Lamchick*, 659 So. 2d at 1119.

573. 659 So. 2d 422 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 251 (Fla. 1996).

excess of the original face amount.<sup>574</sup> The Fourth District Court of Appeal quashed this decision, holding that Pappalardo was not personally liable because he was not made a party to the action.<sup>575</sup>

This case had already worked its way through the court system as *Aetna Casualty and Surety Co. v. Buck*,<sup>576</sup> in which the Supreme Court of Florida determined that a surety's liability for attorneys' fees could not be imposed above the face amount of the bond.<sup>577</sup> Having thus been denied access to Aetna's pocket by the supreme court, Buck apparently regrouped and directed its efforts at Pappalardo personally. Buck had initially sued only Aetna and Pappalardo's construction company and moved to add Pappalardo individually after final judgment. That motion was denied by the trial court, and Buck did not appeal the order.<sup>578</sup> The court intimated that merely obtaining a transfer bond is insufficient to find that the party has submitted to the court's jurisdiction so as to expose him to liability in excess of the bond's face.<sup>579</sup>

*Robie v. Port Douglas (Florida), Inc.*<sup>580</sup> Upon default by the tenant, Inverrary Cinema Corporation, the landlord, Port Douglas and chattel mortgagees, Kenneth L. and Barbara G. Robie, asserted liens to claim possession of equipment in the theater. The Fourth District Court of Appeal reversed the trial court's determination of superiority of the landlord's statutory lien because the landlord and tenant terminated the original lease prior to the tenant's default and entered into a new lease.<sup>581</sup>

The tenant took possession of the theater pursuant to an assignment of lease from R & R Cinemas, Inc., a company owned by the Robies. The Robies filed a Form UCC-1 to secure the furnishings located in the theater. After

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574. *Id.* at 423.

575. *Id.* at 424. The court cited *Canam Sys., Inc. v. Lake Buchanan Dev. Corp.*, 375 So. 2d 582, 583 (Fla. 5th Dist. Ct. App. 1979), *cert. denied*, 386 So. 2d 634 (Fla. 1980) and *Vic Tanny of Fla., Inc. v. Fred McGilvray, Inc.*, 348 So. 2d 648, 651 (Fla. 3d Dist. Ct. App. 1977) for the following proposition: "The principal on a bond to which there has been a transfer from lien must be made a party to be held personally liable." *Pappalardo*, 659 So. 2d at 423.

576. 594 So. 2d 280 (Fla. 1992).

577. *Id.* at 283. The Fourth District Court quoted the supreme court's opinion, which explained the powers and limits thereto conferred upon a trial court by section 713.24(3) of the *Florida Statutes*, which "allows a trial court to order the party providing the bond to either purchase an additional bond or increase the existing bond, or to otherwise provide increase security, [but] the statute does not permit the trial court to increase the liability of the surety beyond the amount of the bond." *Pappalardo*, 659 So. 2d at 423.

578. *Pappalardo*, 659 So. 2d at 423.

579. *Id.*

580. 662 So. 2d 1389 (Fla. 4th Dist. Ct. App. 1995).

581. *Id.* at 1391.

perfection of the Robies' interest, Inverrary and Port Douglas entered into a lease termination agreement and, thereafter, executed a new lease while the tenant was still current under the old lease.<sup>582</sup>

The court noted that under section 83.08 of the *Florida Statutes*, a landlord's statutory lien, which is not required to be filed or recorded in order to be perfected, attaches at the commencement of the tenancy or as soon as the property is brought onto the premises.<sup>583</sup> However, "[w]hen the commencement of a tenancy, based upon a lease, creates a statutory landlord's lien, pursuant to section 83.08, Florida Statutes, such lien is viable only as long as the underlying lease exists."<sup>584</sup> Although the chattel mortgage did not have priority over the original lease, that mortgage gained priority when the original lease was terminated and retained such priority over the subsequent lease.<sup>585</sup>

That the second lease was neither an option nor a renewal of the first lease was critical to a determination of priority of the Robies' lien.<sup>586</sup> In the appellate court's opinion, the trial court relied too heavily on the fact that the new lease was between the same parties and involved the same premises as the old lease, and neglected the "operative inquiry" of "whether landlord and tenant continued their relationship under the initial lease either through an extension, a renewal or an option."<sup>587</sup>

*Shawzin v. Sasser*.<sup>588</sup> Sasser represented Shawzin in a dissolution of marriage action, having first obtained a representation agreement which granted Sasser "all general, possessory and retaining liens and all equitable, special and attorney's charging liens upon the client's interest in any and all *real* and personal property . . . for any balance due, owing and unpaid at the conclusion of the case or the sooner termination of employment."<sup>589</sup> The trial court granted Sasser's December 1992 motion to withdraw as counsel.<sup>590</sup> Thereafter, Shawzin and his former wife entered into a settlement agreement with Shawzin retaining title to the marital home. When the trial court entered

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582. *Id.* at 1390.

583. *Id.* at 1391 (citing *Lovett v. Lee*, 193 So. 538, 542 (Fla. 1940); *Beason-Simons Technologies, Inc. v. Avion Technologies, Inc.*, 662 So. 2d 1317, 1318 (Fla. 4th Dist. Ct. App. 1995)).

584. *Id.* at 1391 (quoting *Flowers v. Centrust Sav. Bank*, 556 So. 2d 1123, 1125 (Fla. 3d Dist. Ct. App. 1989)).

585. *Robie*, 662 So. 2d at 1390.

586. *Id.* at 1391.

587. *Id.*

588. 658 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 252 (Fla. 1996).

589. *Id.* at 1149.

590. *Id.*

final judgment which incorporated the settlement agreement, Sasser moved for a charging lien, obtaining a money judgment of \$52,337.37 and a charging lien on the marital home.<sup>591</sup> Shawzin appealed. Sasser cross appealed, assigning error to the court's setting aside the proceeds of the sale of the marital home under the homestead exemption.

The Fourth District Court of Appeal upheld the award of the lien, outlining the four requirements for the imposition of such a lien, which the court found present.<sup>592</sup> The court, however, reversed the money judgment because Sasser had moved for the lien only.<sup>593</sup> Shawzin thus had insufficient notice that such a judgment might be rendered against him.<sup>594</sup>

On Sasser's appeal of the homestead set aside, the court noted that, under *Orange Brevard Plumbing & Heating Co. v. La Croix*,<sup>595</sup> only proceeds intended to be reinvested in another homestead qualify for homestead protection.<sup>596</sup> In the present case, Sasser had demonstrated that "a significant portion of the proceeds derived from the sale of the homestead [were used] for purposes other than for reinvestment in another homestead."<sup>597</sup> Thus, the court also reversed the trial court's setting aside of all the townhouse proceeds under the homestead exemption and remanded.<sup>598</sup>

*Stunkel v. Gazebo Landscaping Design, Inc.*<sup>599</sup> In this case the Supreme Court of Florida, noting jurisdiction under article V, section 3(b)(4) of the

591. *Id.* at 1150.

592. *Id.* According to the court, these requirements include:

- (1) In order for a charging lien to be imposed, there must first be a contract between the attorney and the client.
- (2) There must also be an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery.
- (3) The remedy is available where there has been an attempt to avoid the payment of fees or a dispute as to the amount involved.
- (4) There are no requirements for perfecting a charging lien beyond timely notice.

*Shawzin*, 658 So. 2d at 1150. For this proposition, the court cited *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1385 (Fla. 1983), among others.

593. *Shawzin*, 658 So. 2d at 1151.

594. *Id.*

595. 137 So. 2d 201, 207 (Fla. 1962).

596. *Shawzin*, 658 So. 2d at 1151.

597. *Id.* *Shawzin* apparently diverted funds from the \$1,850,000 sale of the townhouse to pay his former wife's \$550,000 lump sum alimony and to pay his present counsel's fees and costs.

598. *Id.*

599. 660 So. 2d 623 (Fla. 1995).

*Florida Constitution*, answered the following certified question from the Fourth District Court of Appeal<sup>600</sup> in the negative:

DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE?<sup>601</sup>

The Stunkels contracted with general contractor Bill Free Custom Homes for the construction of a home on their property, who in turn orally contracted with landscaping subcontractor Gazebo. The Stunkels flew on their private plane with a Gazebo representative to a Tampa site to select trees on November 7, 1990. Gazebo began digging on the property on December 5, 1990 and planted the selected trees two days later on December 7, 1990. On February 11, 1992, Gazebo filed suit against the Stunkels and Bill Free Custom Home for breach of contract and to foreclose on its claim of lien.<sup>602</sup>

After an unsuccessful attempt to notify the Stunkels of an impending claim of lien on January 15, 1991, Gazebo posted a notice on the gate of the residence. Because section 713.06(2)(a) of the *Florida Statutes* requires posting of notice to the owner within forty-five days after a subcontractor begins furnishing services or materials, the court needed to determine whether commencement occurred, within the meaning of the statute, when the trees were selected by the Stunkels or when Gazebo began working on the Stunkel residence.<sup>603</sup> The trial court entered an involuntary dismissal of Gazebo's claim of lien after concluding Gazebo began furnishing services when the Stunkels selected the trees and Gazebo failed to give notice within forty-five days of commencement, as required by section 713.06(2)(a).<sup>604</sup> The Fourth District Court of Appeal reversed the trial court's ruling, noting that there was no authority on the timing question, and it "suggested that the trial court

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600. *Gazebo Landscaping Design, Inc. v. Bill Free Custom Homes, Inc.*, 638 So. 2d 87 (Fla. 4th Dist. Ct. App. 1994).

601. *Stunkel*, 660 So. 2d at 624.

602. *Id.*

603. *Id.*

604. *Id.*

consider all relevant factors 'based on the totality of the circumstances' in determining when the subcontractor actually began to provide services."<sup>605</sup>

The supreme court noted that a contract is essential to a mechanic's lien,<sup>606</sup> and when the selection of the trees was made, there was no binding contractual obligation.<sup>607</sup> Therefore, the subcontractor could not have brought a claim of lien against the owner.<sup>608</sup> On this basis, the certified question was answered in the negative.<sup>609</sup> The supreme court rejected the district court's suggested approach because it failed to provide certainty and would frustrate one of the purposes of mechanic's lien law.<sup>610</sup> The court believed that under the suggested approach, "giving notice to owner would be determined on a case-by-case basis, and subcontractors would never know for sure when they had to give notice."<sup>611</sup>

In a separate issue, the trial court refused to enforce the claim of lien, finding that Gazebo's president took no oath when signing the claim.<sup>612</sup> Additionally, despite being signed on January 14, 1991, the claim included a statement that the lien was hand-posted on January 18, 1991. After noting that section 713.08(3) imposes an attestation by notary requirement for claims on lien, the supreme court remanded for a determination by the trial court in accordance with section 713.08(4)(a)<sup>613</sup> on the question of whether the faulty claim of lien adversely affects the Stunkels.<sup>614</sup> Finally, the court denied attorneys' fees to both parties under section 713.29, which allows the prevailing party in an action to enforce a construction lien to recover reasonable attorneys' fees, until such time as the trial court determines a prevailing party on remand and any subsequent appeals are finalized.<sup>615</sup>

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605. *Id.* at 625 (quoting *Gazebo Landscape Design*, 638 So. 2d at 89).

606. *Stunkel*, 660 So. 2d at 625. The court cited *Viking Communities Corp. v. Peeler Const. Co.*, 367 So. 2d 737, 739 (Fla. 4th Dist. Ct. App. 1979) and section 713.06(1) of the *Florida Statutes* (1991) for the proposition that "[a] subcontractor . . . has a lien on the real property improved for any money that is owed to him for labor, services, or materials furnished *in accordance with his contract.*"

607. *Stunkel*, 660 So. 2d at 625.

608. *Id.*

609. *Id.*

610. *Id.* at 625-26.

611. *Id.* at 626.

612. *Stunkel*, 660 So. 2d at 626.

613. Section 713.08(4)(a) provides: "The omission of any of the foregoing details or errors in such claim of lien shall not, within the discretion of the trial court, prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error." FLA. STAT. § 713.08(4)(a) (1991).

614. *Stunkel*, 660 So. 2d at 627.

615. *Id.*

*Viyella Co. v. Gomes.*<sup>616</sup> Viyella Company appealed from an adverse partial final summary judgment, assigning error to the trial court's determination that no genuine issue of material fact existed concerning the value of work performed by Viyella and Viyella's intent to willfully exaggerate the amount of a mechanic's lien.<sup>617</sup> Viyella and the Gomeses executed a contract contemplating Viyella's completion of a \$76,900 contract for improvements to the Gomeses' residential property. Viyella was terminated prior to completion of the work and filed a claim of lien for the contract price above the twenty-five percent deposit of \$19,225 paid by the Gomeses at the time of execution of the contract.<sup>618</sup> The Third District Court of Appeal affirmed, holding that no genuine issue of material fact existed and that the lien was fraudulent under section 713.31(2)(a) of the *Florida Statutes*.<sup>619</sup> The Gomeses thus could invoke the complete defense provided under section 713.31(2)(b) which renders a fraudulent lien unenforceable.<sup>620</sup>

Julio Viyella, president of Viyella Company, first filed a claim of lien for \$57,675, the remainder of the contract price, stating that he completely performed the contract. He then filed a Contractor's Final Affidavit asserting that the Gomeses owed a smaller amount, \$51,883.95, acknowledging that he in fact failed to complete a substantial portion of the work. Then, at deposition, he testified that he had failed to perform an amount of work worth no less than \$27,740. The district court noted that "[t]hese facts are undisputed by the [Gomeses] and any contradictions stem completely from [Viyella's] own statements."<sup>621</sup> On this basis, the district court agreed with the trial court's

616. 657 So. 2d 83 (Fla. 3d Dist. Ct. App. 1995).

617. *Id.* at 84. The company also appealed the denial of its motion for rehearing and/or clarification. *Id.*

618. *Id.* The Gomeses thereupon posted a \$78,938 bond, transferring the lien from the property to the bond. *Id.*

619. *Viyella Company*, 657 So. 2d at 84. The court quoted the following language from sections 713.31 of the *Florida Statutes*:

(2)(a) Any lien asserted . . . in which the lienor has willfully exaggerated the amount for which such lien is claimed or in which the lienor has willfully included a claim for work not performed upon or materials not furnished for the property upon which he seeks to impress such lien . . . shall be deemed a fraudulent lien.

(b) It is a complete defense to any action to enforce a lien . . . that the lien is a fraudulent lien; and the court so finding is empowered to and shall declare the lien unenforceable, and the lienor thereupon forfeits his right to any lien on the property upon which he sought to impress such fraudulent lien. . . .

*Id.* (quoting FLA. STAT. § 713.31(2)(a)-(b) (1993)).

620. *Id.*

621. *Id.* at 85.

finding that there was no genuine issue of material fact regarding the fraudulent nature of the lien and affirmed the trial court's award of partial final summary judgment in favor of the Gomeses.<sup>622</sup>

*Ward v. 3900 Condominium Ass'n.*<sup>623</sup> The Fourth District Court of Appeal reversed, in part, this action to foreclose a \$1,000 assessment lien.<sup>624</sup> The court held that the trial court erred "in not considering the condominium association's decision not to deposit the unit owner's belated 1994 check which was less than the full sum then owed by the unit owner."<sup>625</sup> The check should have been deposited and applied under section 718.116(3) of the *Florida Statutes* (1993), which would have resulted in the amount in dispute being halved "and the matter possibly resolved without all of the litigation."<sup>626</sup> The court also ordered that the attorneys' fee award of \$13,100 "be reduced, without further hearing, to a reasonable sum based on a reduced, properly disputed amount."<sup>627</sup>

## XX. LIS PENDENS

*Lennar Florida Holdings, Inc. v. First Family Bank.*<sup>628</sup> Lennar sought certiorari review from the trial court's order denying its motion to dissolve First Family's notice of lis pendens on a Lake County property in which First Family had acquired a substantial interest, and which Lennar had contracted to sell at an amount which First Family alleged was below fair market value in breach of a participation agreement by which Lennar is bound.<sup>629</sup> The Fifth District Court of Appeal granted Lennar's petition for certiorari and quashed the order of the trial court denying Lennar's motion to dissolve First Family's notice of lis pendens.<sup>630</sup>

In 1972 and 1973 First Family purchased an interest in two loans secured by properties in Lake and Orange Counties made by American Federal Savings and Loan Association of Orlando through contracts referred to as participation

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622. *Id.* The district court commented that the trial court had applied the standard for determining the fraudulent nature and resultant unenforceability of such a lien set forth in section 713.31. *Viyella Company*, 657 So. 2d at 85.

623. 670 So. 2d 1182 (Fla. 4th Dist. Ct. App. 1996).

624. *Id.* at 1183.

625. *Id.*

626. *Id.*

627. *Id.*

628. 660 So. 2d 1122 (Fla. 5th Dist. Ct. App. 1995).

629. *Id.* at 1122.

630. *Id.* at 1124.

agreements. Under these participation agreements, First Family was to share a percentage of the accumulated principal and interest for contributing a percentage of the loan amount. American held the notes and mortgages for the benefit of all participants, and the agreements provided that, although American was authorized to deal with the loans as absolute owner, it would act as a prudent lender upon default. Upon breach or other failure to perform its obligations by American, the other participants could demand repurchase of their interest in the loans at par value. Successors and assigns were bound by the terms of the original participation agreements.<sup>631</sup>

After American Federal merged with AmeriFirst Federal Savings and Loan Association, the Resolution Trust Corporation ("RTC") took possession of AmeriFirst's assets, including the participation agreements underlying the present litigation. The loans went into default. The RTC filed separate foreclosure actions on the Lake and Orange County mortgages, later obtaining a final summary judgment in Lake County and a final judgment of foreclosure in Orange County. First Family did not participate in the foreclosure proceedings. The RTC was the high bidder at an auction for the sale of the Lake County property and obtained a certificate of sale.<sup>632</sup>

Lennar purchased a large portfolio from the RTC, obtained assignments of the RTC's interest in the notes, mortgages, and judgments of foreclosure relating to the properties, and it was later issued a certificate of title to the Lake County property. On May 25, 1994, Lennar entered into a contract to sell the Lake County property for \$200,000, which First Family alleged was below fair market value. First Family alleged further that Lennar, successor in interest to American's obligations, breached its duty to exercise judgment as a prudent lender and refused to repurchase First Family's participation interest after its breach. First Family sought money damages for unpaid principal and interest and improperly charged maintenance costs, as well as a constructive trust and judgment conveying to it a fee simple ownership interest in the property of thirty-four percent, an amount proportional to its interest in the participation agreement.<sup>633</sup>

The appellate court noted that one of the purposes of the doctrine of *lis pendens*, aside from the protection of a plaintiff's interest, is to warn third parties of a dispute concerning the property.<sup>634</sup> Courts may discharge a notice of *lis pendens* if the initial pleading fails to demonstrate that the action is

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631. *Id.* at 1123.

632. *Id.*

633. *Lennar*, 660 So. 2d at 1123.

634. *Id.* See *Chiusolo v. Kennedy*, 614 So. 2d 491 (Fla. 1993).

founded on a duly recorded instrument or mechanic's lien.<sup>635</sup> The court framed the issue in the present litigation as "whether the proponent of the lis pendens, First Family Bank, has shown that there is a sufficient nexus between its action and the property in question."<sup>636</sup> The court, without explicitly explaining its reasoning, held that First Family had not so shown.<sup>637</sup>

## XXI. MOBILE HOMES

*Sandpiper Homeowners Ass'n v. Lake Yale Corp.*<sup>638</sup> The residents of a mobile home park purchased water and wastewater services from a utility company owned by the park owner. Originally the charge for water and wastewater was included in the rent. A dispute in 1990 led to a settlement agreement that annual rent in 1992, 1993, and 1994 would be adjusted according to the Consumer Price Index. After that agreement, the utility company applied for and received a new consumptive use permit from the Water Management District. Pursuant to the permit, water meters were installed in the homes in the park. Then, the utility company applied for and got approval of a new rate structure from the Florida Public Service Commission ("PSC"). The homeowners' association ("Association") objected on the basis that the rate structure would violate the settlement agreement and the park prospectus, but the PSC ruled that those were contract disputes that belonged in circuit court rather than before the PSC. Then, the park unilaterally notified the residents that their rent was being reduced twenty dollars per month to reflect the new separate billing for water and wastewater.<sup>639</sup>

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635. *Id.* See FLA. STAT. § 48.23(3) (1993); *Mohican Valley, Inc. v. MacDonald*, 443 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984).

636. *Id.* at 1124.

637. *Id.* The only evidence of the court's reasoning were the several factual circumstances it noted before announcing its judgment on the issue. The court noted that "[a]lthough First Family had a 'participation' interest in the subject note and mortgage, that mortgage was foreclosed and the collateral property sold pursuant to the judgment." *Id.* The court also took note of the fact that First Family failed to intervene in the foreclosure action, but did not explain how or if First Family's failure to do so would have made any significant difference in the court's present decision. Another fact similarly treated by the court was that First Family never alleged that Lennar fraudulently obtained title to the Lake County property. The court thus felt that First Family's action did not sufficiently implicate the property itself to sustain its notice of lis pendens. In so holding, the court did not directly address the fact that First Family had sought a 34% fee simple ownership interest in the subject property.

638. 667 So. 2d 921 (Fla. 5th Dist. Ct. App. 1996). Judge Goshorn wrote the opinion. Judges W. Sharp and Griffin concurred.

639. *Id.* at 922.

The Association brought this suit seeking declaratory and injunctive relief. The claim was that the rental reduction was inadequate and that the park owner had violated the terms of the settlement agreement and the park prospectus. The circuit court dismissed their claim on the basis that the court lacked subject matter jurisdiction over what was essentially a dispute over utility rates.<sup>640</sup> The district court reversed.<sup>641</sup>

Judge Goshorn wrote a thorough and well-reasoned opinion. It boiled down to this simple distinction. The PSC has exclusive jurisdiction over rate disputes, but this was not a rate dispute. This was a dispute over rent. As the PSC had recognized in its opinion, such a contract dispute belonged in the circuit court.<sup>642</sup>

## XXII. MORTGAGES

*Coral Springs Tower Club II Condominium Ass'n v. Dizefalo.*<sup>643</sup> The Fourth District Court of Appeal granted the association's petition for writ of mandamus, holding that the circuit court erroneously refused to exercise jurisdiction over this action to foreclose a mortgage where the amount in controversy was less than \$15,000.<sup>644</sup> Under *Alexdex Corp. v. Nachon Enterprises, Inc.*,<sup>645</sup> the circuit and county courts have concurrent jurisdiction over foreclosure actions where the action falls within the county court's monetary jurisdiction.<sup>646</sup> After noting that the trial court transferred the case to county court *sua sponte*, the court noted that "[w]e are unaware of any statute, rule of procedure or local administrative order which authorizes transfer because a trial judge just does not want to hear the case."<sup>647</sup>

*Lakeside Regent, Inc. v. FDIC.*<sup>648</sup> Lakeside appealed the trial court's award of summary judgment for the FDIC<sup>649</sup> in a dispute over the proper amount of setoff Lakeside was entitled to apply to FDIC's judgment in a mortgage foreclosure deficiency action. Lakeside had commenced the action

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640. *Id.* at 923.

641. *Id.* at 926.

642. *Id.* at 922.

643. 667 So. 2d 966 (Fla. 4th Dist. Ct. App. 1996).

644. *Id.* at 967.

645. 641 So. 2d 858 (Fla. 1994).

646. *Id.* at 862.

647. *Dizefalo*, 667 So. 2d at 967.

648. 660 So. 2d 368 (Fla. 4th Dist. Ct. App. 1995).

649. *Id.* at 368. FDIC in this case was acting as receiver for First American Bank and Trust, which was declared insolvent. *Id.*

on claims arising from a note, guaranty, and mortgage security agreement, and FDIC counterclaimed for the amounts due on the note and for foreclosure. Lakeside and two individuals, Carl A. Sax and Lanny Horowitz,<sup>650</sup> were found liable to FDIC for \$6,694,017.<sup>651</sup> The subject property was later sold to the City of West Palm Beach for \$1000, whereafter "FDIC noticed for a non-jury trial the issue of the amount of the deficiency judgment."<sup>652</sup> The FDIC moved for summary judgment on this issue, contending that Lakeside, Sax, and Horowitz were only entitled to a setoff in the amount of the \$1000 paid by the City. Although Lakeside contested the propriety of summary judgment on this issue, and had sought discovery on several issues including the terms and conditions of the foreclosure sale,<sup>653</sup> the trial court granted FDIC's motion for a protective order preventing this discovery, finding that these issues were not relevant to the setoff issue.<sup>654</sup> The FDIC was granted summary judgment by the trial court.<sup>655</sup>

The Fourth District Court of Appeal agreed with Lakeside, and reversed.<sup>656</sup> The court noted that the trial court erroneously held that Lakeside's affidavits, which were not formal appraisals, were insufficient to create an issue of fact.<sup>657</sup> The trial court "appear[ed] to have done so based on its erroneous belief that the *only* valid evidence that could be presented by the defendants to oppose a deficiency judgment was a *formal* appraisal of the property by a qualified expert."<sup>658</sup> The trial court had a duty to consider several factors in deciding whether a deficiency judgment is warranted, including the adequacy of the sale price.<sup>659</sup> The court held that the information

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650. Carl A. Sax and Lanny Horowitz were found jointly and severally liable on the guaranty, while final judgment was entered against Lakeside on the note. *Id.* at 369 n.1.

651. This figure included principal, interest, and post-judgment interest. *Id.*

652. *Lakeside*, 660 So. 2d at 369.

653. The other issues mentioned in the opinion on which Lakeside sought discovery were tax arrearages, asbestos removal, and the FDIC's meetings with the FDIC. *Id.*

654. *Id.*

655. *Id.*

656. *Id.* at 370.

657. *Lakeside*, 660 So. 2d at 369.

658. *Id.*

659. *Id.* at 370. The court quoted the following language from *R.K. Cooper Constr. Co. v. Fulton*, 216 So. 2d 11, 13 (Fla. 1968):

A shockingly inadequate sale price in the foreclosure proceeding can be asserted as an equitable defense and the trial judge has the discretion and duty to inquire into the reasonable and fair market value of the property sold, the adequacy of the sale price, and the relationship, if any, between the foreclosing mortgagee and the purchaser at the sale, before entering a judgment on the note.

was discoverable and that "the debtor here ought not to be deprived of the opportunity to make a showing of additional factors justifying his right to challenge the deficiency judgment."<sup>660</sup> As a result of this "first" error regarding the discoverability of this information, the court felt that it must conclude that Lakeside had indeed raised material issues of fact such that summary judgment was improper and, accordingly, reversed.<sup>661</sup>

*Mellor v. Goldberg.*<sup>662</sup> The Second District Court of Appeal reversed the trial court's dismissal with prejudice of appellant's complaint on a promissory note.<sup>663</sup> William and Patricia Mellor filed a complaint against Morton A. Goldberg seeking \$750,000 on a promissory note, attaching the note to the complaint. The Mellors' complaint survived Goldberg's initial motion to dismiss by filing a copy of a mortgage executed in conjunction therewith, containing a clause reading "[t]he land subject to this mortgage shall be the sole security for the indebtedness secured hereby, and a deficiency judgment shall not be obtained against the mortgagor in the event of foreclosure."<sup>664</sup> The court granted Goldberg's renewed motion, in which he argued that the two documents reflected an agreement precluding a personal judgment against him, and it dismissed the Mellors' complaint with prejudice, while ruling that the Mellors were entitled to enforce the mortgage.<sup>665</sup>

The appellate court disagreed with the trial court's dismissal with prejudice.<sup>666</sup> The court noted the sparsity of the record, which contained no documents other than the note and mortgage, and espoused the "general rule . . . [that] a holder of a promissory note secured by real property is permitted to pursue both an action on the note and an action to foreclose the mortgage. These remedies are not inconsistent and are each available to satisfy the underlying obligation."<sup>667</sup> The court declared, "We cannot hold, as a matter of law, that the limitation precluding a deficiency judgment was intended unambiguously either to prohibit or permit a personal judgment."<sup>668</sup> It agreed

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*Lakeside*, 660 So. 2d at 369. Without expressly labeling the sale price at the foreclosure sale of the property in the present case as "shockingly low," the court did note that the \$1000 "represented less than .07% of its assessed value." *Id.* at 370.

660. *Id.* at 369 (citing *Merrill v. Nuzum*, 471 So. 2d 128, 129 (Fla. 3d Dist. Ct. App. 1985)).

661. *Id.* at 370.

662. 658 So. 2d 1162 (Fla. 2d Dist. Ct. App. 1995).

663. *Id.* at 1164.

664. *Id.* at 1163.

665. *Id.*

666. *Id.*

667. *Mellor*, 658 So. 2d at 1163 (citing *Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C.*, 438 So. 2d 408 (Fla. 2d Dist. Ct. App. 1983)).

668. *Id.* at 1164.

the note and mortgage should be construed together, but declared that “evidence of intent is necessary to explain a latent ambiguity within the two documents.”<sup>669</sup> Such evidence was not apparent from the sparse record in the present case.<sup>670</sup> The court reversed the trial court’s order dismissing the Mellors’ complaint with prejudice and remanded.<sup>671</sup>

*Noonan-Judson v. Surrency.*<sup>672</sup> The Fifth District Court of Appeal determined that the trial court erred in applying the doctrine of election of remedies.<sup>673</sup> Surrency held a second mortgage on the subject property, and NationsBank foreclosed on its first mortgage. Surrency, seeking to save her interest in the property, found another party, Noonan-Judson, who was also a client of Surrency’s attorney, William Dixon. The parties agreed to the following terms: 1) Noonan-Judson would put up \$97,000 to bid for the property at the foreclosure sale; 2) the property would be placed on the market and sold; 3) Noonan-Judson’s initial investment of \$97,000 would be repaid from the sale proceeds; and (4) the amount remaining would be divided in half between Noonan-Judson and Surrency. Noonan-Judson tendered a check for \$97,000 with a notation stating “investment” thereon.<sup>674</sup>

Dixon bid \$97,000 at the judicial sale, in his name as trustee for Surrency, and later prepared a mortgage deed and note for Noonan-Judson for the \$97,000, which provided for \$1,500 monthly payments. Dixon “delayed putting the trust terms in writing to give Surrency time to hammer out auxiliary terms related to the marketing of the property.”<sup>675</sup> Surrency failed to make the payments.

Noonan-Judson filed a two-count claim for foreclosure on the mortgage, asking the court to impose an express, resulting, or constructive trust on the property. The trial court awarded Noonan-Judson partial summary judgment

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669. *Id.*

670. Judge Altenbrand’s statements raise interesting questions. How much more evidence of such intent other than an unambiguous clause in such documents would be required? Can a party to such a document ever ensure that the language is legally sufficient to serve the party’s bona fide intent to protect oneself from personal liability? Is not the legitimate purpose in using such unambiguous language to avoid subsequent litigation? Can such a purpose ever be served by the court’s implication that such language does not preclude the admission of other sources of evidence dispositive of the intent of the parties to such a document, which conceivably could be many years old whenever such litigation arises? Is not the motivation in including such language in these documents to avoid other problems of proof of the parties’ intent?

671. *Mellor*, 658 So. 2d at 1164.

672. 669 So. 2d 1058 (Fla. 5th Dist. Ct. App. 1996).

673. *Id.* at 1059.

674. *Id.*

675. *Id.*

on the mortgage claim, granting her a mortgage lien of \$113,378.51, and ordered sale, at which Surrency redeemed.<sup>676</sup> Later, the court denied Noonan-Judson's claim of trust, despite its finding that Surrency understood and consented to the terms of the agreement.<sup>677</sup> The court's reasoning was that Noonan-Judson, in pursuing a mortgage foreclosure claim, had elected her remedy, thus eliminating the preliminary agreement to enter into a written trust agreement as a remedy.<sup>678</sup>

The Fifth District Court of Appeal offered two reasons in assigning error to the court's application of the doctrine of election of remedies.<sup>679</sup> First, Surrency failed to plead the doctrine as an affirmative defense, and the court's inquiry was framed by the pleadings, noting that "[w]here an issue is not presented by pleading or litigated by parties during a hearing, a judgment based on that issue is voidable on appeal."<sup>680</sup> Second, the remedies were not inconsistent, and thus the doctrine was simply inapplicable.<sup>681</sup>

*Pignato v. Great Western Bank.*<sup>682</sup> In 1993, the appellants defaulted on their mortgage executed in 1991 in favor of Great Western. Great Western filed suit to foreclose, and the appellants raised affirmative defenses, including an allegation that Great Western violated the Federal Truth in Lending Act ("TILA")<sup>683</sup> by failing to include as a finance charge the intangible tax which it paid to the Clerk of the Court to record the mortgage, instead including the figure in the amount financed.<sup>684</sup> A violation would, among other things, permit the borrower to rescind the loan.<sup>685</sup> The circuit court found that the lender had complied with the TILA and ordered foreclosure.<sup>686</sup>

The Fourth District Court of Appeal affirmed, interpreting an exception in the definition of finance charge in Federal Reserve Board Regulation Z<sup>687</sup> to

676. *Id.*

677. *Noonan-Judson*, 669 So. 2d at 1059.

678. *Id.*

679. *Id.* at 1060.

680. *Id.* (citing *Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957)).

681. *Id.* (citing *Barbe v. Villeneuve*, 505 So. 2d 1331, 1333 (Fla. 1987); *Goldstein v. Serio*, 566 So. 2d 1338, 1340 (Fla. 4th Dist. Ct. App. 1990), *review denied*, 576 So. 2d 291 (Fla. 1991)).

682. 664 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 673 So. 2d 30 (Fla. 1996).

683. 15 U.S.C. §§ 1601-77 (1988 & Supp. IV 1992).

684. *Pignato*, 664 So. 2d at 1012-13.

685. *Id.* at 1013 (citing 15 U.S.C.A. § 1635(a) (West 1982)).

686. *Id.*

687. 12 C.F.R. § 226 (1994).

include the Florida intangible tax.<sup>688</sup> In so doing, the court rejected the federal eleventh circuit's holding in *Rodash v. AIB Mortgage Co.*,<sup>689</sup> decided after the circuit court entered the present judgment of foreclosure, that the TILA required that the intangible tax be included as a finance charge.<sup>690</sup> The court did not feel bound by *Rodash* "because it construes Florida law, not federal law."<sup>691</sup>

Actually, the court construed both Florida law and federal law in this case. The court looked to Regulation Z for the definition and exceptions to finance charge, and it looked at an exception for "[t]axes and fees prescribed by law that actually are or will be paid to public officials for . . . perfecting . . . a security interest."<sup>692</sup> The *Rodash* court had, according to the Fourth District Court of Appeal, found the exception inapplicable because the purpose of the tax was revenue enhancement, not perfecting a security interest.<sup>693</sup> The court looked to Florida law to clarify the nature of the Florida intangible tax, and it decided that although revenue enhancement was the purpose of the tax, the above exception fit because "[w]ithout payment, the mortgage will not be recorded and the security interest will not be perfected."<sup>694</sup>

In its reasoning, the appellate court disputed the notion that the tax's purpose was relevant.<sup>695</sup> All that was required, in the minds of the Fourth District Court of Appeal, was that the tax be prescribed by law, paid to a public official, for perfecting a security interest, and the Florida intangible tax fit.<sup>696</sup> Since the exception fit, there was no TILA violation, and the court affirmed.<sup>697</sup>

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688. *Pignato*, 664 So. 2d at 1014.

689. 16 F.3d 1142 (11th Cir. 1994).

690. *Pignato*, 664 So. 2d at 1015.

691. *Id.* The court commented that "[o]nly decisions of the United States Supreme Court are binding on the state courts of Florida." *Id.* (citing *Board of County Comm'rs v. Dexterhouse*, 348 So. 2d 916, 918 (Fla. 2d Dist. Ct. App. 1977), *aff'd*, 364 So. 2d 449 (Fla. 1978), *appeal dismissed*, 441 U.S. 918 (1979)).

692. *Id.* at 1014 (quoting 12 C.F.R. § 226.4(e)(i) (1994)). Under TILA, finance charge is generally defined as "the sum of all charges, payable directly or indirectly by the person to whom credit is extended, and imposed directly or indirectly as an incident to the extension of credit." *Id.* (citing 15 U.S.C.A. § 1605(a) (West Supp. 1995)); Reg. Z, 12 C.F.R. § 226.4(a) (1994)).

693. *Pignato*, 664 So. 2d at 1014 (citing *Rodash*, 16 F.3d at 1148-49).

694. *Id.* at 1015. Here too, the court looked to federal sources when it submitted a 1995 revision to the Commentary to Regulation Z. *Id.* at 1016 (citing Reg. Z, 60 Fed. Reg. 16,771 (1995)).

695. *Id.* (noting that the *Rodash* court supplied no authority for the proposition).

696. *Id.* (citing Reg. Z, 12 C.F.R. § 226.4(e)(1) (1994)).

697. *Pignato*, 664 So. 2d at 1016.

*Powers v. ITT Financial Services Corp.*<sup>698</sup> The Fifth District Court of Appeal affirmed the trial court's order granting relief from judgment of foreclosure on account of excusable neglect.<sup>699</sup> Powers executed a mortgage and promissory note to Family First Mortgage Company for \$50,700, which was subsequently assigned to First Nationwide Bank, and another mortgage in favor of ITT for \$22,560. Upon default by Powers, ITT filed a foreclosure action, listing Powers and Nationwide as defendants.<sup>700</sup>

Plaintiff executed service of process on Nationwide through Suzanne Podegraz, First Vice President of the human resources department of Nationwide in Sacramento, California. Podegraz accepted service because she recognized the name "Gary Powers." A person by that name had been employed at the bank and was involved in a divorce proceeding. Believing the documents to be related to that divorce action, Podegraz failed to forward the documents to the appropriate division in the company. As soon as the error was discovered, the papers were duly forwarded.<sup>701</sup>

A final judgment of foreclosure was issued upon ITT's motion for summary judgment, which was followed by a judicial sale and issuance of a certificate of sale from the clerk of the court.<sup>702</sup> After learning of the Podegraz' mistake, Nationwide moved to vacate the judgment of foreclosure, ITT's certificate of title, and the foreclosure sale on grounds of excusable neglect pursuant to Rule 1.540 of the *Florida Rules of Civil Procedure*. The trial court granted Nationwide relief, and the Fifth District Court of Appeal affirmed, finding no error in the trial court's ruling.<sup>703</sup>

*Warehouses of Florida, Inc. v. Hensch.*<sup>704</sup> The issue in this mortgage foreclosure action was whether it was error to enter a deficiency judgment in favor of the mortgagees where the mortgagees bid the entire amount of the final judgment of foreclosure at the foreclosure sale. The Fifth District Court of Appeal held that it was error and, therefore, reversed.<sup>705</sup>

The Hensches were second mortgagees who filed a foreclosure action when Warehouses failed to make payments. The court entered a judgment of

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698. 662 So. 2d 1343 (Fla. 5th Dist. Ct. App. 1995).

699. *Id.* at 1344.

700. *Id.*

701. *Id.*

702. *Id.*

703. *Powers*, 662 So. 2d at 1345. Powers argued that Nationwide's mortgage was extinguished by the judgment of foreclosure, but the Fifth District Court of Appeal disagreed, stating that "once set aside, the judgment has no effect on the rights of either party." *Id.*

704. 671 So. 2d 885 (Fla. 5th Dist. Ct. App. 1996).

705. *Id.* at 886.

foreclosure which included the principal balance due on the note, accrued interest thereon, costs, and attorneys' fees, totaling \$336,343.91.<sup>706</sup> The Henschelers were the sole bidders at foreclosure, bid the entire amount of the judgment of foreclosure, and, thereafter, filed a petition for entry of a deficiency judgment which the trial court granted. Included in the deficiency judgment were \$44,271.85 in first mortgage payments made by the Henschelers to preclude foreclosure on the first mortgage, \$14,375.02 in delinquent 1992 property taxes, \$9,733 in prorated 1993 property taxes, and \$8,500 representing a security deposit paid to Warehouses by a tenant during Warehouses' possession.<sup>707</sup> These sums were added to the balance due on the first mortgage and the foreclosure judgment, which the trial court then subtracted from the "fair market value of \$700,000.00 to arrive at \$139,037.20, the amount of the deficiency judgment."<sup>708</sup>

The Henschelers relied on section 45.031(8) of the *Florida Statutes*, which provides in part:

If the case is one in which a deficiency judgment may be sought and application is made for a deficiency, the amount bid at the sale may be considered by the courts as one of the factors in determining a deficiency under the usual equitable principles.<sup>709</sup>

In rejecting the Henschelers' arguments and reversing, the Fifth District Court of Appeal noted that "the established law in this district is that when a mortgagee purchases the foreclosed property by bidding the full amount of the final judgment of foreclosure, the mortgagee's judgment is satisfied in full and a deficiency judgment is not possible."<sup>710</sup>

*Wilken v. North County Co.*<sup>711</sup> In this case, the Fourth District Court of Appeal, relying on the authority of *Bauer v. Resolution Trust Corp.*,<sup>712</sup> held that the clerk of the court need not refund registry and sales fees to a successful bidder at a foreclosure sale where the mortgagor/debtor, prior to the sale and

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706. *Id.*

707. *Id.*

708. *Id.*

709. *Warehouses*, 671 So. 2d at 886 (citing FLA. STAT. § 45.031(8) (1991)).

710. *Id.* at 887.

711. 670 So. 2d 181 (Fla. 4th Dist. Ct. App. 1996). Appellant, Dorothy H. Wilken, appealed in her capacity as Clerk of the Circuit Court of the Fifteenth Judicial Circuit. *Id.*

712. 621 So. 2d 521 (Fla. 4th Dist. Ct. App. 1993).

without written notice to the clerk, filed a suggestion of bankruptcy in federal court, requiring the sale to be later invalidated.<sup>713</sup>

### XXIII. QUIET TITLE

*Skelton v. Martin.*<sup>714</sup> This case “demonstrates a serious variance between the statutory method for the maintenance of public records and the electronic means by which most private and public records are now retrieved.”<sup>715</sup> Skelton took title to the subject property under a tax deed recorded January 20, 1994. The previous owner, Ernest Martin, had failed to pay the 1990 taxes on the lot, and a tax certificate was issued to Bank Atlantic for the unpaid taxes. The sale was conducted on January 19, 1994, after public notice was published on four separate dates in the *Pinellas County Review*.<sup>716</sup>

Sandy K. Perry received a deed from Ernest Martin to the same property at a closing on January 7, 1994. The deed was recorded on January 25, 1994. Equity Title conducted a title search on the property. Equity neither sent an abstractor to the courthouse nor examined the notices in the *Pinellas County Review*. The abstractor instead used a computer to connect to the “Pinellas County Computer Dial-Up System” and examined the current tax year screen which normally indicates if there are delinquent taxes. No delinquencies were so indicated, and the abstractor did not check the delinquent tax screen.<sup>717</sup>

Since she did not challenge the validity of the tax certificate or of the tax sale, “[i]n essence, Ms. Perry maintained that the current tax screen on the dial-up computer misled Equity Title, and that she would have learned of the tax sale but for this mistake.”<sup>718</sup> The appellate court responded by stating that “[t]he question remains whether this error deprived Ms. Perry of constitutional notice of either the tax certificate or of the pending sale.”<sup>719</sup> The court concluded that it did not, since the tax certificate was recorded in the manner required by statute, and it noted that “there is no present statutory right to accurate information on the Internet. At this point in history, such computerized data is not a form of notice constitutionally guaranteed by article I, section

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713. *Wilken*, 670 So. 2d at 181.

714. 673 So. 2d 877 (Fla. 2d Dist. Ct. App.), *review denied sub nom. Perry v. Skelton*, No. 88,141, 1996 LEXIS 1741, at \*1 (Sept. 16, 1996).

715. *Id.* at 879.

716. *Id.* at 878.

717. *Id.*

718. *Id.* at 879.

719. *Skelton*, 673 So. 2d at 879.

9, of the *Florida Constitution*, or by the Fourteenth Amendment to the *United States Constitution*.”<sup>720</sup>

#### XXIV. RESTRICTIVE COVENANTS

*Kilgore v. Killearn Homes Ass’n*.<sup>721</sup> The question before the First District Court of Appeal was whether the property in question became subject to the covenants and restrictions of Killearn Estates.<sup>722</sup> The Kilgores were allegedly in violation of the covenants and restrictions by keeping more than thirty miniature horses on the property.<sup>723</sup> The appellate court reversed a portion of the partial summary judgment which determined that the entire parcel of Appellant’s property was subject to the covenants and restrictions of Killearn Estates.<sup>724</sup>

In 1994, the Kilgores purchased the subject property surrounded on three sides by property that is within Killearn Estates. The property itself is within Killearn Estates and provides access to a public road and additional adjacent acreage not within Killearn Estates. The homeowners’ association (“Association”) alleged that the Kilgores purchased the property subject to all covenants and restrictions, reservations, and easements of record. The Association further alleged that J.T. Williams, the initial owner and developer, made Lot 14 subject to the covenants and restrictions, but did not subject the several adjacent acres of property. The association also alleged that the Kilgores’ predecessors in title, the Hintikkas, had applied to the City of Tallahassee to create a minor subdivision, Gardenview Too, from a portion of the unplatted additional acreage formerly owned by Williams, and in the process were required by the City to execute a unity of title document, under which the additional acreage which the Hintikkas retained merged with and became part of Lot 14 of Killearn Estates and subject to the covenants and restrictions in question.

The trial court found that the Kilgores’ land was subject to the covenants and restrictions, and it permanently enjoined them from keeping the animals on the land.<sup>725</sup> The First District Court of Appeal reversed, finding that the unity

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720. *Id.*

721. 676 So. 2d 4 (Fla. 1st Dist. Ct. App. 1996). The opinion in this case was modified on grounds not pertinent to the discussion of this case. See *Kilgore v. Killearn Homes Ass’n*, 21 Fla. L. Weekly D1532 (1st Dist. Ct. App. June 25, 1996).

722. *Kilgore*, 676 So. 2d at 5.

723. *Id.* at 6.

724. *Id.* at 5.

725. *Id.* at 6.

of title document did not have the effect of merging Lot 14 and the additional acreage for a purpose other than that intended by the parties to the agreement.<sup>726</sup> The court noted that in general, a unity of title document is meant to restrict or transfer development rights, and that it is an agreement entered into by the property owner and the governing authority.<sup>727</sup> The appellate court found that the purpose of the document in this case was to prevent further subdivision of the additional property without the City's approval, and it noted that the Association was not a party to the agreement.<sup>728</sup> The court also noted that "covenants restraining the free use of realty are not favored in the law"<sup>729</sup> and are enforceable as private rights arising out of contract.<sup>730</sup> In closing, it found that there was no agreement between the Kilgore, or their predecessors in title, and the Association which made the subject acreage subject to the covenants and restrictions.<sup>731</sup>

## XXV. SALES

*Alvarez v. Garcia.*<sup>732</sup> Less than a month after Hurricane Andrew, the parties entered into a contract for the sale of a house. Before signing the contract, the buyers knew that the hurricane had damaged the roof. Both sides got estimates for what the repairs would cost, and the sellers collected under their property insurance policy. Before closing, the buyers discovered that the roof damage was more extensive than they had thought and that the roof damage was causing the house to deteriorate. The seller, having refused to repair the damage or give the insurance proceeds to the buyers, canceled the

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726. *Id.*

727. *Kilgore*, 676 So. 2d at 6. See generally *Gordon v. Flamingo Holding Partnership*, 624 So. 2d 294 (Fla. 3d Dist. Ct. App. 1993), *review denied*, 637 So. 2d 234 (Fla. 1994); *Maturo v. City of Coral Gables*, 619 So. 2d 455 (Fla. 3d Dist. Ct. App. 1993)).

728. *Id.* at 7.

729. *Id.* (citing *Sinclair Refining Co. v. Watson*, 65 So. 2d 732, 733 (Fla. 1953); *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 308 (Fla. 2d Dist. Ct. App.), *cert. denied*, 192 So. 2d 489 (Fla. 1966); *Ortega Co. v. Justiss*, 175 So. 2d 554, 559 (Fla. 1st Dist. Ct. App. 1965)).

730. *Id.* (citing *Dade County v. Matheson*, 605 So. 2d 469, 474 (Fla. 3d Dist. Ct. App. 1992); *Board of Public Instruction v. Town of Bay Harbor Islands*, 81 So. 2d 637, 641 (Fla. 1955)).

731. *Id.* at 7.

732. 662 So. 2d 1312 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 938 (Fla. 1996). Judge Jorgenson wrote the opinion for the panel which included Judges Hubbard and Gersten.

contract. The buyers sued for reformation of the contract and specific performance and won in the trial court.<sup>733</sup> The district court reversed.<sup>734</sup>

Based on what the broker had said to the buyers, the trial court reformed the contract, requiring the seller to apply the insurance proceeds to the roof repairs.<sup>735</sup> That constituted error. A court of equity has the power to reform a written contract to reflect what the parties actually intended, but there was no evidence that the seller ever intended this term. There was no evidence that the broker had the authority to bind the seller to any terms that varied from the terms of the written contract. Nor was there any evidence that the parties had left that term out of the written agreement by mutual mistake.<sup>736</sup>

The trial court also erred in relying on the doctrine of equitable conversion to find that the buyers were entitled to insurance proceeds.<sup>737</sup> First, the buyers had never pled the doctrine, and second, the doctrine would only apply if the casualty occurred after the contract had been signed, i.e., when the buyers were arguably the equitable owners of the land that suffered the casualty.<sup>738</sup> Here, the property was damaged before the contract was signed, and, therefore, the doctrine was inapplicable.<sup>739</sup>

The contract explicitly provided that the seller would be responsible for roof repairs up to two percent of the purchase price. The seller could have voluntarily paid more, but was not required to do so. If roof repairs exceeded two percent and the seller was unwilling to pay the excess, the buyers would have the right to cancel the contract.<sup>740</sup> An addendum to the contract provided in essence that if neither party was willing to pay for a required repair and a compromise could not be reached, then either party could cancel the contract. The district court ruled these provisions should be read together.<sup>741</sup> The roof repairs easily exceeded the two percent. Neither the seller nor the buyers were willing to pay the excess. Clearly a compromise was not reached. Thus, the seller had the right to cancel the contract.

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733. *Id.* at 1313.

734. *Id.* at 1314.

735. *Id.*

736. *Id.*

737. *Alvarez*, 662 So. 2d at 1314.

738. *Id.*

739. *Id.*

740. *Id.* at 1313.

741. *Id.*

*Broward County v. Conner*.<sup>742</sup> The County began an eminent domain action to take the Conners' land. Settlement negotiations began and the parties explored the possibility of settling the case by a real estate exchange. The parties reached an agreement in principle, and the landowners' lawyer sent a letter to the County's private attorney which "confirmed the parameters" of the proposed settlement. The parties subsequently had further meetings, exchanged letters, and exchanged unsigned drafts of the settlement. Then, the County decided not to settle according to these terms.<sup>743</sup>

The trial court granted the landowners' motion in the eminent domain proceeding to specifically enforce the settlement because "the agreement had been partly performed; that [the landowners] had relied to their detriment based on the representation of the county's agents and employees; and, that the county was estopped to deny the settlement."<sup>744</sup> The District Court of Appeal reversed relying on two alternative grounds, the Statute of Frauds and the Sunshine Law.<sup>745</sup> The latter is discussed in the Eminent Domain section of this survey.<sup>746</sup>

The court held that the settlement was a contract for the sale of land.<sup>747</sup> Consequently, the Statute of Frauds<sup>748</sup> required that the contract be in writing and signed by the party to be charged, but the County had not signed the settlement. The court relied upon *Collier v. Brooks*<sup>749</sup> and the cases cited therein for the proposition that "[p]art performance does not remove an oral contract for sale of land from the statute of frauds unless there is payment of all or part of the consideration, possession by the vendee, and valuable improvement so as to constitute a fraud on the vendee if there were no performance."<sup>750</sup> The landowner had not established these elements and, therefore, could not rely on part performance to take the contract out of the Statute of Frauds. This author<sup>751</sup> thinks that the court's conclusion on this point was incorrect. Assuming in fact that there was a contract, a point that this court

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742. 660 So. 2d 288 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 250 (Fla. 1996). Judge Klein wrote the opinion in which Chief Judge Gunther concurred. Judge Farmer wrote a special concurrence.

743. *Id.* at 289.

744. *Id.* at 290.

745. *Id.*

746. See discussion *supra* pp. 304-06.

747. *Conner*, 660 So. 2d at 290.

748. FLA. STAT. § 725.01 (1993).

749. 632 So. 2d 149 (Fla. 1st Dist. Ct. App. 1994).

750. *Conner*, 660 So. 2d at 290 (citing *Collier*, 632 So. 2d at 155).

751. Professor Brown.

does not address, the court should not have determined part performance by a rigid mechanical test. Part performance is an equitable doctrine designed to prevent the Statute of Frauds from being used as a tool to perpetrate a fraud. The court should look at all the circumstances to determine if that is what the county was doing. It is impossible to tell from the facts in the opinion whether the landowners could have prevailed under the proper analysis.

Judge Farmer made an interesting point in his special concurrence.<sup>752</sup> He would have remanded the case to see if any of the writings signed by the county's attorneys were sufficient to satisfy the Statute of Frauds.<sup>753</sup> His approach seems to recognize that the writing requirement can be satisfied by a combination of writings.

*Caronte Enterprises, Inc. v. Berlin.*<sup>754</sup> The contract of sale provided that the seller would make certain repairs prior to the closing but did not specify a closing date, and the "time is of the essence" clause was crossed out. Although the buyers complained for several months that the repairs were not being made quickly enough, they never made a formal demand that the repairs be completed by a particular date. Finally, the seller notified the buyers that the repairs were complete. The buyers disagreed and brought this suit. The jury verdict was for the buyers.<sup>755</sup> On appeal, the district court ruled that the trial judge erred by failing to grant a judgment notwithstanding the verdict.<sup>756</sup>

The district court did not clearly express its theory, but it is apparent that the court concluded that seller was not yet in breach of the contract. Time was not of the essence under the contract, and the buyers had never formally demanded performance by a date certain. So, even if the repairs were not yet satisfactory, the seller still had the time to complete the repairs. It is not known whether the buyers failed to follow the advice of counsel or simply lacked competent legal advice, but these buyers lost because they simply did not play this game by the rules.

## XXVI. SIGNATURES

Although the Florida Legislature did not seem to enact significant legislation this year affecting substantive property law, it did pass the Elec-

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752. *Conner*, 660 So. 2d at 290–91 (Farmer, J., concurring specially).

753. *Id.* at 290.

754. 668 So. 2d 233 (Fla. 3d Dist. Ct. App. 1996). Judges Levy, Gersten and Green concurred in the per curiam opinion.

755. *Id.* at 234.

756. *Id.*

tronic Signature Act of 1996 ("Act").<sup>757</sup> One of this Act's primary purposes is to develop authenticity and integrity to electronic signatures and electronic commerce.<sup>758</sup> As a result, unless prohibited by law, one may now use an electronic signature to sign a writing and such a signature has an equal effect as a written signature.<sup>759</sup> However, although it is the Secretary of State's responsibility to issue to public and private entities certificates (computer-based records) to verify digital signatures, no public or private entity is required to participate in such a program.<sup>760</sup>

## XXVII. TAXES

*Chapparral Partners v. Department of Revenue.*<sup>761</sup> Chapparral is a general partnership composed of Congden Properties, Inc. and First Interstate Bank of California as trustee. First Interstate held defaulted notes and mortgages on two Jacksonville properties which were worth substantially less than the amount due on the notes. First Interstate gave the guarantors of the notes a covenant not to sue in exchange for conveyances of the properties.<sup>762</sup>

The present dispute centered on the amount of documentary stamps to be affixed to those deeds. The parties agreed that the several indebtednesses on the properties were not discharged and remained encumbrances on the land. The Department of Revenue, relying on a part of section 201.02(1) of the *Florida Statutes* "which defines 'consideration' for a conveyance to include 'the amount of any mortgage . . . or other encumbrance, whether or not the underlying indebtedness is assumed,'" felt the stamp taxes should be assessed based on the amount of debt encumbering the land at the time of conveyance.<sup>763</sup> The appellants argued that the part of the statute which should govern provides "[i]f the consideration . . . includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property . . . ."<sup>764</sup> The appellants submitted that the covenant not to sue is "property other than money," making the more specific part of the section referenced by the Department inapplicable to the present case.<sup>765</sup>

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757. Ch. 96-224, § 3, 1996 Fla. Laws at 837.

758. *Id.* § 2, 1996 Fla. Laws at 837.

759. *Id.* § 3, 1996 Fla. Laws at 838.

760. *Id.* § 6, 1996 Fla. Laws at 838.

761. 662 So. 2d 727 (Fla. 1st Dist. Ct. App. 1995).

762. *Id.* at 728.

763. *Id.* (quoting FLA. STAT. § 201.02(1) (1991)).

764. *Id.*

765. *Id.*

The First District Court of Appeal held that applying the language offered by the appellant to the present case would “render the clear legislative intent to define ‘consideration’ in terms of the amount of an encumbrance that survives a conveyance as meaningless,” and noted that otherwise, the specific definition could be regularly evaded by “the giving of any non-money consideration.”<sup>766</sup> The court thus concluded that the Department of Revenue had correctly based the assessment of stamps on the amount of the debt.<sup>767</sup>

## XXVIII. TITLE INSURANCE

*American Title Insurance Co. v. Carter.*<sup>768</sup> The trial court found that American Title had a duty under the title insurance policy to defend the Carters in a boundary dispute, and American Title appealed.<sup>769</sup> The Fifth District Court of Appeal reversed.<sup>770</sup> After purchasing the subject property, the Carters had a professional survey performed, and in reliance thereon, they erected a fence on what they believed was their eastern boundary line. Their neighbor to the East, Eugene Calabrese, had a survey performed, which evidenced that the Carters’ fence encroached 26.5 feet onto Calabrese’s property.

Calabrese filed an action alleging encroachment, seeking recovery of possession of the fenced portion, damages, and attorney’s fees, and the Carters made a formal demand on American Title to defend them. American Title refused, and the Carters filed a third party complaint against American Title and their predecessors in interest, alleging that American Title insured them against loss and damages for circumstances as alleged in Calabrese’s complaint and breached the policy by failing to defend them in the suit. American Title answered, stating two bases for its denial of Calabrese’s claim as not covered under the policy. First, Calabrese’s claim did not assert any claim to any lands described in the Carters’ deed.<sup>771</sup> Second, the claim was not covered due to the survey exception in Schedule B of the policy.<sup>772</sup>

The Fifth District Court of Appeal agreed that American Title was not under a duty to defend under the policy under these circumstances.<sup>773</sup> The issue did not pertain to title, but was merely a boundary dispute not covered by

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766. *Chapparral Partners*, 662 So. 2d at 728.

767. *Id.* at 729.

768. 670 So. 2d 1115 (Fla. 5th Dist. Ct. App. 1996).

769. *Id.* at 1115.

770. *Id.* at 1118.

771. *Id.* at 1116.

772. *Id.*

773. *American Title*, 670 So. 2d at 1116.

the policy.<sup>774</sup> Also, there was an exclusion in the policy excluding from coverage any “encroachments, easements, measurements, variations in area or content, party walls or other facts which a correct survey of the premises would show.”<sup>775</sup> The court thus noted that, “essentially, the Carters are asking the court to write them an insurance policy superior to the one they purchased.”<sup>776</sup>

*National Title Insurance Co. v. Safeco Title Insurance Co.*<sup>777</sup> National appealed the trial court’s decision to grant a new trial on the issue of damages while Safeco cross appealed the trial court’s denial of its motion for directed verdict on the issue of liability for breach of contract.<sup>778</sup> The Third District Court of Appeal reversed the trial court’s denial of directed verdict to Safeco, a decision which the court felt “moot[ed] . . . the appeal in chief.”<sup>779</sup>

In 1982, National loaned \$103,500 to buyers Younts and Bowman. Home Title, an agent of Safeco, acted as closing agent for Safeco, the underwriter of the title insurance policy, which provided that Safeco insured “against loss or damage . . . sustained or incurred by the insured by reason of . . . any defect in or lien or encumbrance on such title.”<sup>780</sup> The policy listed only National’s mortgage and no second mortgage. At closing, Rosen, president of Home Title, notarized and witnessed documents<sup>781</sup> indicating that no second mortgage existed. He did this despite the fact that prior to closing, unbeknownst to National, the buyers had obtained a second mortgage for \$3,009.02 from their developer, Interdevco, which Rosen had also notarized and witnessed. National sold the mortgage to the Federal National Mortgage Association (“FNMA”) in November 1982, while purchasing private mortgage insurance from Verex, representing that no second mortgage existed.

The second mortgage was satisfied in 1984, but the buyers defaulted on the first mortgage. Upon discovery of the second mortgage, the Verex policy was invalidated despite the fact that it had been satisfied four years prior. National paid to FNMA \$75,000, representing the balance unpaid on the first mortgage, and it obtained a deed to the property in lieu of foreclosure.

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774. *Id.* at 1117.

775. *Id.* at 1116.

776. *Id.* at 1117.

777. 661 So. 2d 1234 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 939 (Fla. 1996).

778. *Id.* at 1235.

779. *Id.* at 1236.

780. *Id.* at 1235.

781. Among these documents was a Federal National Mortgage Association document certifying that no second mortgage existed. *Id.*

In July 1989, National sued Safeco, Interdevco, Home Title, and Rosen for breach of the title insurance policy and negligence seeking recovery of the \$75,000 payment to FNMA.<sup>782</sup> Default judgments were entered against Interdevco and Home Title.<sup>783</sup> The jury found that Rosen had no knowledge of the second mortgage at closing.<sup>784</sup> Safeco argued that any loss to National was no result of a breach in its obligations under the policy, and after the trial court denied its motion for directed verdict on the issue of breach, the jury, by special interrogatory verdict, found Safeco had breached, resulting in \$75,000 in damages to National.<sup>785</sup> The jury also found that the two defaulting defendants were negligent and allocated liability among them, with Interdevco responsible for \$50,000 and Home Title responsible for \$25,000.<sup>786</sup> The trial court ordered a new trial on the issue of breach, believing that Safeco's damage liability could not be greater than that of its agent, Home Title.<sup>787</sup>

The Third District Court of Appeal reversed the trial court's denial of Safeco's motion for directed verdict.<sup>788</sup> The court felt that even if Safeco had breached the policy, such breach was not the natural and proximate cause of National's damages.<sup>789</sup> The court then noted that when a title insurer breaches a mortgagee's policy, the proper measure of damages is "the difference between the market value of the mortgage, if the lien thereof were as insured, and the market value of the mortgage with the title imperfection."<sup>790</sup> The court also noted that the second mortgage was not an outstanding encumbrance when National paid FNMA, and that National's loss was a result of the buyers' default, not the second mortgage.<sup>791</sup> The court then affirmed the jury verdict for Rosen, not reaching the evidentiary issues, but held, as a matter of law, that Rosen could not be held liable for National's loss because that loss was not caused by Rosen's failure to disclose the second mortgage, even assuming Rosen was aware of its existence.<sup>792</sup>

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782. *National Title*, 661 So. 2d at 1235.

783. *Id.*

784. *Id.* at 1235-36.

785. *Id.* at 1236.

786. *Id.*

787. *National Title*, 661 So. 2d at 1236.

788. *Id.* at 1237.

789. *Id.* at 1236.

790. *Id.* (quoting *Goode v. Federal Title & Ins. Corp.*, 162 So. 2d 269, 271 (Fla. 2d Dist. Ct. App. 1964); *Interstate Title Corp. v. Miller*, 581 So. 2d 213, 214 (Fla. 4th Dist. Ct. App. 1991)).

791. *Id.*

792. *National Title*, 661 So. 2d at 1236 (citing *Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979) (holding that "[e]ven when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports

## XXIX. TRUTH IN LENDING ACT

*Beach v. Great Western Bank.*<sup>793</sup> In this case, the Fourth District Court of Appeal addressed the following question of first impression in Florida:

[W]hether a consumer has right to rescind a mortgage on a home, under 15 U.S.C.A. section 1635 of the Truth in Lending Act (TILA), as a defense by way of recoupment to the lender's foreclosure action, when the defense is asserted beyond the three year period set forth in the statute.<sup>794</sup>

The court held that a consumer was not entitled to rescission; rather, he is limited to a damage set off.<sup>795</sup>

The opinion included a brief overview of the TILA, noting that the Act gives consumers the right to rescind, for up to three years, any agreement that results in the lender taking a security interest in the consumer's principal dwelling, if the creditor fails to make all material disclosures to the borrower as required.<sup>796</sup> Exercise of the right results in discharge of the consumer's liability for any finance and other charges paid by the consumer, as well as

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it."); *Bird Lakes Dev. Corp. v. Raskin*, 596 So. 2d 133, 134-35 (Fla. 3d Dist. Ct. App. 1992) (holding that a trial court decision may be upheld for any reason appearing in the record)).

793. 670 So. 2d 986 (Fla. 4th Dist. Ct. App.), *review granted*, 678 So. 2d 337 (Fla. 1996).

794. *Id.* at 988 (citation omitted).

795. *Id.* at 990. After criticizing the Colorado Supreme Court decision of *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796 (Colo. 1984), the court observed that "[w]hether one may agree with *Dawe* or not, the ultimate question is whether as a matter of Florida law, the defensive assertion of rescission should be allowed." *Beach*, 670 So. 2d at 991. In asserting the right of statutory rescission, the appellants relied upon the Supreme Court of Florida decision of *Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987). *Id.* at 991.

The court distinguished *Allie* as a case which "addressed a claim barred by a statute of limitations, which bars not the right, but the remedy." *Id.* In distinguishing *Allie*, the court also noted that in *Rybovich Boat Works, Inc. v. Atkins*, 585 So. 2d 270 (Fla. 1991), the Supreme Court of Florida later explained that *Allie* "'rested primarily on consideration of public policy and fairness as well as an analysis of the purpose of the statute of limitations.'" *Beach*, 670 So. 2d at 991 (quoting *Rybovich Boat Works*, 585 So. 2d at 270). The court then explained that, in *Allie*, the Supreme Court of Florida refused to permit assertion of a claim for specific performance after the expiration of the statute of limitations due to the adverse consequences on the free alienability of title. *Id.* The court was persuaded into similar reasoning by Great Western's argument that the same reasoning should apply in the present case. Great Western relied on a January 1972 report submitted to Congress by the Board of Governors of the Federal Reserve System in which the "Board recommended that a limitation on the right to rescind be established because the title to residential real properties may be clouded by the uncertainty regarding the right of rescission." *Id.*

796. *Id.* at 988.

discharge of any security interest taken by the creditor in conjunction with the extension of credit, leaving the creditor with only an unsecured claim on the principal amount.<sup>797</sup> The TILA also allows for money damages for violations with a one year statute of limitations.<sup>798</sup> However, the statute specifically provides that, as a defense of recoupment or set-off to an action for collection of the debt by the creditor, the consumer may assert the damages to which the consumer would be entitled to under the Act for any violations.<sup>799</sup>

In dissent, Judge Pariente noted that the 1995 amendment to 15 U.S.C. § 1635(i)(3) applied to all consumer credit transactions in existence and provided “[n]othing in this subsection affects a consumer’s right of rescission in recoupment under State law,”<sup>800</sup> and that the majority’s interpretation ran contrary to Congress’ intent.<sup>801</sup> Judge Pariente noted that 15 U.S.C. § 1635(f) was not part of the original statute, “but rather has been described as part of a series of technical amendments designed to improve the administration of TILA. In fact, the original version of [15 U.S.C.] § 1635, which created the statutory remedy of rescission, had no time limitations.”<sup>802</sup>

Finally, the appellate court certified the following question to the Supreme Court of Florida as being of great importance:

UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635 BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?<sup>803</sup>

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797. *Id.* at 999 (citing 15 U.S.C.A. § 1635(b); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir. 1988), *aff’d in part*, 898 F. 2d 907 (3d Cir. 1990)).

798. *Beach*, 670 So. 2d at 989 (citation omitted).

799. *Id.* (citing 15 U.S.C.A. § 1640(e) (West 1982)). In its reasoning, the court relied on *Bowery v. Babbit*, 128 So. 801 (Fla. 1930), for the following general rule of statutory interpretation:

[W]here a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided.

*Beach*, 670 So. 2d at 991.

800. *Id.* at 994 (Pariente, J., dissenting) (quoting Pub. L. No. 104-29 §§ 5, 8, 109 Stat. 1517 (1995) (codified at 15 U.S.C. § 1635(f))).

801. *Id.*

802. *Id.*

803. *Id.*

*Home Savings of America, F.S.B. v. Goldstein*.<sup>804</sup> The trial court granted summary judgment on the ground that there had been violations of the Federal Truth in Lending Act ("TILA").<sup>805</sup> Five specific grounds were alleged by the appellees/borrowers, but "the trial court affirmatively refused to specify what violations it found in the documents."<sup>806</sup> The appellate court stated that its review was hampered by the trial court's failure in this regard.<sup>807</sup> The court further noted that one of the alleged violations was the exclusion of the Florida intangible tax finance charge.<sup>808</sup> Since the entry of the summary judgment in this case, the Fourth District Court of Appeal decided, in *Pignato v. Great Western Bank*,<sup>809</sup> that the charge was excludable under the TILA. The trial court appeared to have relied on *Rodash v. AIB Mortgage Co.*,<sup>810</sup> which the Fourth District Court of Appeal departed from in deciding *Pignato*.<sup>811</sup> The court also found that material issues of fact and law remained on the other violations.<sup>812</sup> Thus, the court reversed and remanded.<sup>813</sup>

### XXX. USURY

*Donofro v. Dick*.<sup>814</sup> The first district affirmed the trial court's finding of a lack of "corrupt intent to knowingly and willfully charge and receive an unlawful rate of interest" because the record contained competent and substantial evidence supporting the finding.<sup>815</sup> The court reversed the attorneys' fee award of \$5,576 because the award exceeded that specified in the note.<sup>816</sup> The note called for an award of ten percent of the principal due under the note or \$750, whichever was greater. Under that provision, \$2,200 was due on the \$22,000 outstanding. The court noted that under section 687.06 of the *Florida Statutes*,<sup>817</sup> where the parties have provided for fees in a written

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804. 672 So. 2d 883 (Fla. 4th Dist. Ct. App. 1996).

805. *Id.* at 883.

806. *Id.* at 884.

807. *Id.*

808. *Id.*

809. 664 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1995).

810. 16 F.3d 1142 (11th Cir. 1994).

811. *Home Savings*, 672 So. 2d at 884.

812. *Id.* (citing *Moore v. Morris*, 475 So. 2d 666, 668-69 (Fla. 1985)).

813. *Id.*

814. 21 Fla. L. Weekly D1339 (1st Dist. Ct. App. June 4, 1996).

815. *Id.* (quoting *Sumner v. Investment Mortgage Co. of Fla.*, 332 So. 2d 103, 105 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 344 So. 2d 327 (Fla. 1977)).

816. *Id.*

817. FLA. STAT. § 687.06 (1993).

instrument, and the fee does not exceed ten percent of the principal, the fee is deemed reasonable and, absent a showing that the fee raises equitable questions, such as unconscionability, the parties have contracted away their opportunity to have judicial inquiry into whether a greater or lesser fee should be awarded.<sup>818</sup>

*Jersey Palm-Gross, Inc. v. Paper.*<sup>819</sup> The Supreme Court of Florida affirmed the Fourth District Court of Appeal's decision in *Jersey Palm-Gross, Inc. v. Paper*,<sup>820</sup> in which the fourth district certified conflict with the Fifth District Court of Appeal's opinion in *Forest Creek Development Co. v. Liberty Savings & Loan Ass'n.*<sup>821</sup> The supreme court disapproved of *Forest Creek* insofar as it was inconsistent with the opinion in the present case.<sup>822</sup> The Fourth District Court of Appeal posed the following question, which the Supreme Court of Florida answered in the negative:

[W]hether the existence of a contractual disclaimer of intent to violate the usury laws commonly known as a 'usury savings clause' in the loan documents in this case removes the determination of usurious intent from a factual inquiry and conclusively proves as a matter of law that the lender could not have 'willfully' or knowingly charged or accepted an excessive interest rate.<sup>823</sup>

Justice Anstead, who authored the court's opinion,<sup>824</sup> announced the court's core holding on the effect of these clauses, stating, "[W]e conclude that a usury savings clause cannot, by itself, absolutely insulate a lender from a

818. *Id.* (citing *Dean v. Coyne*, 455 So. 2d 576, 576 (Fla. 4th Dist. Ct. App. 1984); *A&E Int'l Enters., Inc. v. Gold Credit Co.*, 450 So. 2d 1166, 1166 (Fla. 3d Dist. Ct. App.), *review denied*, 461 So. 2d 113 (Fla. 1984); *Sepler v. Emanuel*, 388 So. 2d 28, 29 (Fla. 3d Dist. Ct. App. 1980)).

819. 658 So. 2d 531 (Fla. 1995).

820. 639 So. 2d 664 (Fla. 4th Dist. Ct. App. 1994), *review granted*, 651 So. 2d 1194 (Fla.), *decision approved*, 658 So. 2d 531 (Fla. 1995). See *Brown et. al.*, *supra* note 423, at 358 (discussing the opinion rendered in this case).

821. 531 So. 2d 356 (Fla. 5th Dist. Ct. App. 1988), *review denied*, 541 So. 2d 1172 (Fla. 1989).

822. *Jersey Palm-Gross*, 658 So. 2d at 532.

823. *Id.* at 533.

824. Concurring in Anstead's opinion were Chief Justice Grimes, and Justices Shaw, Kogan, Harding, and Wells. Justice Overton also joined Anstead's opinion and wrote a concurrence in which Justice Wells joined. Justice Overton wrote "to emphasize that a savings clause is still a valid factor—but not the exclusive factor—in determining the intent of the lender at the time of making the loan," and ended by noting that the borrower still has the burden of proof on the issue of usurious intent. *Id.* at 537.

finding of usury."<sup>825</sup> Rather, such clauses are but one factor properly considered in the determination of the lender's intent.<sup>826</sup> The court also felt that its rule struck the proper balance between the legislature's policy and "the need to preserve otherwise good faith, albeit complex, transactions which may inadvertently exact an unlawful rate of interest."<sup>827</sup> Such clauses have a legitimate purpose and, thus, should be enforced under appropriate circumstances, such as where the actual rate charged is close to the legal rate, and "the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency."<sup>828</sup> This statement raises interesting analytical questions since "it is generally agreed that money, which is not absolutely payable, is not interest for usury purposes."<sup>829</sup>

*Levine v. United Companies Life Insurance Co.*<sup>830</sup> The Supreme Court of Florida reviewed the Third District Court of Appeal's decision in this case,<sup>831</sup> and it rejected that court's view in so far as it conflicts with the court's opinion in *Jersey Palm-Gross v. Paper*,<sup>832</sup> holding that a usury savings clause is not conclusive evidence of lack of usurious intent, but is merely relevant evidence to be considered on the issue of intent.<sup>833</sup>

### XXXI. CONCLUSION

The foregoing survey of cases and legislation presents selected materials of significance to real estate professionals. Although there seems to be no consistent pattern to the case law and legislative development, the survey is useful in maintaining contact with the progression of real property law.

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825. *Id.* at 535.

826. *Id.*

827. *Jersey Palm-Gross*, 658 So. 2d at 535.

828. *Id.* (quoting and approving of Judge Pariente's statement in the fourth district's opinion in the present case, *Jersey Palm-Gross*, 639 So. 2d at 671).

829. Brown et. al., *supra* note 423, at 360.

830. 659 So. 2d 265 (Fla. 1995).

831. *Levine v. United Companies Life Ins., Co.*, 638 So. 2d 183 (Fla. 3d Dist. Ct. App. 1994), *decision approved*, 659 So. 2d 265 (Fla. 1995).

832. 658 So. 2d 531 (Fla. 1995).

833. *Levine*, 659 So. 2d at 267.

