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Property Law: 2001 Survey of Florida Law

Ronald Benton Brown*
Joseph M. Grohman**

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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, 2000 through June 30, 2001 especially selected for this article as being of potential interest to the real estate practitioner. The legislative changes affect numerous provisions. So, the legislation comments included in this review are purely for informational purposes. We do not intend this to be all inclusive. Reading the complete amendments is highly recommended.

II. AGENCY

*Lensa Corp. v. Poinciana Gardens Ass'n.*¹ The issue in this case is whether apparent authority can be established when the president of a non-profit corporation negotiates and executes the sale of property.²

In this case, the president of an association negotiated and executed sales documents.³ The purchaser relied on the president's alleged apparent authority and failed to comply with statutory requirements which require a corporate resolution.⁴

The appellate court held that the sale of all or substantially all of a non-profit corporation's assets is strictly controlled by section 617.1202 of the *Florida Statutes* providing that a vote by the members must take place authorizing the transaction.⁵ Therefore, the purchaser was wrong in relying on the president's position because of this statute. Also, it appears the corporate principal never made a representation that the president was its agent for this sale.⁶ Therefore, the appellate court affirmed the lower court's decision disallowing the sale.⁷

III. ARBITRATION

*Zager Plumbing, Inc. v. JPI National Construction, Inc.*⁸ The issue here is whether the trial court erred in finding that a contractor did not waive

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1. 765 So. 2d 296 (Fla. 4th Dist. Ct. App. 2000).
 2. *Id.* at 297.
 3. *Id.*
 4. *Id.*
 5. *Id.* at 297-98.
 6. *Lensa*, 765 So. 2d at 298.
 7. *Id.*
 8. 785 So. 2d 660 (Fla. 3d Dist. Ct. App. 2001).

its right to arbitration when it filed an action to shorten the time in which a construction lien could be foreclosed prior to making a demand for arbitration.⁹

JPI National Construction (“JPI”), a general contractor, entered into a subcontract with Zager Plumbing, which contained an arbitration clause.¹⁰ When it was not paid timely, Zager filed a construction lien against the owner’s property, and JPI filed a complaint under section 713.21(4) of the *Florida Statutes*.¹¹ Under this statute, the lienor has twenty days to show cause why its lien should not be enforced by action or vacated and canceled of record.¹² Failure to respond timely results in an order canceling the lien.¹³ Attached to the complaint was JPI’s demand for arbitration, which was submitted to the American Arbitration Association simultaneously with the filing of the complaint.¹⁴ Zager filed a motion to dismiss contending that JPI waived its right to arbitration by filing suit under section 713.21.¹⁵ The trial court denied the motion, and Zager appealed.¹⁶

The appellate court agreed with the trial court that there was no waiver of the right to arbitration.¹⁷ Public policy is not only in favor of the prompt clearance of construction liens from real property, it also strongly favors arbitration.¹⁸ “All questions concerning the scope or waiver of the right to arbitrate under contracts should be resolved in favor of arbitration rather than against it.”¹⁹

In this case, JPI acted reasonably when it invoked expedited procedure for clearing liens from real property, while at the same time seeking to resolve the parties’ dispute through arbitration.²⁰ Zager was not prejudiced by the trial court’s decision to allow the procedure.²¹

9. *Id.* at 661.

10. *Id.*

11. *Id.*

12. *Id.* (quoting FLA. STAT. § 713.21(4) (1999)).

13. *Zager Plumbing, Inc.*, 785 So. 2d at 661 (quoting FLA. STAT. § 713.21(4) (1999)).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 661–62.

18. *Zager Plumbing, Inc.*, 785 So. 2d at 662.

19. *Id.* (quoting *Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So. 2d 969, 971 (Fla. 5th Dist. Ct. App. 1995)).

20. *Id.* at 662.

21. *Id.*

IV. ATTORNEY'S FEES

*Amerada Hess Corp. v. Department of Transportation.*²² The Department took a temporary construction easement to facilitate bridge repairs.²³ It made an offer of \$112,300 to compensate the landowner.²⁴ The landowner's reaction to the offer was to hire a lawyer.²⁵ Eventually, the landowner agreed to accept \$142,000 as compensation and filed a motion for attorney's fees.²⁶ By statute, attorney's fees in eminent domain cases are based on the benefits the lawyer achieved for the client.²⁷ Monetary benefits are defined as the difference between the compensation the client receives and the last written offer received from the condemning authority.²⁸ The trial court awarded attorney's fees as thirty-three percent of the difference between \$142,000 and \$112,300.²⁹ The landowner's attorney claimed that was inadequate and appealed.³⁰

The appeal was based on two claims. First, the landowner claimed that its attorney had achieved nonmonetary benefits by making the Department change its plans.³¹ However, the district court found that the trial court's decision was supported by competent substantial evidence on the record.³² A trial court's award of attorney's fees should be disturbed only if the trial court clearly abused its discretion.³³ Consequently, that claim was rejected.³⁴

The second claim was more interesting. The landowner had filed a motion to strike the Department's offer of \$112,300.³⁵ Without that offer, the attorney's fees would be based on achieving the benefit of \$142,000, so the award would be significantly higher.³⁶ The basis for the motion was that the Department had subsequently made substantial changes to its plans, so

22. 788 So. 2d 276 (Fla. 4th Dist. Ct. App. 2000).

23. *Id.* at 277.

24. *Id.*

25. *Id.*

26. *Id.*

27. FLA. STAT. § 73.092(1) (1999).

28. § 73.092(1)(a).

29. *Amerada Hess Corp.*, 788 So. 2d at 277.

30. *Id.*

31. *Id.*

32. *Id.* at 278.

33. *Id.* at 277.

34. *Amerada Hess Corp.*, 788 So. 2d at 278.

35. *Id.* at 277.

36. *Id.*

the original offer involved a different taking and could not, logically, be used to measure the benefits achieved here.³⁷ The district court rejected that argument.³⁸ The landowner's attorney claimed the benefit it had achieved was "a substantial reduction in [Landowner's] costs to cure, a lesser impact upon [Landowner's] property, and an entitlement to greater compensation."³⁹ Thus, the benefit achieved had already been used in calculating the attorney's fees, and it would be getting a windfall to increase those fees even more.⁴⁰

Dow v. McKinley.⁴¹ Landowners hired a contractor to build their single-family house.⁴² A dispute arose and the landowners refused to honor the contractor's final invoice.⁴³ The contractor filed this suit for damages based on, inter alia, breach of contract and to foreclose its mechanic's lien.⁴⁴ The landowners raised four affirmative defenses and three counterclaims based substantially on allegations of faulty workmanship.⁴⁵ The trial court granted judgment in favor of the contractor, but also granted judgment for the landowners on their counterclaim.⁴⁶ The court also entered an order for attorney's fees under the construction lien statute.⁴⁷

The net award to the contractor was \$16,026.98, but the court awarded attorney's fees of \$62,125 based on 355 hours at \$175 per hour.⁴⁸ The court of appeal decided that this was erroneous.⁴⁹ The critical factor was that the contractor had won less than thirty percent of his original claim of \$56,086.87.⁵⁰ Consequently, the trial court should have considered whether the attorney's fee should be reduced based on the level of success, a low level in this case, achieved by the attorney.⁵¹ The district court also found several items for which costs should not have been awarded including an

37. *Id.*

38. *Id.*

39. *Amerada Hess Corp.*, 788 So. 2d at 277.

40. *Id.* at 278.

41. 776 So. 2d 1017 (Fla. 5th Dist. Ct. App. 2001).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1018.

46. *Dow*, 776 So. 2d at 1018.

47. *Id.* (citing FLA. STAT. § 713.29 (1997)).

48. *Id.* at 1018.

49. *Id.*

50. *Id.*

51. *Dow*, 776 So. 2d at 1018.

appraisal report, which was not submitted into evidence, and trial transcripts, whose use and purpose was not established.⁵²

*Hartleb v. Department of Transportation.*⁵³ Plaintiff in an eminent domain case prevailed and was awarded attorneys' fees.⁵⁴ The Department of Transportation deposited the money into the registry of the court.⁵⁵ Unsatisfied with the terms of his win, plaintiff filed a motion for a rehearing.⁵⁶ When that failed, plaintiff appealed.⁵⁷ Because a statute provided any withdrawal of the funds would result in the appeal being dismissed,⁵⁸ plaintiff left the money in the court registry for the three years it took to complete the appeal process.⁵⁹ Ultimately, the appeal was unsuccessful.⁶⁰ Then, plaintiff withdrew the money from the court registry and moved for an award of interest for the three-year period from entry of judgment to the withdrawal.⁶¹ Reversing the trial court, the district court concluded he was entitled to it.⁶² The Florida Constitution mandates full compensation for land taken.⁶³ That mandate would be violated if a plaintiff is denied interest on land held in the court's registry pending appeal, even if that appeal is unsuccessful.⁶⁴

*Sayre v. JMC Painting, Inc.*⁶⁵ Plaintiff filed her action against the landowner and the general contractor in county court.⁶⁶ The action was based on the claim that a contract had been breached.⁶⁷ Among the counts were claims for a mechanic's lien and the transfer bond surety.⁶⁸ There were also claims against the payment bond.⁶⁹ However, the county court did not have subject matter jurisdiction over a claim against a surety bond,⁷⁰ so these

52. *Id.* at 1018–19.

53. 778 So. 2d 1063 (Fla. 4th Dist. Ct. App. 2001).

54. *Id.* at 1064.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Hartleb*, 778 So. 2d at 1064 (citing FLA. STAT. § 73.131(1) (2000)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. FLA. CONST. art. X, § 6.

64. *Hartleb v. Dep't of Transp.*, 778 So. 2d 1063, 1064 (Fla. 4th Dist. Ct. App. 2001).

65. 778 So. 2d 430 (Fla. 4th Dist. Ct. App. 2001).

66. *Id.* at 431.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Sayre*, 778 So. 2d at 431.

claims were dismissed.⁷¹ The county court then granted attorney's fees to the two sureties.⁷² Unfortunately, the county court failed to specify its basis for granting attorney's fees.⁷³ If attorney's fees were granted under the Mechanic's Lien Act,⁷⁴ then the attorney's fees award was improper. Lacking subject matter jurisdiction over the claim, the court also lacked jurisdiction to award attorney's fees based on that claim.⁷⁵ Therefore, the case was remanded to the trial court to determine the basis of its decision to grant attorney's fees.⁷⁶

*Department of Transportation v. Patel.*⁷⁷ The Department brought a condemnation action to take part of the landowner's land.⁷⁸ At the close of the evidence, the Department moved for a whole taking of the land, rather than a partial taking, if that turned out to be less expensive, as was then allowed by section 337.27(2) of the *Florida Statutes*.⁷⁹ The landowner opposed the motion.⁸⁰ The court denied the motion, but ordered an interrogatory verdict be distributed to the jury.⁸¹ The court made a compensation award and then proceeded to consider attorney's fees.⁸²

One component of the attorney's fees awarded was for nonmonetary benefits achieved for the landowner,⁸³ including the value of the land that the Department failed to take when the motion for a whole taking was defeated.⁸⁴ In addition, the nonmonetary benefits included the income from that land.⁸⁵ However, the district court rejected this characterization.⁸⁶ Rather, attorney's fees for defeating that motion should be calculated as if a condemnation had been defeated under the other part of the statute.⁸⁷ That constituted reversible error.⁸⁸ However, the Department conceded that

71. *Id.*

72. *Id.*

73. *Id.* at 432.

74. FLA. STAT. § 713.29 (1999).

75. *Sayre*, 778 So. 2d at 431.

76. *Id.* at 432.

77. 768 So. 2d 1173 (Fla. 2d Dist. Ct. App. 2000).

78. *Id.* at 1174.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Patel*, 768 So. 2d at 1174.

83. FLA. STAT. § 73.092(1)(b) (1997).

84. *Patel*, 768 So. 2d at 1174.

85. *Id.*

86. *Id.* at 1175.

87. *Id.* (citing FLA. STAT. § 73.092(2)).

88. *Id.*

where the attorney's efforts had extended the period that the landowner remained in possession of the premises, there was a benefit achieved for which attorney's fees could be recovered.⁸⁹ The trial court also committed reversible error by awarding expert witness fees when the testimony's sole use was as a basis for claiming attorney's fees.⁹⁰ Since the condemnee has no interest in the attorney's fees obtained, there is no right to recover attorney's fees and litigation costs.⁹¹

V. BROKERS

*Framer Realty, Inc. v. Ross.*⁹² Out-of-state buyers were looking for an expensive house.⁹³ Framer showed them numerous properties when they visited Florida.⁹⁴ They expressed particular interest in a certain house which they had seen twice, but indicated they first had to complete an out-of-state transaction.⁹⁵ Eventually they did return to Florida to complete the purchase, but they used another broker, Ross, to make the offer and handle the closing.⁹⁶ Ross collected and kept the entire commission.⁹⁷ As a result, Framer sued Ross, who was aware that Framer had shown the house to the buyers, for unjust enrichment.⁹⁸ The trial court granted Ross's motion for summary judgment.⁹⁹

The Third District Court of Appeal reversed.¹⁰⁰ To recover, Framer would have to show that he had an implied contract or that he was the procuring cause of the sale.¹⁰¹ "Genuine issues of material fact remain for a determination by the trier of fact as to whether Framer was a procuring cause of the sale . . ."¹⁰² Framer might have been entitled to a broker's commission because he brought the buyers to see the property.¹⁰³ The

89. *Patel*, 768 So. 2d at 1175.

90. *Id.*

91. *Id.*

92. 768 So. 2d 5 (Fla. 3d Dist. Ct. App. 2000).

93. *Id.* at 6.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Ross*, 768 So. 2d at 6.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Ross*, 768 So. 2d at 6.

103. *Id.*

evidence might lead to the conclusion that he was intentionally excluded by the buyer and seller from the negotiations that led to the sale.¹⁰⁴ Also, "it could be reasonably inferred that Ross accepted the benefit of Framer's efforts" to sell the house.¹⁰⁵ Consequently, summary judgment was inappropriate and the case was remanded for further proceedings.¹⁰⁶

*Media Services Group, Inc. v. Bay Cities Communications, Inc.*¹⁰⁷ The plaintiff had a ninety-day exclusive right to sell defendant's radio station.¹⁰⁸ Defendant terminated the agreement when the ninety days ran out.¹⁰⁹ However, plaintiff continued to try to find a buyer for the station.¹¹⁰ It was on a list of stations that were available that plaintiff sent to Root Communications.¹¹¹ Plaintiff also arranged for personnel from Root to tour the station and meet with a major shareholder of defendant.¹¹² Plaintiff also included the station in a offering sent to Root.¹¹³ Defendant knew about these efforts and cooperated.¹¹⁴

Plaintiff directed its sales appeals to other prospective buyers.¹¹⁵ Those efforts produced Hochman Communications which signed a "letter agreement"¹¹⁶ with defendant.¹¹⁷ Hochman had difficulty getting the necessary financing, but plaintiff did not give up.¹¹⁸ It worked to make the deal happen.¹¹⁹ Before that could occur, defendant started negotiating with another buyer.¹²⁰ Plaintiff finally discovered that buyer was Root; so it notified defendant that it had produced Root and wanted to be involved in the negotiations.¹²¹ Plaintiff was not allowed to participate.¹²² The station

104. *Id.*

105. *Id.*

106. *Ross*, 768 So. 2d at 7.

107. 237 F.3d 1326 (11th Cir. 2001).

108. *Id.* at 1328.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Media Servs. Group, Inc.*, 237 F.3d at 1328.

113. *Id.*

114. *Id.* at 1328 n.1.

115. *Id.* at 1328.

116. *Id.*

117. *Media Servs. Group Inc.*, 237 F.3d at 1328.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Media Servs. Group, Inc.*, 237 F.3d at 1328.

was sold to Root, and defendant refused to pay plaintiff a commission for the sale.¹²³

Plaintiff sued in federal district court.¹²⁴ Its complaint for compensation had three counts: breach of an oral contract, unjust enrichment, and quantum meruit.¹²⁵ The oral contract and quantum meruit claims were tried by a jury which returned a verdict for defendant.¹²⁶ The unjust enrichment claim, being equitable in nature, was tried by the court without a jury.¹²⁷ The district judge held defendant liable based on unjust enrichment.¹²⁸ Defendant appealed.¹²⁹

Defendant claimed that under Florida law, a broker could not recover for unjust enrichment.¹³⁰ That argument was rejected.¹³¹ Florida case law showed that a broker could recover for unjust enrichment based on "either the existence of an implied contract to pay him for [his] services in finding and negotiating with the ultimate purchasers or that he was the procuring factor in the sale."¹³² The problem for plaintiff was that it had not negotiated with the ultimate purchasers and the district court had expressly stated in its final order that plaintiff was not the procuring cause of this sale.¹³³ The court of appeal noted that in order to be considered the procuring cause of the sale, "the broker must have brought the [parties] together and effected the sale as a result of continuous negotiations inaugurated by him unless the seller and buyer intentionally exclude the broker and thereby vitiate the need for continuous negotiations."¹³⁴ The facts in the record demonstrated that this broker brought the parties together.¹³⁵ The facts in the record also demonstrated that the buyer and seller intentionally excluded the broker from the negotiations.¹³⁶ There was no need to show that the buyer and

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* Plaintiff did not appeal. *Id.* at 1328–29 n.4.

127. *Media Servs. Group, Inc.*, 237 F.3d at 1328 n.4.

128. *Id.* at 1328.

129. *Id.* at 1327.

130. *Id.* at 1329.

131. *Id.*

132. *Media Servs. Group, Inc.*, 237 F.3d at 1329 (citations omitted).

133. *Id.*

134. *Id.* (quoting *Sheldon Greene & Assoc., Inc. v. Rosinda Inv., N.V.*, 475 So. 2d 925, 927 (Fla. 3d Dist. Ct. App. 1985); *rev. dismissed*, *Horn v. Sheldon Greene & Assoc., Inc.*, 502 So. 2d 421 (Fla. 1987)).

135. *Id.* at 1330.

136. *Id.*

seller had acted in bad faith.¹³⁷ The record also showed that the property had been sold.¹³⁸ Consequently, the district court must have meant that plaintiff was not the procuring cause in this case only because the buyer and seller had prevented it from bringing the sale to closure.¹³⁹ Thus, the court's finding of facts was consistent with defendant's being held liable.¹⁴⁰ Since that was the only possible explanation, a remand for further proceedings was unnecessary.¹⁴¹ The court of appeal could not disturb the findings of the federal district court because they were not clearly erroneous.¹⁴²

*Newbern v. Mansbach.*¹⁴³ Buyers sued the real estate broker and the insurance agent for fraudulent and negligent misrepresentation.¹⁴⁴ Buyer alleged that they would not have purchased the land if they had known that it was located in a Coastal Barrier Resource Area (CBRA) or that they could not get federal flood insurance.¹⁴⁵ The broker conceded that she represented that the land was not located in the CBRA even though she had information that it was.¹⁴⁶ Because it was located in the CBRA, federal flood insurance could not be obtained.¹⁴⁷ The insurance agent knew this before the real estate closing, but failed to reveal it, despite having represented to the buyers that the insurance had been obtained.¹⁴⁸

The trial court granted summary judgment for both defendants.¹⁴⁹ Its theory was that whether the land was located in the CBRA was a matter that could be determined from the public records by reasonable efforts.¹⁵⁰ Consequently, recovery for misrepresentation was precluded as a matter of law.¹⁵¹ The First District Court of Appeal rejected that analysis.¹⁵²

137. *Media Servs. Group, Inc.*, 237 F.3d at 1329.

138. *Id.* at 1330.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Media Servs. Group, Inc.*, 237 F.3d at 1330.

143. 777 So. 2d 1044 (Fla. 1st Dist. Ct. App. 2001).

144. *Id.* at 1045.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Newbern*, 777 So. 2d at 1045.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

The elements for recovery based on negligent misrepresentation are borrowed from section 552 of the *Restatement (Second) of Torts*.¹⁵³ It provides that a person may be held liable for a negligent misrepresentation if

in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss . . . if he fails to exercise reasonable care or competence in obtaining or communicating the information.¹⁵⁴

However, he will only be liable for harm that resulted from justifiable reliance on the misrepresentation.¹⁵⁵ “[J]ustifiable reliance is an issue of comparative negligence that should be resolved by a jury.”¹⁵⁶ Therefore, the trial court should have allowed the jury to determine if the buyers justifiably relied upon the misrepresentations or had been negligent in not discovering these facts from the public records.

The claim of fraudulent misrepresentation raised a slightly different issue. The recipient of a fraudulent misrepresentation may rely on it, “even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.”¹⁵⁷ That presents questions of disputed fact that could not be properly disposed of by summary judgment based on the information being available in the public records.¹⁵⁸ The CBRA regulations and documents are complicated and so the falsity of the misrepresentations was not obvious.¹⁵⁹

Scott v. Simpson.¹⁶⁰ A real estate salesman signed a contract to sell units at a condominium project.¹⁶¹ The contract provided that he would receive a 1.5% commission on each sale but it was to be payable half when the statutory right to rescission expired and the other half when the sale was completed.¹⁶² The contract also provided that the salesman would forfeit any

153. *Newbern*, 777 So. 2d at 1045.

154. RESTATEMENT (SECOND) OF TORTS § 552(1).

155. *Id.* § 552(2).

156. *Newbern*, 777 So. 2d at 1046 (citing *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 339 (Fla. 1997)).

157. *Id.* (quoting from *Besett v. Basnett*, 389 So. 2d 995, 998 (Fla. 1980)).

158. *Id.* at 1047.

159. *Id.* at 1046.

160. 774 So. 2d 881 (Fla. 4th Dist. Ct. App. 2001).

161. *Id.* at 882.

162. *Id.*

pending commissions if the contract was terminated.¹⁶³ Eighteen units were under contract when the salesman received notice alleging certain shortcomings in his performance, and therefore, termination of the contract.¹⁶⁴

The salesman sued for the unpaid commissions on the eighteen units and won in the trial court, but the Fourth District Court of Appeal reversed.¹⁶⁵ "Interpretation of a written contract is a matter of law,"¹⁶⁶ so the appellate court engaged in a de novo review.¹⁶⁷ It found that the contract clearly and unambiguously provided that unpaid commissions would be forfeited upon termination of the contract.¹⁶⁸ "Agreements entitling sales persons to commissions only after the sales have actually closed are standard in this business, and have been upheld by this and other courts."¹⁶⁹ Consequently, the salesman was not entitled to these commissions under the contract.¹⁷⁰ Moreover, since the parties had a valid express contract covering these sales, the salesman could not recover on the theory of quantum meruit.¹⁷¹

It is worth noting that there is no mention of any claim that the termination was unjustified or in any way wrongful. Nor was there any mention of a claim that disparate bargaining power was exerted to get the salesman to agree to these terms. If such factors had appeared, they might have changed the outcome of the case.

*Southampton Development Corp. v. Palmer Realty Group, Inc.*¹⁷² The broker negotiated a fee arrangement with the seller that provided "if my [b]uyer goes to contract with you, the following commission schedule will apply . . ."¹⁷³ The buyer and seller had not signed a contract when seller filed for bankruptcy reorganization.¹⁷⁴ Later, with the approval of the bankruptcy court, seller did reach an agreement with buyer.¹⁷⁵ After the closing, the broker filed a claim for a commission with the bankruptcy

163. *Id.* at 882.

164. *Id.*

165. *Scott*, 774 So. 2d at 883.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Scott*, 774 So. 2d at 884.

171. *Id.*

172. 769 So. 2d 1113 (Fla. 2d Dist. Ct. App. 2000).

173. *Id.* at 1114.

174. *Id.*

175. *Id.* at 1115.

court.¹⁷⁶ That claim was dismissed without prejudice, allowing the broker to file suit in state court.¹⁷⁷ The broker first had to prove it did not have adequate notice of the bankruptcy to succeed in state court.¹⁷⁸ The broker was able to surmount that hurdle, but winning on the merits was a different story.¹⁷⁹

The district court concluded that the broker never had a contract with the seller.¹⁸⁰ Careful scrutiny revealed that the fee arrangement between the broker and seller was merely an offer to enter into a unilateral brokerage contract.¹⁸¹ The offer would be accepted by performance, i.e., the buyer and seller signing a sales contract.¹⁸² That had not occurred before the bankruptcy was filed.¹⁸³ Afterwards, the seller was operating as a debtor in possession.¹⁸⁴ The debtor in possession was considered a different person from the debtor, i.e., the seller, who had made the offer of the unilateral brokerage contract.¹⁸⁵ Consequently, neither the debtor in possession signing the sales contract nor closing on the contract could be considered an acceptance of that offer to enter into the contract to pay a commission.¹⁸⁶ It is worth noting that there is no mention of a claim for quantum meruit. Such a claim might have succeeded, but it would also present interesting theoretical problems.

VI. CONDOMINIUMS

*Cooley v. Pheasant Run at Rosemont Condominium Ass'n.*¹⁸⁷ The issue here was whether a condominium unit owner could be joined as a party to a suit against the condominium association for an injury that occurred on the common elements of the condominium.¹⁸⁸ Appellant brought an action against appellees for an injury sustained while on the appellees property in

176. *Id.*

177. *Southampton Dev. Corp.*, 769 So. 2d at 1115.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Southampton Dev. Corp.*, 769 So. 2d at 1115.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. 781 So. 2d 1182 (Fla. 5th Dist. Ct. App. 2001).

188. *Id.* at 1183.

which he joined individual unit owners as defendants in the suit.¹⁸⁹ Appellant alleged that he was injured while an invited guest upon the common elements of the condominium grounds.¹⁹⁰ The circuit court dismissed the individual unit owners from the suit, holding that Florida law did not support such an action against unit owners, but could only be maintained against the association.¹⁹¹ Plaintiff appealed.¹⁹²

The appellate court held that under section 718.119(2) of the *Florida Statutes*, the only liability of individual unit owners was for those additional assessments by the condominium association in relation to the use of the common elements.¹⁹³ Therefore, the court held that the trial court properly dismissed the individual unit owners from plaintiff's personal injury suit.¹⁹⁴

VII. CONSTRUCTION

*Gainesville-Alachua County Regional Airport Authority v. R. Hyden Construction, Inc.*¹⁹⁵ The construction contract had a change order provision.¹⁹⁶ In the event there were alterations in the work, those alterations, and an adjustment in the price, were to be agreed upon by the parties.¹⁹⁷ The parties executed one such change order which included a price increase.¹⁹⁸ Subsequently, the contractor submitted another change order for another price increase based upon costs associated with the earlier change order.¹⁹⁹ The Airport Authority rejected the second change order and refused to pay the higher price.²⁰⁰ The contractor sued for the higher price on the theory of breach of contract.²⁰¹ The Airport Authority's motion for summary judgment was denied and the jury found in favor of the contractor.²⁰² The Fourth District Court of Appeal reversed.²⁰³

189. *Id.*

190. *Id.*

191. *Id.*

192. *Cooley*, 781 So. 2d at 1183.

193. *Id.* at 1184.

194. *Id.* at 1184-85.

195. 766 So. 2d 1238 (Fla. 1st Dist. Ct. App. 2000).

196. *Id.* at 1238-39.

197. *Id.* at 1239.

198. *Id.*

199. *Id.*

200. *R. Hyden Constr., Inc.*, 766 So. 2d at 1239.

201. *Id.*

202. *Id.*

203. *Id.*

The change order, once executed by both parties, became part of the contract.²⁰⁴ Here, the executed change order clearly established the total sum due for the work.²⁰⁵ “[S]ince there was no ambiguity, the interpretation of the parties’ agreement is a question of law to be resolved by the court.”²⁰⁶ Consequently, it was reversible error to submit to the jury the question of whether the contractor was entitled to recover the additional costs generated by the change order.²⁰⁷ To the contrary, summary judgment should have been entered for the Airport Authority.²⁰⁸

*Gables v. Choate.*²⁰⁹ Prior to the completion of a luxury condominium residence, the buyer contracted to purchase it for \$700,000.²¹⁰ One clause provided that the buyer would forfeit his substantial deposit if he failed to close.²¹¹ The contract also contained a date when construction had to be completed and a liquidated damages provision giving the buyer a credit of \$5000 for each month of delay.²¹² Six months after the due date, the construction was still not finished and the developer was in severe financial trouble.²¹³ The parties entered into an improvement contract that gave the developer thirty days to finish the construction.²¹⁴ Any delay would result in the developer having to pay the buyer \$5000 per week.²¹⁵ The buyer finally moved into the unit over a year later, but the unit was far from finished and what had been completed was done badly.²¹⁶ It still had not been finished when the developer walked off the job six months later.²¹⁷ The buyer hired another contractor who put the apartment into proper order for about \$8000.²¹⁸ Buyer sued the developer and, based on the liquidated damages clause, was awarded over \$125,000.²¹⁹

204. *Id.*

205. *R. Hyden Constr., Inc.*, 766 So. 2d at 1239.

206. *Id.*

207. *Id.*

208. *Id.*

209. 792 So. 2d 520 (Fla. 3d Dist. Ct. App. 2001).

210. *Id.* at 521.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Gables*, 792 So. 2d at 521.

215. *Id.*

216. *Id.* at 521–22.

217. *Id.* at 522.

218. *Id.* at 523.

219. *Gables*, 792 So. 2d at 522.

The developer's point on appeal was that the liquidated damages clause was invalid because it was really a penalty.²²⁰ The district court rejected the argument.²²¹ The parties were sophisticated and represented by counsel.²²² Buyer had bargained for a luxury residence and ended up having to live in a construction zone while struggling to complete the construction properly.²²³ Buyer had suffered "prolonged inconvenience, discomfort, invasion of privacy and renegotiation . . ."²²⁴ Calculating damages for that injury would be difficult and the amount was not necessarily disproportionate to the figure agreed upon.²²⁵ On this final point, Senior Judge Nesbitt disagreed in a brief dissent.²²⁶

*The Palms v. Magil Construction Florida, Inc.*²²⁷ The contractor sued a landowner claiming breach of a construction contract.²²⁸ The landowner raised, as a defense, that the contractor did not have a license and was, therefore, barred from recovering.²²⁹ The contractor had applied for a license before entering into the contract, but a license had never been issued.²³⁰ The contractor asserted the right to cure its missing license problem by obtaining a license, relying on a sentence in the statute that stated, "[h]owever, in the event the contractor obtains or reinstates his license, the provisions of this section shall no longer apply."²³¹ The problem facing the court was that the quoted sentence had been subsequently eliminated by the legislature.²³² So the amendment would only apply to this case if it had retroactive effect.²³³ The district court concluded that the amendment "worked a change in the substantive rights of contractors . . . [s]ince [it] is a substantive change in law, the 2000 amendment does not operate retroactively."²³⁴ However, the court avoided interpreting the

220. *Id.*

221. *Id.*

222. *Id.* at 523.

223. *Id.*

224. *Gables*, 792 So. 2d at 523.

225. *Id.*

226. *Id.*

227. 785 So. 2d 597 (Fla. 3d Dist. Ct. App. 2001).

228. *Id.*

229. *Id.* at 597-98.

230. *Id.* at 597.

231. *Id.* (quoting FLA. STAT. § 489.128 (1995)).

232. *See* Ch. 2000-372, § 35, 2000 Fla. Laws 4307, 4338 (codified at FLA. STAT. § 489.128 (2000)).

233. *Palms*, 785 So. 2d at 598.

234. *Id.*

effect of the 2000 amendment.²³⁵ It based its ruling on the assumption that the amendment would bar the contractor from avoiding the statute's effect by getting a license.²³⁶

*Performing Arts Center Authority v. Clark Construction Group, Inc.*²³⁷

When a puddle was found on the floor of the Performing Arts Center in February, 1995, the manager suspected a roof leak and contacted the roofing contractor.²³⁸ An inspection revealed that the leak was in the exterior stucco.²³⁹ Minor cracks were discovered and the stucco subcontractor explained that the cracking was caused by the building settling.²⁴⁰ In June 1995, a consultant advised that the building could not be repainted because the cracks in the exterior stucco were too extensive.²⁴¹ After heavy rains, another consultant concluded that the exterior walls had been improperly designed and built.²⁴² The Performing Arts Center filed suit against the general contractor and the stucco subcontractor on May 14, 1999, less than four years from receiving the report identifying the nature of the defect, but more than four years after the other events.²⁴³ The trial court granted defendants' motion for summary judgment based on the four-year statute of limitations.²⁴⁴

The Fourth District Court of Appeal reversed, holding that it was a question of fact when the plaintiff had notice of the latent defect.²⁴⁵ The court distinguished cases in which there were leaks immediately after a new roof had been installed because they involved a situation in which it was "not only apparent, but obvious, that someone is at fault."²⁴⁶ "However, as in this case, where the manifestation is not obvious but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred."²⁴⁷

235. *Id.*

236. *Id.*

237. 789 So. 2d 392 (Fla. 4th Dist. Ct. App. 2001).

238. *Id.* at 393.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Clark Constr. Group, Inc.*, 789 So. 2d at 394.

243. *Id.*

244. *Id.* See FLA. STAT. § 95.11(3)(c) (2001).

245. *Clark Constr. Group, Inc.*, 789 So. 2d at 394.

246. *Id.* (quoting *Kelly v. Sch. Bd. of Seminole County*, 435 So. 2d 804, 806 (Fla. 1983)).

247. *Id.*

*Shapiro v. Department of Business & Professional Regulation.*²⁴⁸ Mr. and Mrs. Shapiro contracted to buy a new home to be built by Centron.²⁴⁹ Title to the land passed from Centron to the Shapiros little more than a month later.²⁵⁰ After a year, the house still had not been completed, and eventually, Centron abandoned the project leaving the house incomplete.²⁵¹ Mr. and Mrs. Shapiro won a judgment against Centron, but were unable to collect, so they filed a claim on the Construction Industries Recovery Fund administered by the Department of Business and Professional Regulation.²⁵² Their claim was denied on the grounds that they were not the owners of the land when the contract was signed.²⁵³ The governing statute provided: "A person is not qualified to make a claim for recovery from the Construction Industries Recovery Fund if: . . . (c) Such person's claim is based upon a construction contract in which the licensee [builder] was acting with respect to the property owned or controlled by the licensee"²⁵⁴

The Fifth District Court of Appeal applied the purpose approach of statutory interpretation. The legislature passed the statute to protect consumers who are harmed by defaulting contractors.²⁵⁵ To deny a consumer protection merely because the builder owned the land at the time of contracting would undermine the protection that the legislature had provided.²⁵⁶ Such an interpretation was "unreasonable" and, consequently, the decision of the Board was reversed.²⁵⁷

VIII. COVENANTS AND RESTRICTIONS

*Eckerd Corp. v. Corners Group, Inc.*²⁵⁸ The issue here is whether a restriction in a deed prevented the use of a piece of property as a parking lot for the type of business proscribed by the restriction.²⁵⁹

In this case appellant bought land to build a pharmacy.²⁶⁰ When it was unable to purchase enough adjoining property, appellant sold the property

248. 788 So. 2d 1100 (Fla. 5th Dist. Ct. App. 2001).

249. *Id.* at 1101.

250. *Id.*

251. *Id.*

252. *Id.* at 1102.

253. *Shapiro*, 788 So. 2d at 1102.

254. FLA. STAT. § 489.141(2)(c) (2000).

255. *Shapiro*, 788 So. 2d at 1102.

256. *Id.*

257. *Id.*

258. 786 So. 2d 588 (Fla. 5th Dist. Ct. App. 2000).

259. *Id.* at 589.

imposing a restrictive covenant against use of that property as a drugstore.²⁶¹ Appellant then purchased land on the opposite corner and built a pharmacy.²⁶² Appellees purchased the restricted property as well as an adjacent tract of land and submitted a development plan for a competing pharmacy to be built, with its parking lot located on that portion of the land which carried the restrictive covenant entered by appellant.²⁶³ The appellate court found that the purpose of the restrictive covenant was to prevent the restricted parcel from being used as any part of a competing pharmacy.²⁶⁴

The appellate court held that the restricted parcel was a necessary part of the proposed pharmacy.²⁶⁵ Therefore, use of any part of the restricted parcel for parking or ingress or egress violated the restrictive covenant.²⁶⁶

IX. DEEDS

*American General Home Equity, Inc. v. Countrywide Home Loans, Inc.*²⁶⁷ The issue in this case is whether a deed is valid when it only has one signature of an identified witness, the signature of the grantor, and the signature of the notary.²⁶⁸

The appeals court noted section 689.01 of the *Florida Statutes* provides “that an interest in land be conveyed ‘by instrument in writing, signed in the presence of two subscribing witnesses by the party . . . conveying . . . such . . . interest’”²⁶⁹ American argued against summary judgment because there allegedly were questions of material fact supposedly raised by the deed having three signatures and the notary having seen the grantor sign the deed as evidenced by its affidavit in opposition to summary judgment.²⁷⁰ The appeals court found the affidavit insufficient because it failed to state the notary signed in the capacity of a witness.²⁷¹ There is no presumption that

260. *Id.*

261. *Id.*

262. *Id.* at 590.

263. *Eckerd Corp.*, 786 So. 2d at 590.

264. *Id.* at 593.

265. *Id.*

266. *Id.*

267. 769 So. 2d 508 (Fla. 5th Dist. Ct. App. 2000).

268. *Id.* at 509.

269. *Id.*

270. *Id.*

271. *Id.* at 509–10.

when a notary acknowledges an instrument the notary is signing also as a witness.²⁷² The lower court was affirmed.²⁷³

Mattox v. Mattox.²⁷⁴ The issue here is whether decedent delivered a properly executed and recorded deed to the husband.²⁷⁵

In this case the decedent divided a three-acre parcel of land into three one-acre lots by executing a deed to each lot, and by naming as grantee each of her three sons.²⁷⁶ She kept a life estate to herself in each deed and recorded them in 1979.²⁷⁷ In 1996, when decedent's health began to fail, she prepared a deed reconveying appellant husband's lot, appellee's lot, and one-half of the third son's lot to appellee.²⁷⁸ The deed was executed by decedent in the hospital and was recorded by appellee.²⁷⁹ After decedent's death, appellants sued appellee to quiet title, for slander of title, and for unjust enrichment.²⁸⁰ The trial court failed to determine whether the title to appellant husband's lot had vested and appellants filed an appeal.²⁸¹

The court held that the recording of the 1979 deed to appellant husband in the absence of fraud vested the remainder interest in appellant husband, so that, upon decedent's death, he was vested with fee simple title.²⁸² Therefore, the judgment was vacated except as to its denial of appellee's unlawful entry claim.²⁸³

Zurstrassen v. Stonier.²⁸⁴ The issue is whether the trial court erred in entering summary judgment for defendants in plaintiff Zurstrassen's quiet title action where factual issues existed as to whether Zurstrassen should be estopped from asserting that deed was a forgery, whether he waived his right to contest the forged deed, and whether he ratified the forged deed.²⁸⁵

In June 1997, Klaus Zurstrassen, a citizen of Germany, and his brother Rolf, a United States citizen, purchased two lots in Indian River County with

272. *Am. Gen. Home Equity, Inc.*, 769 So. 2d at 509 (citing *Walker v. City of Jacksonville*, 360 So. 2d 52 (Fla. 1st Dist. Ct. App. 1978)).

273. *Id.* at 510.

274. 777 So. 2d 1041 (Fla. 5th Dist. Ct. App. 2001).

275. *Id.* at 1043.

276. *Id.* at 1042.

277. *Id.*

278. *Id.*

279. *Mattox*, 777 So. 2d at 1042.

280. *Id.*

281. *Id.* at 1042-43.

282. *Id.* at 1043.

283. *Id.*

284. 786 So. 2d 65 (Fla. 4th Dist. Ct. App. 2001).

285. *Id.* at 67.

the intent to build on the lots and then sell them.²⁸⁶ On September 10, 1997, Klaus returned to Germany leaving Rolf in charge of commencing construction.²⁸⁷ A deed was recorded fifteen days later, conveying Klaus' interest to Rolf.²⁸⁸ Klaus returned in October, unaware of the deed, and contacted a realtor to list the property in February 1998.²⁸⁹ When the listing agent's preliminary title search indicated that Klaus' name did not appear on the last deed of record, his brother Rolf led him to believe it was just a mix up and that he shouldn't worry about title problems.²⁹⁰ The two brothers entered into a written agreement that stated title was in Rolf's name alone and then outlined the process by which the proceeds of sale would be distributed after closing.²⁹¹ Because his visa was expiring, Klaus had to return to Germany shortly thereafter.²⁹²

In June of 1998, Rolf transferred title to both lots to David Stonier by quit claim deed.²⁹³ Two months later, Stonier transferred title to the Wihlborgs by warranty deed.²⁹⁴ The deed was inadvertently recorded in the wrong county and not correctly recorded in Indian River County until November 23, 1998.²⁹⁵ Klaus had received notice while in Germany that the lots had been sold, and as soon as he returned to the United States, he investigated the title and filed a suit to quiet title to the property and for rescission.²⁹⁶ The *lis pendens* was recorded on November 10, 1998, thirteen days before the Wihlborg deed.²⁹⁷

The trial court entered summary judgment in favor of the defendants.²⁹⁸ The court concluded that Klaus either waived or was estopped from asserting his rights to object to the forged deed when he entered into the February 1998 agreement with his brother, on the basis that he was aware of the forged deed in 1998 and failed to take action.²⁹⁹

286. *Id.*

287. *Id.*

288. *Id.*

289. *Zurstrassen*, 786 So. 2d at 67.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Zurstrassen*, 786 So. 2d at 67.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 68.

299. *Zurstrassen*, 786 So. 2d at 68.

The appellate court held that because the deed from Klaus to Rolf was void, it had no legal effect to transfer Klaus' ownership of the property to Rolf.³⁰⁰ "[A] forged deed is void and thus creates no legal title nor affords protection to those claiming under it."³⁰¹ If fraud in the inducement is present, then the deed may still convey title but be voidable in equity.³⁰² When applied to titles of land, a party who allows another to purchase title to the property under an erroneous opinion of title and who by acts, words or silence, does not disclose his claim, cannot come back later and exercise his legal right against the purchaser.³⁰³ In this case, because Klaus made no representations to either Stonier or the Wihlborgs, and the record contained no evidence indicating he knew of the forged deed at the time he entered into the February 1998 agreement with his brother, the trial court erred in concluding he had knowledge of the forgery and failed to take action on it.³⁰⁴ Appellees' argument for equitable estoppel fails because they cannot show Klaus misrepresented a material fact (clear title) that they relied on to their detriment.³⁰⁵

The appellate court also found issues of fact as to whether Klaus waived his right to contest the forged deed.³⁰⁶ In order to waive a right, a party has to have: "(1) . . . a right, privilege, advantage or benefit which may be waived; (2) the actual or constructive knowledge of [that] right; and (3) the intention to relinquish the right."³⁰⁷ "Waiver of fraud can occur where a party should have discovered the fraud through ordinary diligence."³⁰⁸

Waiver can also be implied; forbearance for a reasonable time alone is not enough, but conduct that leads a party to believe a right has been waived may imply such a waiver.³⁰⁹ In this case, the appellate court found questions

300. *Id.* at 68.

301. *Id.* See *McCoy v. Love*, 382 So. 2d 647, 648 (Fla. 1979).

302. *Zurstrassen*, 786 So. 2d at 68.

303. *Id.* at 69; see also *Coram v. Palmer*, 58 So. 721, 722 (Fla. 1912).

304. *Zurstrassen*, 786 So. 2d at 70.

305. *Id.* at 71.

306. *Id.* at 70.

307. *Id.* See also *Leonardo v. State Farm Fire & Cas. Co.*, 675 So. 2d 176, 178 (Fla. 4th Dist. Ct. App. 1996).

308. *Zurstrassen*, 786 So. 2d at 70; see *Hurner v. Mut. Bankers Corp.*, 191 So. 831, 833 (Fla. 1939).

309. *Zurstrassen*, 786 So. 2d at 70; see *Am. Somax Ventures v. Touma*, 547 So. 2d 1266, 1268 (Fla. 4th Dist. Ct. App. 1989); *Arbogast v. Bryan*, 393 So. 2d 606, 608 (Fla. 4th Dist. Ct. App. 1981).

of fact existing as to whether Klaus used due diligence in discovery of the forgery.³¹⁰

The appellate court also found that the lower court erred in granting summary judgment on the issue of ratification of the fraud.³¹¹ Ratification of fraud is an issue of fact.³¹² If Klaus knew of the fraud, did not reject it, and took a material act inconsistent with an intent to avoid it, or delayed in asserting any remedial rights, then he would have ratified the fraud.³¹³ Here, there was no evidence indicating he had knowledge of the fraud.³¹⁴ The document acknowledging title in Rolf's name alone and authorizing Rolf to sell the property was based on his good faith belief that the title problems were merely a mix up, not the true state of ownership of the property.³¹⁵

X. EASEMENTS

*Perkins v. Smith.*³¹⁶ The issue is whether the trial court erred in its finding that a recorded easement agreement between Perkins' predecessor in title and Smith precludes Perkins from obtaining a statutory way of necessity across Smith's property.³¹⁷

Perkins purchased a landlocked parcel of land for residential and agricultural purposes.³¹⁸ His land is bordered by property owned by Smith, a Mr. Clemmons, the South Florida Water Management District, and the Kissimmee River.³¹⁹ He accessed his property by using an existing private road over Smith's land, which had been there for eight years.³²⁰ Perkins knew before taking title that his seller had entered into an easement agreement with Smith regarding the use of the road.³²¹ The recorded agreement required extensive improvements to the road, at the expense of the grantee for permanent use of the road.³²² Smith offered Perkins the same

310. *Zurstrassen*, 786 So. 2d at 70–71.

311. *Id.* at 71.

312. *Id.*

313. *Id.* See *Ball v. Ball*, 36 So. 2d 172, 177 (Fla. 1948).

314. *Zurstrassen*, 786 So. 2d at 71.

315. *Id.*

316. 794 So. 2d 647 (2d Dist. Ct. App. 2001).

317. *Id.* at 648.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Perkins*, 794 So. 2d at 648.

322. *Id.*

contractual use of the easement afforded his seller.³²³ Perkins took the position that this was a unilateral offer, and he declined.³²⁴ There was testimony at trial that if he built a new road, Perkins could access his land from a public road to the north.³²⁵ Although the route would be shorter than the one presently used, the new road would have to be built over mostly raw land and bodies of water.³²⁶ The trial court entered a judgment that Perkins had “an express right to build a paved road onto his property” pursuant to the recorded easement and Smith’s offer.³²⁷

The appellate court reversed, holding that Perkins was not barred from the benefits of section 704.01(2) of the *Florida Statutes*.³²⁸ A statutory way of necessity, exclusive of any common-law right exists when a parcel of land is landlocked so that no practicable route of egress or ingress is available to the nearest public or private road.³²⁹ The land must be outside any municipality and either used or intended to be used for residential or agricultural purposes.³³⁰ The owner or tenant thereof may use and maintain an easement over the lands lying between the landlocked parcel and the nearest practical route.³³¹

The term “practical” used in section 704.01 of the *Florida Statutes* is defined in section 704.03 of the *Florida Statutes* to mean “without the use of bridge, ferry, turnpike road, embankment, or substantial fill.”³³² In this case, in order for Perkins to reach the public road to the north, he would have to construct a road over mostly raw land and bodies of water, requiring embankment, and involving substantial fill.³³³ Based on the foregoing reasoning, the appellate court concluded that the existing road across Smith’s land constituted the shortest, practical route, and Perkins was entitled to a statutory way of necessity across Smith’s lands, notwithstanding the terms of the easement.³³⁴

323. *Id.*

324. *Id.*

325. *Id.*

326. *Perkins*, 794 So. 2d at 648.

327. *Id.*

328. *Id.*

329. *Id.* (citing FLA. STAT. § 704.01(2) (1999)).

330. *Id.*

331. *Perkins*, 794 So. 2d at 648.

332. *Id.* (citing FLA. STAT. § 704.03 (1999)).

333. *Id.* See *Keene v. Jackson*, 732 So. 2d 1138 (Fla. 1st Dist. Ct. App. 1999); *Trammell v. Ward*, 667 So. 2d 223 (Fla. 1st Dist. Ct. App. 1995); *Walkup v. Becker*, 161 So. 2d 893 (Fla. 1st Dist. Ct. App. 1964).

334. *Perkins*, 794 So. 2d at 648.

XI. EMINENT DOMAIN

*Armadillo Partners, Inc. v. Department of Transportation.*³³⁵ The Department was engaged in a road improvement project that required taking part of the landowner's parking lot.³³⁶ The landowner was entitled to severance damages for the loss in value the taking effected on its remaining land.³³⁷ Ordinarily, severance damages are calculated as the difference between the value of the land before the taking and after.³³⁸ However, an alternative valuation is the cost of curing the harm the taking caused.³³⁹ In this case, the Department took seventy-three of the 140 parking spaces in the parking lot.³⁴⁰ The Department proposed a plan to cure part of that loss by locating twenty-six parking spaces elsewhere on the landowner's land.³⁴¹ Over the landowner's objection, the trial court admitted valuation testimony that was based upon that plan.³⁴² The district court found that testimony inadmissible because it was based on a misconstruction of the law and, consequently, reversed the case.³⁴³

The Department's expert used the relocation of twenty-six parking spaces to reduce the severance damages suffered by the landowner.³⁴⁴ However, the expert failed to offset the loss the landowner would suffer by that relocation.³⁴⁵ In this case, the twenty-six parking spaces were to be carved out of an "Arbor Area" located in front of some of the businesses.³⁴⁶ "In a consistent line of cases, Florida courts have held that where property outside the parcel taken is converted to parking to effect a cure of severance damages, the loss of that property must be taken into account in determining severance damages."³⁴⁷ The valuation did not include independent consideration to the landowner's loss of that area, so the valuation should not have been admitted into evidence.³⁴⁸

335. 780 So. 2d 234 (Fla. 4th Dist. Ct. App. 2001).

336. *Id.* at 235.

337. *Id.*

338. *Id.*

339. *Id.*

340. *Armadillo Partners, Inc.*, 780 So. 2d at 235.

341. *Id.*

342. *Id.*

343. *Id.* at 236.

344. *Id.* at 235.

345. *Armadillo Partners, Inc.*, 780 So. 2d at 236.

346. *Id.* at 235.

347. *Id.*

348. *Id.*

The cure was also based upon a proposal to build new driveways at particular locations.³⁴⁹ However, the driveways could not be built there without violating the regulations of the Water Management District.³⁵⁰ Thus, the cure was based upon mere speculation that it could be put into effect.³⁵¹ Equally important, the relocation of the driveways did not appear in the pleadings or in the construction plans entered into evidence.³⁵² It was an error to allow testimony about a plan that was inconsistent with the plans that were in evidence.³⁵³

*Cordones v. Brevard County.*³⁵⁴ The county condemned an easement to the beach as part of a beach renourishment project.³⁵⁵ Evidence showed that without the project, the beach would erode through the dune line.³⁵⁶ In order to obtain federal funds, the county needed at least a fifty-year easement.³⁵⁷ The landowners unsuccessfully asserted that the county had not established the taking was necessary for the public purpose claimed.³⁵⁸ The district court rejected this claim.³⁵⁹ It recognized that “[n]o bright line test is available to determine what constitutes ‘reasonable necessity’ for a taking by a condemning authority.”³⁶⁰ However, “[a] trial court’s order approving condemnation of private property for public use should not be disturbed on appeal when the taking is supported by good faith considerations of cost, safety, environmental protection and long-term planning.”³⁶¹ The county had followed the directions of the United States Corps of Engineers and condemned only what was required to do the job.³⁶² Thus, there was sufficient evidence of a public purpose and no evidence to suggest bad faith or over reaching by the county.³⁶³

349. *Id.* at 236–37.

350. *Armadillo Partners, Inc.*, 780 So. 2d at 237.

351. *Id.*

352. *Id.*

353. *Id.*

354. 781 So. 2d 519 (Fla. 5th Dist. Ct. App. 2001).

355. *Id.* at 521.

356. *Id.*

357. *Id.*

358. *Id.* at 521–22.

359. *Cordones*, 781 So. 2d at 522.

360. *Id.*

361. *Id.*

362. *Id.* at 521.

363. *Id.* at 522.

The landowners also claimed that the county failed to introduce a valid appraisal into evidence.³⁶⁴ The county's appraiser had not produced a written report, but testified that he used his perceptions of the market and how the taking would reduce the value of the servient lands.³⁶⁵ The court recognized that the valuing of easements is problematic and that no Florida case establishes how they should be valued.³⁶⁶ Because the property taken was unique, the normal valuation methods would not be appropriate.³⁶⁷ Consequently, the method used was appropriate.³⁶⁸

The trial court, however, made an error in granting a temporary easement of unlimited duration.³⁶⁹ All the testimony, including the County's Resolution of Necessity, concerned the taking of a fifty-year easement.³⁷⁰ The order should have set the duration of the easement at fifty years and the case was remanded for the trial court to modify its order accordingly.³⁷¹

Nutt v. Orange County.³⁷² The landowner owned a 512-acre tract.³⁷³ The county took a triangular parcel of 2.545 acres for a road straightening project that was scheduled for the distant future.³⁷⁴ Exactly how the road would be straightened had not yet been determined.³⁷⁵ The landowner sought severance damages because one possible route across the triangle would have had a serious negative impact on the value of the remaining land.³⁷⁶ However, the trial court rejected the claim for severance damages and the district court affirmed.³⁷⁷ "Everyone is at the mercy of future governmental planning."³⁷⁸ However, that risk is not compensable.³⁷⁹ Severance damages can be recovered only for the diminution in value caused when part of one's land is taken, not because of the potential uses to which

364. *Cordones*, 781 So. 2d at 523.

365. *Id.*

366. *Id.*

367. *Id.* at 524.

368. *Id.*

369. *Cordones*, 781 So. 2d at 522.

370. *Id.*

371. *Id.* at 524.

372. 769 So. 2d 453 (Fla. 5th Dist. Ct. App. 2000).

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Nutt*, 769 So. 2d at 453.

378. *Id.*

379. *Id.*

the taken land may eventually be put.³⁸⁰ Consequently, this landowner was not entitled to severance damages based upon these facts.³⁸¹

*Youth for Christ of Sarasota, Inc. v. Sarasota County.*³⁸² This apparently involved a quick taking pursuant to chapter 74 of the *Florida Statutes*, which allows the condemning authority to take the property first and litigate the taking later.³⁸³ As required by the statute, the county made a "good faith" estimate of the property taken and deposited that amount into the court's registry.³⁸⁴ The landowner withdrew the money, so the only issue remaining for trial was the amount of compensation to which the landowner was entitled.³⁸⁵ To the landowner's surprise, the jury decided that the county's deposit was too generous and that the county was owed a refund of over fifty-seven thousand dollars.³⁸⁶ Accordingly, a final judgment for that amount was entered in favor of the county.³⁸⁷ The landowner subsequently filed a motion to tax costs, and the parties reached an agreement as to the appropriate figure.³⁸⁸ Then the county convinced the judge to enter an order to amend the final judgment, offsetting the costs the county owed the landowner against the refund the landowner owed the county.³⁸⁹ When the landowner's objection was overruled, the landowner appealed.³⁹⁰

The district court determined that amending the final judgment was a reversible error.³⁹¹ The county had not filed a timely motion to amend the final judgment as required by rule 1.540 of the *Florida Rules of Civil Procedure*.³⁹² The time for filing such a motion had run.³⁹³ Thereafter, the trial court no longer had jurisdiction to amend the final judgment.³⁹⁴ On remand, the trial court was ordered to enter a judgment for costs in favor of the landowner.³⁹⁵

380. *Id.* at 453–54.

381. *Id.* at 454.

382. 765 So. 2d 794 (Fla. 2d Dist. Ct. App. 2000).

383. *Id.* at 795.

384. *Id.* (citing FLA. STAT. §§ 74.051, .061 (1993)).

385. *Id.* at 795.

386. *Id.*

387. *Youth for Christ of Sarasota, Inc.*, 765 So. 2d at 795.

388. *Id.*

389. *Id.*

390. *Id.* at 794.

391. *Id.*

392. *Youth for Christ of Sarasota, Inc.*, 765 So. 2d at 795.

393. *Id.* at 795.

394. *Id.*

395. *Id.* at 796.

XII. EQUITABLE LIENS

*Liddle v. A.F. Dozer, Inc.*³⁹⁶ The contractor's complaint included claims for the foreclosure of a mechanic's lien, and also for the imposition and foreclosure of an equitable lien.³⁹⁷ Apparently, both claims were based on the same facts because the trial court found that the contractor was entitled to a mechanic's lien in the amount of \$11,042.08 and an equitable lien in the amount of \$11,042.08.³⁹⁸

A party may seek more than one remedy to redress a particular wrong.³⁹⁹ "[I]f the remedies are concurrent or cumulative, and logically can coexist on the same facts, the doctrine of election does not apply until the injured party has received full satisfaction for his [or her] injuries."⁴⁰⁰ The plaintiff here was not required to elect one of the remedies until it was time for the court to enter the judgment.⁴⁰¹ However, the entry of judgment containing both the mechanic's lien and the equitable lien was reversible error because it amounted to a double recovery.⁴⁰²

*Spridgeon v. Spridgeon.*⁴⁰³ Years after their divorce, former spouses were on such friendly terms that the ex-husband loaned his ex-wife the money she needed to purchase a condominium apartment.⁴⁰⁴ He also loaned her money to make repairs and renovations.⁴⁰⁵ Their understanding was that these loans would be repaid when the ex-wife was able to get a conventional mortgage loan.⁴⁰⁶ However, when the opportunity arose to get a conventional mortgage at favorable terms, the ex-wife refused to apply.⁴⁰⁷ That is when the friendship dissolved into this suit.⁴⁰⁸

The circuit court granted the ex-husband an equitable lien on the unit.⁴⁰⁹ The ex-wife appealed, claiming that the ex-husband failed to prove she had committed fraud or misrepresentation, or that they had an agreement that the

396. 777 So. 2d 421 (Fla. 4th Dist. Ct. App. 2000).

397. *Id.*

398. *Id.* at 422 n.1.

399. *Id.* at 422.

400. *Id.*

401. *Liddle*, 777 So. 2d at 422.

402. *Id.*

403. 779 So. 2d 501 (Fla. 2d Dist. Ct. App. 2000).

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Spridgeon*, 779 So. 2d at 501.

409. *Id.*

property would secure the loan.⁴¹⁰ The district court rejected those claims, holding such a showing was not necessary because an equitable lien could be imposed on property, even homestead property, based upon unjust enrichment.⁴¹¹ In this case, the ex-wife accepted the benefits of the loan while knowing that her ex-husband was relying upon her promise to use the property, once renovated, as security for a mortgage loan and use the proceeds to repay him.⁴¹² Allowing her to enjoy the benefits of that agreement while escaping her obligation would unjustly enrich her.⁴¹³ Conversely, imposing the lien would put her in no worse position that she would be in had she performed as promised, but it would protect her ex-husband from injury.⁴¹⁴

XIII. EQUITABLE REMEDIES

*Hollywood Lakes Country Club, Inc. v. Community Ass'n Services, Inc.*⁴¹⁵ The developer of a common interest community filed this action based on the management company's failure to take the steps needed to collect assessments from the homeowners.⁴¹⁶ The management company represented to the developer that it took those steps, despite its knowledge to the contrary.⁴¹⁷ Believing that the assessments were being collected properly, the developer did not take any action of its own to collect the assessments or see that they were collected.⁴¹⁸ The failure to collect the assessments produced a shortfall for the association.⁴¹⁹ Under the terms of the declaration, the developer was liable for such shortage.⁴²⁰ The trial court dismissed the developer's four-count complaint, but the Fourth District Court of Appeal reversed on the counts of fraud and equitable subrogation.⁴²¹

The elements of fraud are: "(1) a false statement concerning a material fact; (2) knowledge by the person making the statement that the

410. *Id.*

411. *Id.* at 502.

412. *Id.*

413. *Spridgeon*, 779 So. 2d at 502.

414. *Id.*

415. 770 So. 2d 716 (Fla. 4th Dist. Ct. App. 2000).

416. *Id.* at 717.

417. *Id.* at 718.

418. *Id.*

419. *Id.*

420. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 718.

421. *Id.* at 417.

representation is false; (3) the intent by the person making the statement that the representation will induce another to act on it; and (4) reliance on the representation to the injury of the other party.”⁴²² The facts alleged included allegations of fact sufficient to establish all of the elements if proved.⁴²³ Moreover, when the developer paid the shortfall to the association, it was paying the debt for assessments owed by individual homeowners to the association.⁴²⁴ That sets up a claim for equitable subrogation, i.e., that the developer would be subrogated to the associations right to collect unpaid assessments.⁴²⁵ A person is entitled to subrogation when: “(1) the subrogee made the payment to protect his or her own interest; (2) the subrogee did not act as a volunteer; (3) the subrogee was not primarily liable for the debt; (4) the subrogee paid off the entire debt; and (5) subrogation would not work any injustice to the rights of a third party.”⁴²⁶ The developer was secondarily liable under the terms of the Declaration. So a developer should “be given the opportunity to show that the equities are in its favor in this action.”⁴²⁷

*Liddle v. A.F. Dozer, Inc.*⁴²⁸ The contractor’s complaint included claims for the foreclosure of a mechanic’s lien, and also for the imposition and foreclosure of an equitable lien.⁴²⁹ Apparently both claims were based on the same facts because the trial court found that the contractor was entitled to a mechanic’s lien in the amount of \$11,042.08 and an equitable lien in the amount of \$11,042.08.⁴³⁰

A party may seek more than one remedy to redress a particular wrong. “[I]f the remedies are concurrent or cumulative, and logically can coexist on the same facts, the doctrine of election does not apply until the injured party has received full satisfaction for his [or her] injuries.”⁴³¹ The plaintiff here was not required to elect one of the remedies until it was time for the court to enter the judgment.⁴³² However, the entry of judgment containing both the

422. *Id.* at 718 (quoting *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984)).

423. *Id.* at 719.

424. *Id.*

425. *Hollywood Lakes Country Club, Inc.*, 770 So. 2d at 719.

426. *Id.* at 718.

427. *Id.* at 719.

428. 777 So. 2d 421 (Fla. 4th Dist. Ct. App. 2000).

429. *Id.*

430. *Id.* at 422, n.1.

431. *Id.* at 422 (quoting *Goldstein v. Serio*, 566 So. 2d 1338, 1339 (Fla. 4th Dist. Ct. App. 1990)).

432. *Id.*

mechanic's lien and the equitable lien was reversible error because it amounted to a double recovery.⁴³³

*Sander v. Ball.*⁴³⁴ The option violated the Rule Against Restraints on Alienation because it lacked a time limit.⁴³⁵ The trial court was wrong to reform the option by adding a time limit so as to avoid the rule violation. Reformation is available to make the writing agree with what the parties had actually agreed. It cannot be used to cure a defect in their agreement. Here, the parties never even discussed a time limit for the option.⁴³⁶ The court could not supply the term under the guise of reformation.⁴³⁷

*Spridgeon v. Spridgeon.*⁴³⁸ Years after their divorce, former spouses were on such friendly terms that the ex-husband loaned his ex-wife the money she needed to purchase a condominium apartment.⁴³⁹ He also loaned her money to make repairs and renovations.⁴⁴⁰ Their understanding was that these loans would be repaid when the ex-wife was able to get a conventional mortgage loan.⁴⁴¹ However, when the opportunity arose to get a conventional mortgage at favorable terms, the ex-wife refused to apply.⁴⁴² That is when the friendship dissolved into this suit.⁴⁴³

The circuit court granted the ex-husband an equitable lien on the unit.⁴⁴⁴ The ex-wife appealed, claiming that the ex-husband had failed to prove she had committed fraud or misrepresentation, or that they had an agreement that the property would secure the loan.⁴⁴⁵ The district court rejected those claims, holding such a showing was not necessary because an equitable lien could be imposed on property, even homestead property, based upon unjust enrichment.⁴⁴⁶ In this case, the ex-wife accepted the benefits of the loan while knowing that her ex-husband was relying upon her promise to use the property, once renovated, as security for a mortgage loan and use the

433. *Liddle*, 777 So. 2d at 422.

434. 781 So. 2d 527 (Fla. 5th Dist. Ct. App. 2001). This case is discussed *infra* in Part XXI.

435. *Id.* at 528–29.

436. *Id.* at 530.

437. *Id.* at 530–31.

438. 779 So. 2d 501 (Fla. 2d Dist. Ct. App. 2000).

439. *Id.* at 501.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Spridgeon*, 779 So. 2d at 501.

444. *Id.*

445. *Id.*

446. *Id.* at 502.

proceeds to repay him.⁴⁴⁷ Allowing her to enjoy the benefits of that agreement while escaping her obligation would unjustly enrich her.⁴⁴⁸ Conversely, imposing the lien would put her in no worse position than she would have been in had she performed as promised, but it would protect her ex-husband from injury.⁴⁴⁹

XIV. FORECLOSURES

Dailey v. Leshin.⁴⁵⁰ This is an appeal of a final summary judgment against Dailey and Warmus “on their counterclaims raising Truth-in-Lending Act (“TILA”) violations as a defense to a mortgage foreclosure.”⁴⁵¹ The main issue is whether a contract to sell property terminates a mortgagor’s right to rescind a refinance transaction.⁴⁵² The second issue is whether appellants’ motion alleging new and different TILA violations was erroneously dismissed by the trial court as moot and should have been construed as a motion to amend their counterclaim based upon its substantive content and not its heading.⁴⁵³

Nancy Dailey and Thomas Warmus, appellants, experiencing financial difficulties, hired attorney Randall Leshin to represent them in various matters.⁴⁵⁴ Leshin put them in touch with Arthur M. Walker as Trustee, who agreed to hold a mortgage on their homestead property.⁴⁵⁵ Dailey and Warmus executed a promissory note and mortgage for \$100,000 in April 1998 and a \$300,000 future advance and note at the end of May 1998.⁴⁵⁶ They were never given the required TILA notice of their right to rescind the transaction.⁴⁵⁷ When Leshin received the future advance proceeds of \$300,000, he refused to disburse it to Dailey and Warmus, claiming they owed him attorney’s fees for earlier work.⁴⁵⁸ Dailey and Warmus

447. *Id.*

448. *Spridgeon*, 779 So. 2d at 502.

449. *Id.*

450. 792 So. 2d 527 (Fla. 4th Dist. Ct. App. 2001).

451. *Id.* at 528.

452. *Id.* at 530.

453. *Id.* at 532–33.

454. *Id.* at 529.

455. *Dailey*, 792 So. 2d at 529.

456. *Id.*

457. *Id.*

458. *Id.*

subsequently failed to make the mortgage payments to Walker because they believed Leshin and Walker were conspiring together.⁴⁵⁹

Walker filed an action in 1998 to foreclose the mortgage, and appellants filed an answer, affirmative defenses and counterclaim.⁴⁶⁰ The counterclaim did not allege any TILA claims, but in its prayer for relief, sought rescission and cancellation of the \$300,000 note due to fraudulent inducement and negligent non-disclosures.⁴⁶¹ During this litigation, Dailey and Warmus entered into a contract to sell the subject property in March 1999.⁴⁶² The pending foreclosure action resulted in a cloud on their title, and the original closing date of April was extended to May, but there is no indication that the transaction actually closed.⁴⁶³ On May 3, 1999, Dailey and Warmus' motion to amend their answer and counterclaim to allege TILA violations, RESPA violations and violations of the Mortgage Brokers Act and Fair Credit Reporting Act was granted.⁴⁶⁴ Walker moved for summary judgment on the amended counterclaim, claiming that appellant's right of rescission under TILA had expired because they contracted to sell the property.⁴⁶⁵ The trial court granted the summary judgment and determined that all remaining motions were moot.⁴⁶⁶ Walker subsequently filed a motion for summary judgment on the foreclosure complaint, attaching an affidavit of the amounts due under both notes at the default interest rate of eighteen percent.⁴⁶⁷ Dailey and Warmus responded with a motion alleging new TILA violations, which was never heard by the court.⁴⁶⁸ The property was eventually sold in December 1999.⁴⁶⁹ Walker was paid, and Dailey and Warmus then appealed the summary judgment entered in Walker's favor on their counterclaim.⁴⁷⁰

The appellate court first addressed the issue of whether Dailey and Warmus' contract for sale in March 1999 terminated their right of rescission

459. *Id.*

460. *Dailey*, 792 So. 2d at 529.

461. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *Dailey*, 792 So. 2d at 529.

466. *Id.*

467. *Id.*

468. *Id.*

469. *Id.*

470. *Dailey*, 792 So. 2d at 529.

under Section 1635(f) of the Federal Truth-in-Lending Act.⁴⁷¹ Section 1635(f) provides:

An obligor's right of rescission shall expire three years after the date of consummation of the transaction *or upon the sale of the property*, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor⁴⁷²

A consumer has the right to rescind up to three business days after the closing of the transaction or delivery of the TILA disclosures.⁴⁷³ If the consumer does not receive the disclosures, the right to rescind expires three years after the closing date or upon the sale of the property, whichever occurs first.⁴⁷⁴ Following the analysis used by the Ninth Circuit Court of Appeals,⁴⁷⁵ the appellate court held that Dailey and Warmus' TILA claims based on failure to disclose the right to rescind expired when they entered into a contract to sell the property.⁴⁷⁶ In this case, when Dailey and Warmus contracted to sell their property in March, their right to rescind expired before they exercised it in April.⁴⁷⁷ The fact that the sale is pending is sufficient to trigger the expiration of the right to rescind.⁴⁷⁸ The transaction does not have to close.⁴⁷⁹

471. *Id.* Section 1635(a) provides that where a security interest is retained or acquired against the principal residence of the obligor in a consumer credit transaction, "the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section," whichever is later, by notifying the creditor of his right to do so. 15 U.S.C. § 1635(a) (1997).

472. 15 U.S.C. § 1635(f) (1997) (emphasis added).

473. *Dailey*, 792 So. 2d at 530.

474. *Id.* at D1547-48.

475. *See Hefferman v. Bitton*, 882 F.2d 379, 384 (9th Cir. 1989) (contract for sale of property terminates the right of rescission pursuant to section 1635(f) rather than the actual sale).

476. *Dailey*, 792 So. 2d at 530. *See Hefferman*, 882 F.2d at 384. A sale is defined as a "contract between two parties," in which the seller, "in consideration of the payment of money or promise of payment . . . , transfers to the [buyer] the title and possession of the property." *Dailey*, 792 So. 2d at 531 (quoting BLACK'S LAW DICTIONARY 1200 (5th ed. 1979)).

477. *Dailey*, 792 So. 2d at 532.

478. *Id.*

479. *Id.*

The appellate court then reviewed the issue of whether the trial court should have heard Dailey and Warmus' motion filed in response to Walker's motion for summary judgment.⁴⁸⁰ In reviewing the motion, the appellate court found that even though it is not titled a "Motion to Amend the Counterclaim," in substance it seeks to amend.⁴⁸¹ The prayer for relief requested that the court "address the issues of the motion as a new and separate" TILA violation.⁴⁸² Motions to amend should be liberally granted.⁴⁸³ The motion described an arguable additional violation of TILA that caused appellants additional damages.⁴⁸⁴ For this reason, the trial court improperly concluded it was moot.⁴⁸⁵ So, the appellate court reversed to permit the lower court to hear and rule on the motion.⁴⁸⁶

*Deluxe Motel, Inc. v. Patel.*⁴⁸⁷ The issue is whether due process rights have been violated when the right of redemption granted in an order has expired prior to the time the order is signed by the court.⁴⁸⁸

The parties had entered into a land sale contract where appellees were to purchase appellants' motel.⁴⁸⁹ The consideration for the purchase consisted of an unsecured promissory note and another promissory note secured by a mortgage on the property with installment payments over the course of twenty years.⁴⁹⁰ The appellee defaulted on both promissory notes, and appellants foreclosed on the property with the court granting the foreclosure.⁴⁹¹ Appellees argued mistakes in the trial court's order essentially denied them the right to exercise their right of redemption.⁴⁹² The appellate court noted that the trial court's order providing appellees' right of redemption was eliminated prior to the execution of the order.⁴⁹³ The court held a right to redeem foreclosed property was considered to be an estate in land and was a valued right.⁴⁹⁴ As such, the failure of a trial court to provide

480. *Id.*

481. *Id.*

482. *Dailey*, 792 So. 2d at 532.

483. *See Dimick v. Ray*, 774 So. 2d 830, 833 (Fla. 4th Dist. Ct. App. 2000).

484. *Dailey*, 792 So. 2d at 533.

485. *Id.*

486. *Id.*

487. 770 So. 2d 283 (Fla. 5th Dist. Ct. App. 2000).

488. *Id.* at 284.

489. *Id.* at 283.

490. *Id.*

491. *Id.*

492. *Patel*, 770 So. 2d at 284.

493. *Id.*

494. *Id.*

that opportunity was not harmless error.⁴⁹⁵ Therefore, the court reversed and remanded the matter to allow appellees the right to exercise their redemption rights.⁴⁹⁶

*Indian River Farms v. YBF Partners, Inc.*⁴⁹⁷ The issue in this case is whether the right of redemption was timely and properly exercised.⁴⁹⁸ Appellee purchased property at a judicial sale, and a certificate of sale was filed with the clerk on the same day.⁴⁹⁹ Appellants objected to the sale, and the trial court overruled appellants' objections.⁵⁰⁰ The assignee of appellants intervened and attempted to exercise their right of redemption by tendering payment to the clerk of the court, which was refused.⁵⁰¹ A certificate of title was issued to appellee, and appellants moved to compel the clerk to accept assignee's tender for redemption of the property.⁵⁰² The appellate court found that appellants' objections did not concern any defect or irregularity with the foreclosure sale itself which is required in order to be a legally sufficient ground to set aside the sale.⁵⁰³

However, the appellate court did find that when assignee tendered payment under the judgment of foreclosure to the clerk of court, it properly exercised its right of redemption and did not require the court's permission.⁵⁰⁴ The appellate court held that while the clerk of court erred in failing to accept tender, such error did not render assignee's exercise of its right of redemption untimely because its tender was made prior to the filing of the certificate of title.⁵⁰⁵ The case was reversed and remanded.⁵⁰⁶

*Norwest Mortgage, Inc. v. King.*⁵⁰⁷ This is a petition for writ of certiorari seeking review of a non-final order of the Broward County Circuit Court.⁵⁰⁸ The issue is whether the trial court erred in ordering Norwest Mortgage, Inc. to issue a satisfaction on its mortgage when it received a portion of its payoff amount and the funds remaining on deposit in the court

495. *Id.*

496. *Id.*

497. 777 So. 2d 1096 (Fla. 4th Dist. Ct. App. 2001).

498. *Id.* at 1097.

499. *Id.*

500. *Id.* at 1098.

501. *Id.*

502. *Indian River Farms*, 777 So. 2d at 1098.

503. *Id.*

504. *Id.* at 1099.

505. *Id.* at 1100.

506. *Id.*

507. 789 So. 2d 1139 (Fla. 4th Dist. Ct. App. 2001).

508. *Id.*

registry did not allow for additional interest, expenses or costs accruing on the note/mortgage subsequent to the payoff statement date.⁵⁰⁹

Norwest Mortgage, Inc. commenced foreclosure proceedings against Barbara King in 1997.⁵¹⁰ At that time, the outstanding principal and interest totaled approximately \$8000.⁵¹¹ Its motions for summary judgment were continued repeatedly in order to allow King to quiet title to the property and then arrange financing to satisfy the mortgage.⁵¹² King received a payoff statement on December 20, 1999, valid until January 14, 2000.⁵¹³ The payoff was for \$23,396.47, and included Norwest's payment of taxes and insurance on the property for the period of time during which the mortgage was in default.⁵¹⁴ King requested a breakdown of the payoff amount along with copies of invoices and receipts.⁵¹⁵ Because she did not receive them timely, she did not satisfy the mortgage by January 14, 2000.⁵¹⁶ She did, however, close on new financing, and funds were withheld to pay off Norwest.⁵¹⁷ In March 2000, King filed a motion for expedited final hearing and to shorten the discovery period and time for production.⁵¹⁸ She requested that the court toll the interest and attorney's fees on the open mortgage from the date of her closing.⁵¹⁹ Norwest argued that it did not produce the requested information timely because, as a result of the delays in waiting for King to quiet title and arrange financing, some of the records were hard to obtain.⁵²⁰

The trial court granted King relief, and on May 25, 2000, ordered \$23,396.47 (the December 20 payoff statement amount) placed in the court registry.⁵²¹ Of these funds, \$11,228.34 was to be disbursed to petitioner, and the disputed balance would remain in the court registry pending a determination of the appropriate expenses.⁵²² In addition, the order required Norwest to issue a satisfaction of its mortgage within ten days of its receipt

509. *Id.* at 1140.

510. *Id.*

511. *Id.*

512. *King*, 789 So. 2d at 1140.

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.*

517. *King*, 789 So. 2d at 1140.

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. *King*, 789 So. 2d at 1140.

of the \$11,228.34.⁵²³ Norwest appealed the order on the basis that the amount recovered is insufficient to cover the amount due.⁵²⁴

Under Florida law, a mortgagee is required to issue a satisfaction of mortgage after full payment of the obligations contained in the note.⁵²⁵ The appellate court quashed the order, holding that it could lead to irreparable harm to Norwest if it were later discovered that Norwest was entitled to additional interest and expenses.⁵²⁶ The issuance of a satisfaction of mortgage terminates the right to foreclose on the property to collect for any additional funds owed.⁵²⁷ In this case, because the payoff amount was in dispute, absent an evidentiary hearing, the trial court was unable to determine that Norwest was *not* entitled to receive additional funds in excess of the payoff figure quoted.⁵²⁸ The amount deposited did not include additional interest, advances, or funds for attorney's fees and costs that continued to accrue subsequent to January 14, 2000 through the date of an evidentiary hearing.⁵²⁹ The appellate court concluded that the trial court forced Norwest to settle its foreclosure action on King's terms, with or without an evidentiary hearing, which constitutes a departure from the essential requirements of law.⁵³⁰

*Secretary of Veteran Affairs v. Tejedo.*⁵³¹ This is a rehearing *en banc*.⁵³² The issue in this case is whether the court will grant leave to amend a complaint when the original case was heard over a year ago and the party who instigated the original lawsuit seeking redemption sold the property in question.⁵³³

In this case, the appellant instigated a suit to force redemption against the appellee, an omitted lienor in a foreclosure action.⁵³⁴ During the course

523. *Id.*

524. *Id.*

525. FLA. STAT. § 701.04(1) (2000).

526. *King*, 789 So. 2d at 1140.

527. *See generally* *Atkins v. Rybovich Boat Works, Inc.*, 561 So. 2d 594 (Fla. 4th Dist. Ct. App. 1990), *quashed on other grounds*, 585 So. 2d 594 (Fla. 1991); *State-Wide Constr. Inc., v. Dowda*, 424 So. 2d 198, 198-99 (Fla. 5th Dist. Ct. App. 1983); *Hallmark Mfg. Inc. v. Lujack Constr. Co.*, 372 So. 2d 520 (Fla. 4th Dist. Ct. App. 1979).

528. *King*, 789 So. 2d at 1140.

529. *Id.*

530. *Id.*

531. 774 So. 2d 709 (Fla. 3d Dist. Ct. App. 2000).

532. *Id.* at 712.

533. *Id.*

534. *Id.*

of the trial, the appellant transferred the property without notifying the court or appellee.⁵³⁵

The appeals court held that this “amounts to *mala fides* and cannot be condoned.”⁵³⁶ Also, “[p]arties must come to courts of equity with clean hands as equity does not condone concealment of affirmative misconduct.”⁵³⁷ The Appellate Court remanded the case with instructions allowing for leave to amend the pleadings to seek damages for the difference between the property’s fair market value and the amount tendered by appellee, plus costs and fees.⁵³⁸

*South Palm Beach Investments, Inc. v. Regatta Trading Ltd.*⁵³⁹ The issue raised here is whether an emergency motion to intervene, filed by a prior titleholder, was properly denied by the trial court.⁵⁴⁰

South Palm Beach Investments sold its property, and the new owner obtained a mortgage at closing.⁵⁴¹ When the mortgage was foreclosed, South Palm Beach Investments filed a motion to intervene, which was dismissed.⁵⁴²

The appellate court affirmed the order.⁵⁴³ Once a party has conveyed all of its rights, title, and interest in a parcel of land to another, that party will not be a proper party to a suit foreclosing the mortgage.⁵⁴⁴ Here, Regatta Trading was seeking only to foreclose its mortgage.⁵⁴⁵ It was not seeking a deficiency judgment.⁵⁴⁶

XV. HOMESTEAD

*Dyer v. Beverly & Tittle, P.A.*⁵⁴⁷ The issue here is whether the marital property or homestead can be subject to forced sale when the home is awarded as a form of child support under the divorce proceeding.⁵⁴⁸

535. *Id.* at 713.

536. *Tejedo*, 774 So. 2d at 713.

537. *Id.* (citing Dep’t of Revenue v. David, 684 So. 2d 308 (Fla. 1st Dist. Ct. App. 1996)).

538. *Id.*

539. 789 So. 2d 396 (Fla. 4th Dist. Ct. App. 2001).

540. *Id.* at 397.

541. *Id.*

542. *Id.*

543. *Id.*

544. *Regatta Trading Ltd.*, 789 So. 2d at 397.

545. *Id.*

546. *Id.* at 397.

547. 777 So. 2d 1055 (Fla. 4th Dist. Ct. App. 2001).

548. *Id.* at 1056.

In this case, the couple divorced and the house was awarded to the wife as a form of child support.⁵⁴⁹ The court also awarded the wife her attorney's fees.⁵⁵⁰ The wife then assigned her orders of final judgment for attorney's fees to her attorneys so that they may pursue their fees.⁵⁵¹ The attorney's placed a judgment lien against the home that the wife lived in which was owned in the name of the former husband.⁵⁵²

The appellate court found that the homestead exemption statute is to protect not only the husband, but also his family from destitution and becoming public charge.⁵⁵³ The courts have declined to act in equity to permit the forced sale of a homestead property, unless there is evidence of the debtor's fraudulent or egregious conduct.⁵⁵⁴

The appellate court held that the evidence presented in this case did not support the application of equitable exception to the homestead exemption and, therefore, reversed.⁵⁵⁵

*Havoco of America, Ltd. v. Hill.*⁵⁵⁶ This is a certified question of law to the Supreme Court of Florida, from the United States Court of Appeals for the Eleventh Circuit, that is determinative of a case pending in the federal courts for which there appears to be no controlling precedent. "Does Article X, Section 4⁵⁵⁷ of the Florida Constitution exempt a Florida homestead, where the debtor acquired the homestead using non-exempt funds with the specific intent of hindering, delaying, or defrauding creditors in violation of Fla. Stat. § 726.105 or §§ 222.29 and 222.30?"⁵⁵⁸

In 1981, Havoco sued Hill, claiming damages for fraud, conspiracy, tortious interference with contractual relations, and breach of fiduciary duty.⁵⁵⁹ When the case finally went to trial, nine years later, a jury found for

549. *Id.*

550. *Id.* at 1057.

551. *Id.*

552. *Dyer*, 777 So. 2d at 1057.

553. *Id.* at 1059 (quoting *Anderson v. Anderson*, 44 So. 2d 652, 655 (Fla. 1950)).

554. *Id.* (citing *Smith v. Smith*, 761 So. 2d 370 (Fla. 5th Dist. Ct. App. 2000)).

555. *Id.* at 1059-60.

556. 790 So. 2d 1018 (2001).

557. Art. X, Section 4(a)(1) of the Florida Constitution provides in part: There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon; obligations contracted for the purchase, improvement or repair thereof; or obligations contracted for house, field, or other labor performed on the realty

Id.

558. *Hill*, 790 So. 2d at 1019.

559. *Id.*

Havoco and awarded it \$15,000,000 in damages.⁵⁶⁰ The district court entered judgment in accordance with the verdict on December 19, 1990; the judgment became enforceable on January 2, 1991.⁵⁶¹ Hill purchased the Destin property on December 30, 1990, for which he paid \$650,000 in cash and spent approximately \$75,000 for household furnishings.⁵⁶² Hill claims that although he was a long time resident of Tennessee, he intended to make the Destin property his retirement home.⁵⁶³

In July, 1992, Hill filed a voluntary Chapter Seven bankruptcy petition, in which he claimed that real property located in Destin, Florida was exempt as his homestead under Article X, Section 4 of the Florida Constitution.⁵⁶⁴ Havoco objected, arguing that Hill converted nonexempt assets into the homestead with the intent to hinder, delay or defraud his creditors.⁵⁶⁵ The bankruptcy court denied Havoco's objections to Hill's homestead claims, concluding that Havoco had not proven by a preponderance of the evidence that Hill acted with the specific intent to defraud his creditors.⁵⁶⁶

Havoco appealed, and the district court reversed, finding error in the bankruptcy court's conclusion that a debtor's specific intent to defraud his creditors could provide a ground to deny the homestead exemption.⁵⁶⁷ The mandate ordered the bankruptcy court "to determine whether and under what circumstances Florida law prevented debtors . . . from converting nonexempt property to exempt property."⁵⁶⁸ On remand, the bankruptcy court held that under Florida law, Hill was not prohibited from converting nonexempt assets into a homestead, even if he had the intent to put those assets outside the reach of his creditors.⁵⁶⁹ They further held that a debtor's right to the homestead exemption is not affected by Florida's fraudulent conveyance statute.⁵⁷⁰ The district court affirmed the decision and Havoco appealed.⁵⁷¹ The Eleventh Circuit certified the instant question to the Supreme Court of Florida, detailing the inconsistent treatment of the issue in the bankruptcy

560. *Id.*

561. *Id.*

562. *Id.*

563. *Hill*, 790 So. 2d at 1019.

564. *Id.*

565. *Id.*

566. *Id.* at 1020.

567. *Id.*

568. *Hill*, 790 So. 2d at 1020 (citing *Havoco of Am., Ltd. v. Hill*, 197 F.3d 1135, 1138 (11th Cir. 1999)).

569. *Id.*

570. *Id.*

571. *Id.*

courts based on prior applications of the homestead exemption by the Supreme Court.⁵⁷²

The Supreme Court of Florida answered the certified question in the affirmative.⁵⁷³ “The transfer of nonexempt assets into an exempt homestead with the intent to hinder, delay, or defraud creditors is not one of the three exceptions to the homestead exemption provided in article X, section 4.”⁵⁷⁴

The court applied a liberal construction to the exemption in the interest of protecting the family home, but a strict construction of the exceptions contained therein.⁵⁷⁵ In applying strict construction to the exceptions, the Court has refused to allow civil forfeitures of property following convictions under the RICO Act or findings of fact that debtors converted nonexempt assets into exempt homestead property with the intent to defraud their creditors.⁵⁷⁶

The disparate treatment of the exception appears in cases where the Supreme Court of Florida, in certain instances has allowed the imposition of equitable liens against homestead property under the “doctrine of equitable subrogation.”⁵⁷⁷ The Supreme Court of Florida rejected Havoco’s argument that its equitable lien jurisprudence created a fourth exception in cases where fraud or conversion of nonexempt assets into a homestead for purposes of avoiding creditors.⁵⁷⁸

*Moss v. Estate of Moss.*⁵⁷⁹ In this case, the issue is whether the homestead property inures to the deceased spouse’s descendants.⁵⁸⁰

The decedent died testate leaving no surviving spouse or minor children.⁵⁸¹ The personal representative of the estate, who is also a beneficiary under decedent’s will, filed a petition to determine homestead status of

572. *Id.*

573. *Hill*, 790 So. 2d at 1019.

574. *Id.* at 1028.

575. *Id.* at 1021.

576. *See Butterworth v. Caggiano*, 605 So. 2d 56, 60 (Fla. 1992) (“[A]rticle X, section 4 expressly provides for three exceptions to the homestead exemption. Forfeiture is not one of them.”); *Bank Leumi Trust Co. v. Lang*, 898 F. Supp. 883, 887 (S.D. Fla. 1995), (“[H]omestead exemption does not contain an exception for real property which is acquired in the state of Florida for the sole purpose of defeating the claims of out-of-state creditors.”).

577. Legal Subrogation, a/k/a equitable subrogation. Subrogation that arises by operation of law or by implication in equity to prevent fraud or injustice. BLACK’S LAW DICTIONARY 1440 (7th ed. 1999).

578. *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1024 (Fla. 5th Dist. Ct. App. 2000).

579. 777 So. 2d 1110 (Fla. 4th Dist. Ct. App. 2001).

580. *Id.* at 1111.

581. *Id.*

real property.⁵⁸² The petition requested an order to determine 1) that the decedent's condo was homestead property; 2) that the condo descended to the beneficiaries named in the will; and 3) that the constitutional exemption of a decedent's homestead from creditors' claims against the decedent's estate inured to the beneficiaries.⁵⁸³

A creditor of the estate filed an objection to the petition, claiming the petitioner failed to establish that the devisees of the real estate were qualified heirs of the decedent.⁵⁸⁴ The trial court found that the constitutional exemption from claims of the decedent's creditors inured to three intestate heirs, but the exemption did not inure to the heirs of the predeceased spouse of the decedent.⁵⁸⁵

The appellate court held that the trial court erred in excluding the brother of the decedent's last deceased spouse and the niece of the decedent's last deceased spouse as devisees of the decedent's homestead.⁵⁸⁶

*Reinish v. Clark.*⁵⁸⁷ The appellants raise three separate issues as to why they and the class like them should receive homestead exemption on their Florida house.⁵⁸⁸

The first count alleged that denying the homestead tax exemption to the Reinishes and their class solely on the basis of their out-of-state residency was a constitutional and statutory discrimination in violation of the Fourteenth Amendment of the United States Constitution.⁵⁸⁹ The appellate court held that:

Whether the person is a Florida resident or not, only one homestead exemption is allowed, irrespective of how many other residences the person owns. Thus, the exemption distinguishes between real estate used in good faith as a Florida permanent residence, on the one hand, and (by implicit exclusion) any other real estate such as secondary or vacation residences or rentals, on the other hand.⁵⁹⁰

582. *Id.*

583. *Id.*

584. *Moss*, 777 So. 2d at 1111-12.

585. *Id.* at 1112.

586. *Id.* at 1113.

587. 765 So. 2d 197 (Fla. 1st Dist. Ct. App. 2000).

588. *Id.* at 201.

589. *Id.* at 203.

590. *Id.* at 205.

The appellate court found that the statute did not treat Florida residents who had more than one home in Florida any differently than those from out of town.⁵⁹¹

The second count alleged that the Florida constitutional and statutory homestead tax exemption provisions unconstitutionally infringe upon the fundamental rights to travel interstate and to own property, in violation of the Privileges and Immunities Clause.⁵⁹² The appellate court held that the exemption is closely and substantially related to the State's valid objective to promote and protect taxpayers' financial ability to purchase and maintain the primary shelter, which is totally unrelated to state residency.⁵⁹³ The appellate court found that because the Reinishes had not demonstrated the denial of a right protected by the Privileges and Immunities Clause, the count was properly dismissed.⁵⁹⁴

The third count alleged that the constitutional and statutory homestead tax exemption provisions constitute a per se violation of the Dormant Commerce Clause in that they "attempt to create customs duties, barriers, or taxes that discriminate against and unduly burden interstate commerce and impermissibly impose a tariff on citizens whose primary residence is located outside Florida."⁵⁹⁵ The appellate court found no facial discrimination against interstate commerce nor any burden on interstate commerce that outweighs its potential benefits.⁵⁹⁶ The appellate court concluded, "the Florida exemption is an even-handed regulation that promotes the legitimate, strong public interest in promoting the stability and continuity of the primary permanent home."⁵⁹⁷ The case was affirmed.⁵⁹⁸

*Spridgeon v. Spridgeon.*⁵⁹⁹ The issue here is whether an equitable lien can be placed on a homestead.⁶⁰⁰

In this case, the parties were divorced from each other and had remained friendly after the divorce.⁶⁰¹ Mr. Spridgeon purchased a condo and performed renovations on it for Mrs. Spridgeon.⁶⁰² It was determined by the

591. *Id.*

592. *Reinish*, 765 So. 2d at 207.

593. *Id.* at 210.

594. *Id.*

595. *Id.* at 210–11.

596. *Id.* at 215.

597. *Reinish*, 765 So. 2d at 215.

598. *Id.*

599. 779 So. 2d 501 (Fla. 2d Dist. Ct. App. 2000).

600. *Id.*

601. *Id.*

602. *Id.*

trial court that Mr. and Mrs. Spridgeon had agreed that this was to be a loan to Mrs. Spridgeon that she would repay by getting a conventional loan with a bank and paying the proceeds to Mr. Spridgeon.⁶⁰³

The court looked to the case of *Palm Beach Savings & Loan Ass'n v Fishbein*⁶⁰⁴ in which the wife received the homestead in a divorce.⁶⁰⁵ In that case, the husband had forged her name onto a note from the savings and loan company.⁶⁰⁶ The Supreme Court of Florida ruled that an equitable lien should be placed on the property to the extent the funds were used to pay down the previous mortgage on the property.⁶⁰⁷ The court held that Ms. Fishbein was in no worse position than she would have been if the mortgage had not been paid off.⁶⁰⁸

In this case, the judge followed *Fishbein*.⁶⁰⁹ Here, the judge ruled that an equitable lien was proper to prevent unjust enrichment and that Mrs. Spridgeon was no worse off than she would have been had she honored her agreement.⁶¹⁰

XVI. INVERSE CONDEMNATION

Department of Environmental Protection v. Youel.⁶¹¹ The trial court awarded judgment for the plaintiff based upon a finding that there had been a temporary taking when the Department improperly asserted jurisdiction and imposed development conditions that deprived the landowner of all use of the land.⁶¹² The Department of Environmental Protection (DEP) issued a final notice of violation to the landowner, but the landowner never appealed, so she is bound by the finding that the violation existed.⁶¹³ "Basically, the trial court's finding of a temporary taking was predicated upon a theory of estoppel—i.e., that DEP misled Youel in regard to permitting and mitigation."⁶¹⁴ Equitable estoppel can only be applied to the state in

603. *Id.*

604. 619 So. 2d 267 (Fla. 1993).

605. *Spridgeon*, 779 So. 2d at 502.

606. *Id.*

607. *Fishbein*, 619 So. 2d at 270.

608. *Spridgeon*, 779 So. 2d at 502.

609. *Id.*

610. *Id.*

611. 787 So. 2d 923 (Fla. 5th Dist. Ct. App. 2001).

612. *Id.* at 923–24.

613. *Id.* at 924.

614. *Id.*

exceptional cases.⁶¹⁵ Essential to the claim is proof that the reliance was on the positive act of an authorized official.⁶¹⁶ However, the record lacked those elements.⁶¹⁷ Youel was never denied a development permit because she never tried to get a development permit, and the official with whom she was dealing was not even in the permitting division of the DEP.⁶¹⁸

*Keshbro, Inc. v. City of Miami.*⁶¹⁹ Two cases were joined for consideration by the Supreme Court of Florida.⁶²⁰ Both involved the forcible closing of multiple dwelling unit structures by a Nuisance Abatement Board following the finding of a pattern of illegal activity on the premises.⁶²¹ The Supreme Court of Florida, in a unanimous opinion, upheld the action of the Nuisance Abatement Board in one case but not in the other.⁶²² The court first concluded that the temporary closing of a motel or a rental apartment building might constitute a taking under the Fifth Amendment so as to require the payment of compensation.⁶²³ The prospective regulation did not change that conclusion.⁶²⁴ The court approved the district court's reliance on *Lucas*.⁶²⁵ There had been no physical invasion of the properties, but the owners had been deprived of the beneficial use of their properties for the proscribed time because the structures could not be reasonably used for any but the prohibited uses during the period of the prohibition.⁶²⁶

A critical question was whether the governmental action fit within the nuisance exception.⁶²⁷ If the activity was a public nuisance, it could have been prohibited by a court at common law.⁶²⁸ Consequently, governmental action preventing that nuisance activity would not be a taking under the Fifth Amendment.⁶²⁹ Both cases involved illegal activities: one case involved sales of illegal drugs and the other involved prostitution as well as illegal

615. *Id.* at 924–25.

616. *Youel*, 787 So. 2d at 925.

617. *Id.*

618. *Id.*

619. 26 Fla. L. Weekly S469 (July 13, 2001).

620. *Id.*

621. *Id.*

622. *Id.* at S472.

623. *Id.* at S470.

624. *Keshbro, Inc.*, 26 Fla. L. Weekly at S471.

625. *Id.* (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

626. *Id.* at S471–72.

627. *Id.* at S472.

628. *Id.*

629. *Keshbro, Inc.*, 26 Fla. L. Weekly at S472.

drug sales and usage.⁶³⁰ So both would fit within the nuisance exception.⁶³¹ However, “[i]t is well settled in this State that injunctions issued to abate public nuisances must be specifically tailored to abate the objectionable conduct, without unnecessarily infringing upon the conduct of a lawful enterprise.”⁶³² The nuisance exception had the same limits. The record revealed that in the Miami case,⁶³³ the record supported the Board’s conclusion that the operation of the motel “had become inextricably intertwined with the drug and prostitution activity”⁶³⁴ The only way to prevent the nuisance activity was to close the motel, so that order was upheld.⁶³⁵ However, in the St. Petersburg case,⁶³⁶ the record had evidence of only two cocaine sales.⁶³⁷ Consequently, closing the entire apartment house was far beyond what was necessary to prevent future sales and, in fact, prohibited legal activity as well as the illegal.⁶³⁸ Such an overly broad order could not fit within the nuisance exception, so it could not be allowed to stand.⁶³⁹

*Millender v. Department of Transportation.*⁶⁴⁰ In 1975, the Department of Transportation moved the channel in the Carrabelle River.⁶⁴¹ The change caused the landowner’s river front land to begin eroding.⁶⁴² After the hurricane of 1985, state agents issued to the landowner, along with many others, permits to put in sea walls.⁶⁴³ However, after the seawall was completed, the Florida Department of Environmental Protection cited the seawall as illegal.⁶⁴⁴ Eight years of litigation followed.⁶⁴⁵ The Department of Environmental Protection finally prevailed, and in 1993, the landowner was forced to remove the seawall.⁶⁴⁶ Without the seawall, the erosion continued and the landowner said, “[o]ur property is vanishing, going in the

630. *Id.*

631. *Id.*

632. *Id.*

633. *Id.*

634. *Keshbro, Inc.*, 26 Fla. L. Weekly at S472.

635. *Id.*

636. *City of St. Petersburg v. Kablinger*, 730 So. 2d 409 (Fla. 2d Dist. Ct. App. 1999).

637. *Keshbro, Inc.*, 26 Fla. L. Weekly at S472.

638. *Id.*

639. *Id.*

640. 774 So. 2d 767 (Fla. 1st Dist. Ct. App. 2000).

641. *Id.* at 768.

642. *Id.*

643. *Id.* at 771 n.4.

644. *Id.*

645. *Millender*, 774 So. 2d at 768.

646. *Id.*

river, washing down the river Our docks is (sic) torn down, our buildings is falling in,"⁶⁴⁷ The landowner brought this inverse condemnation suit for damages and an injunction.⁶⁴⁸ The trial court granted summary judgment for the Department of Transportation based on the statute of limitations, but the First District Court of Appeal reversed.⁶⁴⁹

Under the Continuing Tort Theory, an injunction may be granted to prevent further tortious conduct even though the statute of limitations would bar suit for the original tort.⁶⁵⁰ Where the tort is a continuing one, the statute of limitations does not begin to run until the last tortious act.⁶⁵¹ Therefore, the trial court should not have ruled as a matter of law that the landowner could not get injunctive relief under these circumstances.⁶⁵²

Furthermore, the district court recognized the Dickinson Stabilization Doctrine.⁶⁵³ That doctrine is based on the United States Supreme Court's 1947 decision in *United States v. Dickinson*.⁶⁵⁴ It provided that the statute of limitations for inverse condemnation does not begin to run until the situation "becomes stabilized."⁶⁵⁵ While the doctrine had never been officially adopted in Florida, it had been cited in one earlier Florida case.⁶⁵⁶ This court found that the doctrine was sound and should be applied in Florida, but it did certify the question of the doctrine's viability in Florida to the Supreme Court of Florida.⁶⁵⁷ Furthermore, the district court concluded the doctrine should be applied in this case because the landowner was the victim of an unforeseeable future event, the order of the Department of Environmental Regulation, that prevented the landowner from stopping the erosion with a seawall.⁶⁵⁸

647. *Id.* at 768 n.2.

648. *Id.* at 768.

649. *Id.*

650. *Millender*, 774 So. 2d at 769.

651. *Id.*

652. *Id.* at 771.

653. *Id.* at 769.

654. 331 U.S. 745 (1947).

655. *Id.* at 749.

656. See *Hillsborough County Aviation Auth. v. Benitez*, 200 So. 2d 194, 200 (Fla. 2d Dist. Ct. App. 1967).

657. The exact question certified as being of great public importance was: "DOES THE DOCTRINE STATED IN *UNITED STATES V. DICKINSON*, 331 U.S. 745 (1947), APPLY IN AN APPROPRIATE FLORIDA CASE SO AS TO DELAY THE ACCRUAL OF AN ACTION FOR INVERSE CONDEMNATION AND INJUNCTIVE RELIEF?" *Millender*, 774 So. 2d at 771 (citations omitted).

658. *Id.*

*Sayfie v. Department of Transportation.*⁶⁵⁹ In order to encourage abutting property owners to donate rights of way for the construction of Alligator Alley across southern Florida, the following language was inserted into the donation deeds: "Reserving to the Grantor, his heirs or assigns, the right of access from his remaining property to any service road which may be constructed on the outer 50 feet of the right of way described above."⁶⁶⁰ This gave those abutting landowners access to a service road, if one ran parallel to Alligator Alley.⁶⁶¹ Generally, the service road did exist and had an entrance to the highway at two-mile intervals.⁶⁶² Years later, the Department expanded Alligator Alley into a modern multilane, high speed, limited access highway, Interstate-75.⁶⁶³ To do so, the Department acquired an additional 125-foot-wide strip on the southern side of Alligator Alley.⁶⁶⁴ The plaintiffs here claimed compensation based on their loss of access.⁶⁶⁵ The trial court had granted summary judgment to the Department based on an earlier case that had denied claims for compensation to landowners on the north side of I-75.⁶⁶⁶ However, the district court found that case distinguishable because the claimants here had land on the south side, the side on which the Department had expanded.⁶⁶⁷ In effect, the claimants here had lost their easement to the abutting land where the service road might be built and that was a compensable loss.⁶⁶⁸

*Department of Environmental Protection v. Burgess.*⁶⁶⁹ The landowner acquired undeveloped wetlands in 1956.⁶⁷⁰ He had the vague idea that the land would appreciate in value and thought it would be a good investment.⁶⁷¹ Until 1992, he used the land for occasional nature walks and fishing.⁶⁷² That year he decided to develop the land.⁶⁷³ He subdivided it into smaller tracts

659. 770 So. 2d 193 (Fla. 2d Dist. Ct. App. 2000).

660. *Id.* at 194.

661. *Id.*

662. *Id.*

663. *Id.*

664. *Sayfie*, 770 So. 2d at 194.

665. *Id.*

666. *Id.* (citing *Dep't of Transp. v. Edwards*, 545 So. 2d 479 (Fla. 2d Dist. Ct. App. 1989)).

667. *Id.* at 195.

668. *Id.*

669. 772 So. 2d 540 (Fla. 1st Dist. Ct. App. 2000).

670. *Id.* at 541.

671. *Id.* at 542.

672. *Id.* at 542-43.

673. *Id.* at 542.

and put them up for sale.⁶⁷⁴ He also made plans to build a large wooden dock, boardwalk, and A-framed camping shelter.⁶⁷⁵ To build the camping shelter, he needed a dredge and fill permit from the Department of Environmental Protection, but his application was refused.⁶⁷⁶ Rather than appeal, he filed this action claiming inverse condemnation of his property.⁶⁷⁷

The landowner based his claim on *Lucas v. South Carolina Coastal Council*.⁶⁷⁸ The district court, however, pointed out that in *Lucas* the state trial court had determined that the regulation had rendered the land valueless.⁶⁷⁹ That determination had not been challenged on appeal, so the United States Supreme Court had not based its decision on that unchallenged premise.⁶⁸⁰ In contrast, in this case, the Department vigorously challenged his claim that the land was valueless or that the regulation effected a regulatory taking.⁶⁸¹ The district court concluded that no taking had occurred.⁶⁸²

To constitute a regulatory taking, the regulation must deprive the landowner of all, or substantially all, economically viable use of his land.⁶⁸³ That question turned on whether the permit denial “interfered with his reasonable, distinct, investment-backed expectations, held at the time he purchased the property.”⁶⁸⁴ The record showed that, at the time he bought the land, he had only a general hope of finding a way to make a profit from the land in the future.⁶⁸⁵ He did not have a specific plan that he was putting into effect at that time.⁶⁸⁶ However, a landowner does not have a right to make a profit from his investment.⁶⁸⁷ He also had an expectation that he would be able to use the land for recreation.⁶⁸⁸ The permit denial does not interfere with the way he used the land for recreation for over thirty years.⁶⁸⁹

674. *Burgess*, 772 So. 2d at 541.

675. *Id.*

676. *Id.*

677. *Id.*

678. 505 U.S. 1003 (1992); *Burgess*, 772 So. 2d at 542.

679. *Burgess*, 772 So. 2d at 542.

680. *Id.*

681. *Id.* at 543.

682. *Id.* at 544.

683. *Id.* at 543.

684. *Burgess*, 772 So. 2d at 543.

685. *Id.*

686. *Id.*

687. *Id.* at 544.

688. *Id.*

689. *Burgess*, 772 So. 2d at 544.

It merely prevents him from changing that recreational use.⁶⁹⁰ In fact, he could still build his dock and expand the recreational use without the permit.⁶⁹¹ Consequently, the landowner failed to prove his case for inverse condemnation.⁶⁹²

*State Department of Transportation v. Gayety Theatres, Inc.*⁶⁹³ A road improvement project included the building of a concrete median down the middle of a busy thoroughfare.⁶⁹⁴ Before the project, drivers coming north or south could turn directly into the theater's parking lot; similarly, patrons leaving the theater could turn directly north or south.⁶⁹⁵ After the project was completed, northbound patrons would have to go a half mile beyond the theater, make a u-turn, and come back half a mile in the southbound lane to enter the theater's parking lot.⁶⁹⁶ The theater sued for loss of access and won in the trial court.⁶⁹⁷ The district court, however, reversed.⁶⁹⁸

A landowner is not entitled to recover compensation merely because government action has caused a lessening of traffic in an abutting road.⁶⁹⁹ Compensation would only be due where access to the property had been substantially diminished.⁷⁰⁰ Whether that has happened is a question for the judge.⁷⁰¹ This case fit squarely within the first rule because the project had merely modified the flow of the northbound traffic.⁷⁰² The theater still had the same access to the roadway even if it was only from the southbound lane.⁷⁰³

*State Department of Transportation v. Suit City of Aventura.*⁷⁰⁴ The landowner operated a large shopping center at the intersection of two busy roads.⁷⁰⁵ To alleviate the severe traffic problems at the intersection, the Department changed the traffic patterns and built elevated lanes to divert

690. *Id.*

691. *Id.*

692. *Id.*

693. 781 So. 2d 1125 (Fla. 3d Dist. Ct. App. 2001).

694. *Id.* at 1126.

695. *Id.*

696. *Id.*

697. *Id.* at 1126–27.

698. *Gayety Theaters Inc.*, 781 So. 2d at 1128.

699. *Id.* at 1127.

700. *Id.*

701. *Id.*

702. *Id.* at 1127–28.

703. *Gayety Theaters Inc.*, 781 So. 2d at 1127–28.

704. 774 So. 2d 9 (Fla. 3d. Dist. Ct. App. 2000).

705. *Id.* at 10.

traffic over the intersection.⁷⁰⁶ The project resulted in the closing of one entrance to the mall and an obstruction of the view of the mall.⁷⁰⁷ The landowner sought compensation for both.⁷⁰⁸ The district court found both to be noncompensable.⁷⁰⁹

Closing the entrance would be compensable only if it substantially deprived the landowner of access to the property.⁷¹⁰ Here, the landowner still had two entrances on each of the busy roadways.⁷¹¹ In addition, the project had, to some effect, improved the access by at least one of those entrances.⁷¹² So, there was no compensable loss of access.⁷¹³ Nor did building the elevated lanes, which to some extent, blocked the light, air, and view of the mall, constitute a compensable taking.⁷¹⁴ The Department was validly exercising its police power in redesigning the traffic patterns to protect the public welfare.⁷¹⁵ To the extent that this interfered with the rights of the landowner, it would be compensable only if the interference was unreasonable.⁷¹⁶ The court concluded that “[r]educing the traffic distress at this intersection by elevated lanes is certainly within the discretion of the DOT and is well within the bounds of reason.”⁷¹⁷

*State Department of Transportation v. Kirkland.*⁷¹⁸ The landowner operated a restaurant with direct access to State Road 77.⁷¹⁹ A short distance from the restaurant, State Road 77 proceeded to cross the bay by a bridge.⁷²⁰ Then the Department built a new bridge and relocated State Road 77 to cross the bay by the new bridge.⁷²¹ The old bridge was closed and converted into a fishing pier.⁷²² That part of old State Road 77 was renamed and could still be reached from the new State Road 77, but it now reached a dead end at the

706. *Id.* at 11.

707. *Id.*

708. *Id.* at 10.

709. *Suit City of Aventura*, 774 So. 2d at 14.

710. *Id.* at 12.

711. *Id.*

712. *Id.*

713. *Id.* at 12–13.

714. *Suit City of Aventura*, 774 So. 2d at 13.

715. *Id.* at 12.

716. *Id.* at 14.

717. *Id.*

718. 772 So. 2d 566 (Fla. 1st Dist. Ct. App. 2000).

719. *Id.* at 567.

720. *Id.*

721. *Id.*

722. *Id.*

pier.⁷²³ The restaurant parking lot still opened onto that road in exactly the same way as it had before, but the landowner brought this inverse condemnation action.⁷²⁴ The district court concluded that no compensable taking had occurred.⁷²⁵ What occurred here was the mere redirection of traffic.⁷²⁶ That was not a taking because it did not deprive the landowner of access.⁷²⁷

*VLX Properties, Inc. v. Southern States Utilities, Inc.*⁷²⁸ Glenn Abby Golf Course (“GAGC”) owned a golf course.⁷²⁹ VLX owned a portion of James Pond which was adjacent to and, to some degree, within the confines of the golf course.⁷³⁰ GAGC was prohibited from watering the golf course with water from its wells, so it entered into a contract with the Public Utility for reclaimed wastewater.⁷³¹ However, when the Public Utility began discharging the reclaimed wastewater, James Pond was flooded.⁷³² VLX claimed the flooding caused the water quality in the pond to deteriorate seriously.⁷³³ The trial court concluded that wastewater had been discharged directly into James Pond but that did not amount to a taking because VLX had not been deprived of all reasonable and beneficial use of its property.⁷³⁴ The findings of fact were not challenged on appeal, but VLX claimed that the trial court had applied the wrong legal standard.⁷³⁵ The three-judge panel of the Fifth District Court of Appeal agreed and reversed.⁷³⁶

The court noted that “a distinction has been made between categories of takings in inverse condemnation cases.”⁷³⁷ For example, taking may occur “by physical occupation, flooding, governmental regulation, and taking of access rights.”⁷³⁸ The legal standard to be applied in determining whether a taking occurred depends on which category of taking is alleged.⁷³⁹ In this

723. *Kirkland*, 772 So. 2d at 567.

724. *Id.*

725. *Id.* at 568.

726. *Id.*

727. *Id.*

728. 792 So. 2d 504 (Fla. 5th Dist. Ct. App. 2001).

729. *Id.* at 506.

730. *Id.*

731. *Id.*

732. *VLX Props., Inc. v. S. States Utils., Inc.*, 25 Fla. L. Weekly D1745 (5th Dist. Ct. App. July 21, 2000).

733. *Id.*

734. *Id.*

735. *Id.* at D1746.

736. *Id.*

737. *VLX Props., Inc.*, 25 Fla. L. Weekly at D1745.

738. *Id.* at D1745-46.

739. *Id.* at D1746.

case, the trial court considered the allegation to be that a taking that had been effected by flooding which was caused by the Public Utility.⁷⁴⁰ That would be an indirect invasion and, consequently, it required the claimant to prove that the flooding had deprived the claimant of all reasonable and beneficial use of the land.⁷⁴¹ However, close analysis revealed that the claim was really that the Public Utility directly occupied VLX's land by discharging wastewater directly into the pond.⁷⁴² A direct invasion is a per se taking.⁷⁴³ The claimant need only show entry upon its land for more than a momentary period, under warrant or color of legal authority that devoted it to public use.⁷⁴⁴ Those factors were clearly established in the trial court's findings of fact.⁷⁴⁵ Any showing of the size of the encroachment or the economic loss it caused would only be elements of damages, not essentials to establishing liability.⁷⁴⁶ In sum, the trial court had erred in characterizing this case as one where flooding was alleged to have caused the taking when, in fact, it was a case in which the taking had caused the flooding.⁷⁴⁷

The Fifth District Court of Appeal granted a motion for rehearing *en banc*.⁷⁴⁸ The panel's opinion was withdrawn, and it decided to recede from its 1997 decision in this very litigation.⁷⁴⁹ The *en banc* opinion characterized the dispute as VLX's attempt to claim damages for the invasion of the wastewater into those parts of the pond that it had obtained after it had agreed to a flowage easement.⁷⁵⁰ Over Judge Sharp's and Judge Peterson's spirited dissents, the court found a flowage easement existed because it had been intended by all the necessary parties based on the facts.⁷⁵¹ The court then invoked the "tipsy coachman" rule to uphold the trial court's decision.⁷⁵²

740. *Id.*

741. *Id.*

742. *VLX Prop. Inc.*, 25 Fla. L. Weekly at D1745-46.

743. *Id.* at D1746.

744. *Id.* (citing *Shick v. Fla. Dep't of Agric.*, 504 So. 2d 1318 (Fla. 1st Dist. Ct. App. 1987), which in turn quoted from *Poe v. State Road Dep't*, 127 So. 2d 898, 900 (Fla. 1st Dist. Ct. App. 1961)).

745. *Id.*

746. *Id.*

747. *VLX Prop. Inc.*, 25 Fla. L. Weekly at D1745.

748. *VLX Prop., Inc. v. S. States Util., Inc.*, 792 So. 2d 504 (Fla. 5th Dist. Ct. App. 2001), referred to by the court as "VLX1." See Ronald Benton Brown & Joseph M. Grohman, *Property Law: 1998 Survey of Florida Law*, 23 NOVA L. REV. 229, 275 (1998).

749. *VLX Prop., Inc.*, 792 So. 2d at 506.

750. *Id.* at 506-07.

751. *Id.* at 507.

752. *Id.* at 509.

The “tipsy coachman” rule is that a decision that produces the right result will be affirmed even if it was reached for the wrong reasons. In this case, the trial court had ruled for the defendants because, it decided, no taking had occurred. The trial court should have ruled for the defendants because they had a flowage easement which allowed them to disburse the wastewater as they had. The “tipsy coachman” rule may be, to most of us, more interesting than the other parts of this tortured litigation. The phrase is based on a verse, first quoted from Goldsmith’s *RETALIATION* for this purpose in 1879 by the Supreme Court of Georgia:

The pupil of impulse, it forc’d him along
His conduct still right, with his argument wrong;
Still aiming at honor, yet fearing to roam,
The coachman was tipsy, the chariot drove home;⁷⁵³

In essence, if the coach gets home safely, the fact that the coachman was tipsy becomes irrelevant. This verse was repeated by the Supreme Court of Florida in 1963⁷⁵⁴ and, therefore, the “tipsy coachman” rule has become part of our legal culture.

XVII. LANDLORD AND TENANT

*Bailey v. Brickell Key Centre-FBEC, L.L.C.*⁷⁵⁵ The landlord brought an action for possession, damages and recovery on a guaranty.⁷⁵⁶ The trial court issued a final judgment of eviction and ordered a writ of possession to issue.⁷⁵⁷ The judgment reserved jurisdiction on collateral matters that included, but were not limited to, attorney’s fees.⁷⁵⁸ The landlord later requested and was granted a judgment for damages against the tenant’s guarantor.⁷⁵⁹ The guarantor appealed on the basis that the trial court lacked jurisdiction to issue and the district court of appeal reversed.⁷⁶⁰ The eviction

753. *Lee v. Porter*, 63 Ga. 345, 346 (1879). For the complete poem, see *RETALIATION: A POEM* which is reprinted with some explanatory notes on *BOB’S BYWAY* at <http://shoga.wva.com/~rgs/xgoldsmi.htm> or <http://cluster.wva.com/~rgs/xgoldsmi.htm>.

754. *Carraway v. Armour & Co.*, 156 So. 2d 494, 497 (Fla. 1963).

755. 778 So. 2d 386 (Fla. 3d Dist. Ct. App. 2001).

756. *Id.*

757. *Id.*

758. *Id.*

759. *Id.*

760. *Bailey*, 778 So. 2d at 386.

order here was final as to damages because there was no reservation of jurisdiction on that issue.⁷⁶¹ Once a trial court issued that final judgment, it lost jurisdiction to award further damages.⁷⁶²

*Beacon Property Management, Inc. v. PNR, Inc.*⁷⁶³ PNR bought a restaurant.⁷⁶⁴ As part of the transaction, the commercial lease for the restaurant space was assigned to PNR.⁷⁶⁵ The corporate landlord was run by two shareholders who were also the corporate officers, identified herein as "A" and "B."⁷⁶⁶ PNR alleged that A induced PNR to complete the transaction by certain statements regarding the landlord's future plans for the premises.⁷⁶⁷ Unfortunately, the landlord allowed the premises to fall into such a bad state that one wall collapsed.⁷⁶⁸ After repairs were made, PNR tried to reopen the restaurant, but gave up after a short time.⁷⁶⁹ The landlord evicted the tenant from the closed restaurant.⁷⁷⁰

The tenant then filed this suit seeking damages from the corporate landlord, the company that managed the premises, and A and B.⁷⁷¹ The landlord did not appear to defend and A settled.⁷⁷² That left B and the management company to face the charges of violating Florida's Deceptive and Unfair Trade Practices Act,⁷⁷³ fraud, negligent representation, tortious interference with contract, and wrongful eviction.⁷⁷⁴ The jury verdict awarded PNR compensatory and punitive damages, but the district court reversed.⁷⁷⁵

The district court held that the alleged conduct here could not constitute a violation of the Deceptive and Unfair Trade Practices Act.⁷⁷⁶ That act provides that: "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any

761. *Id.* at 386.

762. *Id.*

763. 785 So. 2d 564 (Fla. 4th Dist. Ct. App. 2001).

764. *Id.* at 566.

765. *Id.*

766. *Id.* at 566 n.1.

767. *Id.* at 566.

768. *PNR, Inc.*, 785 So. 2d at 566.

769. *Id.*

770. *Id.*

771. *Id.*

772. *Id.*

773. FLA. STAT. § 501.204 (2001).

774. *PNR, Inc.*, 785 So. 2d at 566.

775. *Id.*

776. *Id.* at 567.

trade or commerce are hereby declared unlawful.”⁷⁷⁷ The court noted the plain meaning of these terms and concluded, “[a] single instance of doing something does not make it a method or a practice.”⁷⁷⁸ Here the evidence was limited to a single lease, so a violation had not been established.⁷⁷⁹ Having reached that conclusion, the court found it unnecessary to address the question of whether the act even applied to commercial leases, a question that had been raised by the landlord.⁷⁸⁰

The district court also found that a case of fraud or negligent representation had not been proven against these defendants.⁷⁸¹ The alleged misrepresentations had been made by A.⁷⁸² There was no evidence that A was acting on behalf of B or the management company.⁷⁸³ A had been acting on his own behalf or on behalf of the corporate landlord.⁷⁸⁴ There was no basis for applying any legal theory which might hold shareholders of the corporate landlord personally liable for the statements of the corporation or another investor.⁷⁸⁵

The claim of tortious interference with a business relationship was initially based on the claim that the landlord’s conduct had prevented the restaurant from attracting future patrons.⁷⁸⁶ On its face, this claim should have failed because the tort requires the existence of a present relationship, not merely hopes of a future one.⁷⁸⁷ PNR also tried to claim that B and the management company tortiously interfered with the lease.⁷⁸⁸ That also failed to satisfy one of the elements of the tort which was that the interference must be done by a third party.⁷⁸⁹ B and the management company were not strangers to the lease transaction.⁷⁹⁰ Their involvement was on behalf of the landlord and the conduct complained of, in fact, benefited the landlord.⁷⁹¹

777. § 501.204 (1).

778. *PNR, Inc.*, 785 So. 2d at 568.

779. *Id.* at 567.

780. *Id.*

781. *Id.* at 568.

782. *Id.*

783. *PNR, Inc.*, 785 So. 2d at 568.

784. *Id.*

785. *Id.*

786. *Id.*

787. *Id.* at 569.

788. *PNR, Inc.*, 785 So. 2d at 569.

789. *Id.*

790. *Id.*

791. *Id.*

Finally, the wrongful eviction claim against B and the management company was also fatally defective.⁷⁹² Neither B nor the management company had brought the eviction action.⁷⁹³ It had been brought on behalf of the corporate landlord by A.⁷⁹⁴ So any wrongful eviction claim would have to be brought against A or the landlord.⁷⁹⁵

*Camena Investments & Property Management Corp. v. Cross.*⁷⁹⁶ Tenant leased the property as the location for her restaurant.⁷⁹⁷ The leasing agent assured her that she would be able to open for business by October 1st.⁷⁹⁸ However, when the tenant sought approval of her plans, she learned that there were zoning and restrictive covenant obstacles.⁷⁹⁹ Eventually, she was able to open the restaurant, but it was not a success.⁸⁰⁰ When she failed to pay the rent, the landlord brought an eviction action in the county court.⁸⁰¹ The tenant raised the affirmative defense of fraud in the inducement.⁸⁰² The parties later agreed that the defense could be stricken and a default judgment for possession entered in favor of the landlord.⁸⁰³

The landlord then brought an action for the unpaid rent in circuit court.⁸⁰⁴ The tenant counterclaimed for damages based on fraud in the inducement and breach of contract.⁸⁰⁵ The landlord first claimed that the counterclaim was barred by res judicata based on the judgment in the eviction action.⁸⁰⁶ That argument was rejected.⁸⁰⁷ The district court concluded that the tenant had voluntarily abandoned fraud in the inducement as a defense.⁸⁰⁸ It likened that to taking a voluntary dismissal which is without prejudice because it is not an adjudication on the merits.⁸⁰⁹ Thus, res judicata would be inapplicable.

792. *Id.*

793. *PNR, Inc.*, 785 So. 2d at 569–70.

794. *Id.* at 570.

795. *Id.*

796. 791 So. 2d 595 (Fla. 3d Dist. Ct. App. 2001).

797. *Id.* at 596.

798. *Id.*

799. *Id.*

800. *Id.*

801. *Cross*, 791 So. 2d at 596.

802. *Id.*

803. *Id.*

804. *Id.*

805. *Id.*

806. *Cross*, 791 So. 2d at 596.

807. *Id.*

808. *Id.*

809. *Id.* at 597.

The landlord also claimed that the tenant could not claim fraud in the inducement because she took with notice of what was on the public records.⁸¹⁰ It asserted that *Pressman v. Wolf*⁸¹¹ stood for the proposition that statements concerning public records can never form the basis for a claim of actionable fraud.⁸¹² The district court held that there was no such general rule.⁸¹³ The question is whether a person in the plaintiff's position would have been able to ascertain the true facts by taking reasonable steps such as checking the public records.⁸¹⁴ A buyer acting reasonably would check the public records.⁸¹⁵ A contractor pulling a permit would be expected to check the public records.⁸¹⁶ However, "these types of searches are not expected to be performed as standard procedure by a party entering into a commercial lease."⁸¹⁷

The district court did, however, reverse the trial court's dismissal of the tenant's motion for tax attorney's fees for lack of evidence.⁸¹⁸ The tenant had presented an expert witness who testified to having reviewed the agreement between the tenant and her attorney, what the agreed rate was, and that he had reviewed the time sheets kept by the attorney.⁸¹⁹ The tenant had moved for rehearing on the attorneys' fees issue, but that had been denied.⁸²⁰ "We fail to appreciate what was missing in [the tenant's] presentation of evidence regarding the amount of attorney's fees"⁸²¹ stated the district court. At the very least, the trial court should have granted the motion for rehearing and denying that motion was an abuse of discretion that required reversal.

*Horizon Medical Group, P.A. v. City Center of Charlotte County, Ltd.*⁸²² The commercial tenant signed a five year lease in March 1999, but less than nine months later the landlord filed this action alleging that tenant

810. *Id.*

811. 732 So. 2d 356 (Fla. 3d Dist. Ct. App. 1999).

812. *Cross*, 791 So. 2d at 597 (citing *Pressman*, 732 So. 2d at 361).

813. *Id.*

814. *Id.*

815. *Id.*

816. *Id.*

817. *Cross*, 791 So. 2d at 598.

818. *Camena Inv. & Prop. Mgmt. Corp. v. Cross*, 791 So. 2d 595, 598 (3d Dist. Ct. App. 2001).

819. *Id.*

820. *Id.*

821. *Id.*

822. 779 So. 2d 545 (Fla. 2d Dist. Ct. App. 2001).

had breached the lease.⁸²³ The tenant admitted that it had abandoned the premises and owed back rent, so the trial court entered a final summary judgment.⁸²⁴ The damages awarded by the court included unpaid back rent and accelerated future rent for the entire term and the cost of reletting the premises.⁸²⁵ The possibility of reletting was the basis for the partial reversal.⁸²⁶ A landlord is not entitled to the windfall of collecting rent for a property from two different tenants.⁸²⁷ So if the landlord did relet the premises and collect rent from a third party for time covered by this lease, the tenant was entitled to credit against the accelerated future rent. The trial court was ordered to retain jurisdiction for the purpose of considering a motion by the tenant for an accounting to consider any credits to which it might become entitled based upon the landlord reletting the premises to a replacement tenant.⁸²⁸

The Florida Residential Landlord and Tenant Act was amended during the 2001 legislative session.⁸²⁹ The first change is to give the landlord more time to notify the tenant of an intent to impose a claim against the security deposit. Now the landlord has thirty days, rather than fifteen, to send the tenant notice by certified mail.⁸³⁰

The Disposition of Personal Property Landlord and Tenant Act has also been modified.⁸³¹ This act provides the method by which the landlord may dispose of personal property left behind by the tenant without incurring any risk that the tenant may later reappear and assert a conversion claim against the landlord.⁸³² The lease may now contain a provision which relieves the landlord of the statutory duty to give notice that personal property has been left behind to the tenant or any other person the landlord thinks to be the personal property's owner.⁸³³ Under the prior law, if the landlord reasonably believed that the personal property left behind was worth less than \$250, then the landlord could simply keep it rather than have to sell it at a public

823. *Id.* at 546.

824. *Id.*

825. *Id.*

826. *Id.*

827. *Horizon Med. Group*, 779 So. 2d at 546.

828. *Id.*

829. FLA. STAT. § 83.49 (2001).

830. FLA. STAT. § 83.49(3)(a) (2001) as amended by Ch. 2001-179, § 1, 2001 Fla. Sess. Law Serv. 581 (West).

831. FLA. STAT. §§ 715.10-.111 (2000).

832. *Id.*

833. *See* FLA. STAT. § 83.67(3) (2001) as amended by Ch. 2001-179, § 2, 2001 Fla. Sess. Law Serv. 581 (West).

sale.⁸³⁴ That threshold has been raised to \$500.⁸³⁵ The notice forms sent to former tenants and other possible owners have been modified to reflect this change.⁸³⁶

The legislature has also taken steps to provide further protections to members of the Armed Forces of the United States. If the tenant is a member of the military whose post is moved more than thirty-five miles from the rental unit or who is unexpectedly deactivated, that tenant may terminate the lease upon thirty days notice to the landlord.⁸³⁷ The tenant must include a copy of the military orders with the termination notice that is sent to the landlord to invoke this provision.⁸³⁸ If the member of the military dies while on active duty, the lease may be terminated in a similar fashion.⁸³⁹ Following termination, the landlord shall be entitled only to the prorated rent.⁸⁴⁰ If the lease was terminated more than fourteen days before the tenant was to take possession, the landlord is not entitled to any rent.⁸⁴¹ However, if the landlord has suffered actual damages due to the early termination of the lease, the landlord may recover liquidated damages, although the amount is limited if the lease was terminated after a period less than six months.⁸⁴²

XVIII. LIENS

*Slachter v. Swanson.*⁸⁴³ The issue in this case is whether a subsequent property purchaser's claim to property takes priority over the holder of a disputed mortgage.⁸⁴⁴

In this case, a mortgage company assigned a mortgage to its former president, mortgagee.⁸⁴⁵ The company filed a foreclosure action against the mortgagors which was dismissed with prejudice.⁸⁴⁶ The mortgagors then sued the company for wrongful foreclosure and fraud, and were awarded

834. FLA. STAT. § 715.109(1) (2000).

835. FLA. STAT. § 715.109(1) (2001).

836. *Id.*

837. FLA. STAT. § 83.682(1)(a) (2001).

838. *Id.*

839. § 83.682 (1)(b).

840. FLA. STAT. § 83.682 (2) (2001).

841. *Id.*

842. § 83.682 (3).

843. 26 Fla. L. Weekly D586 (3d Dist. Ct. App. Feb. 28, 2001).

844. *Id.*

845. *Id.*

846. *Id.*

damages.⁸⁴⁷ In order to collect on the judgment, the mortgagors got a trial court order discharging the note and mortgage as paid in full.⁸⁴⁸ The discharge judgment was duly recorded.⁸⁴⁹ But, the discharge judgment ultimately was reversed by a Supreme Court of Florida decision that dealt with numerous investors and appellants although the spelling and phonetics of the name were not the same.⁸⁵⁰ Thereafter, the mortgagors transferred the property by warranty deed to appellee.⁸⁵¹ After this transfer, the trial court vacated the discharge judgment.⁸⁵² Appellant then sued appellee to foreclose on the property and appellee's partial summary judgment motion was granted.⁸⁵³

The appellate court affirmed the judgment because appellant failed to show appellee had knowledge of appellant's claim that the mortgage had been reinstated after it was supposedly discharged, and thus, did not establish he had implied actual knowledge of that reinstatement or that it was readily ascertainable because of the difference in names in the Supreme Court of Florida decision.⁸⁵⁴ Therefore, the appellate court held that he was a bona fide purchaser of the property whose claim to that property took priority over appellant's disputed mortgage.⁸⁵⁵

Legislative amendments to changes in section 55.10 of the *Florida Statutes*, revising the duration period of certain liens, provide in subparagraph (1) that if a certified copy was first recorded between July 1, 1987 and June 30, 1994, the judgment, order, or decree is valid for an initial period of seven years from the date recorded.⁸⁵⁶ If the certified copy is first recorded on or after July 1, 1994, it is a lien for an initial period of ten years from the date of recording.⁸⁵⁷ Subparagraphs (2), (3), and (4) clarify the re-recording language.⁸⁵⁸ The lien in subsection (1) or an extension of that lien as provided by subsection (2), may be extended for an additional ten years.⁸⁵⁹ As an example, if a lien was recorded between July 1, 1987 and June 30,

847. *Id.*

848. *Slachter*, 26 Fla. L. Weekly at D586.

849. *Id.*

850. *Id.*

851. *Id.*

852. *Id.*

853. *Slachter*, 26 Fla. L. Weekly at D586.

854. *Id.* at D587.

855. *Id.*

856. S.B. 178, 102d Sess. (Fla. 2001).

857. *Id.*

858. *Id.*

859. *Id.*

1987 one can re-record it twice to reach the twenty year statute of limitations provided under section 55.081.

XIX. LIS PENDENS

*Seligman v. North American Mortgage Co.*⁸⁶⁰ The issue is whether notice of a *lis pendens* creates a property right that has priority over a mortgage, later recorded, when the property is part of the marital property in a marriage dissolution case.⁸⁶¹

Appellee tried to foreclose on its mortgage to appellant.⁸⁶² The mortgage in question was executed by appellant's former husband as a single man after appellant filed a notice of *lis pendens* regarding the property, upon her petition for dissolution of their marriage.⁸⁶³

Appellant properly recorded the notice of *lis pendens* and also properly procured a valid extension of the *lis pendens*.⁸⁶⁴ The *lis pendens* remained in effect, and was not dissolved at the time appellee's mortgage was executed and recorded and at the time appellee's foreclosure suit was filed.⁸⁶⁵ Because of the common law doctrine of *pendente lite*, the court in a dissolution of marriage proceeding, had jurisdiction over the property until final judgment, and whoever purchased or encumbered the property took subject to the dissolution judgment.⁸⁶⁶ The former husband was not allowed to encumber or alienate the property pending litigation.⁸⁶⁷ Appellee had record notice of the pending dissolution and should have known the husband was not in fact single.⁸⁶⁸ This court held that the fact that the notice of *lis pendens* referred to the action filed as a dissolution of marriage and listed the property at issue was sufficient for the requirements of section 48.23(1)(a) of the 1997 *Florida Statutes* to set forth the relief sought.⁸⁶⁹ The trial court's decision was reversed.⁸⁷⁰ The matter was remanded for entry of judgment for appellant.⁸⁷¹

860. 781 So. 2d 1159 (Fla. 4th Dist. Ct. App. 2001).

861. *Id.* at 1161.

862. *Id.* at 1160.

863. *Id.*

864. *Id.* at 1163.

865. *Seligman*, 781 So. 2d at 1163.

866. *Id.*

867. *Id.*

868. *Id.*

869. *Id.*

870. *Seligman*, 781 So. 2d at 1164.

871. *Id.*

XX. MORTGAGES

*Michel v. Beau Rivage Beach Resort, Inc.*⁸⁷² The issue in this case is whether a lien on a home is proper when it represents security for a commission earned by the real estate broker.⁸⁷³

In this case, the broker earned a commission on the sale of a property.⁸⁷⁴ The broker allowed the seller to be paid the funds owed to him, so the purchaser could get a loan in the amount of the commission from the seller.⁸⁷⁵ The trial court construed section 475.42(1)(j) of the *Florida Statutes*, which prohibits a broker or salesman from placing a mortgage in the public records in order to collect a commission, to disallow what occurred here.⁸⁷⁶ The appellate court found that the broker was placing a lien on the property.⁸⁷⁷ Here, the broker allowed the seller, who was obligated to pay the commission, to use the commission to grant a loan to the purchaser.⁸⁷⁸ The appellate court held that the funds were the seller's to do with as he pleased, and that the trial court had misconstrued the statute in this instance.⁸⁷⁹ Therefore, the appellate court reversed the trial court.⁸⁸⁰

*Suntrust Bank v. Riverside National Bank of Florida.*⁸⁸¹ The issue in this case involved the priority of a first mortgagee's refinanced loan.⁸⁸²

In 1993, appellant recorded a balloon first mortgage of \$148,500.⁸⁸³ In 1995, appellee recorded a \$100,000 second mortgage.⁸⁸⁴ In 1998, appellant refinanced the first mortgage, lending \$136,800.⁸⁸⁵ The sums paid off the original mortgage and appellant recorded a satisfaction of the original first mortgage and its new mortgage.⁸⁸⁶ Appellant assumed that its new mortgage was the first mortgage because its title search did not disclose the appellee's

872. 774 So. 2d 900 (Fla. 4th Dist. Ct. App. 2001).

873. *Id.* at 901.

874. *Id.*

875. *Id.*

876. *Id.* at 902; *see also* FLA STAT. § 475.42(1)(j).

877. *Michel*, 774 So. 2d at 902.

878. *Id.*

879. *Id.*

880. *Id.*

881. 26 Fla. L. Weekly D513 (4th Dist. Ct. App. Feb. 14, 2001), *withdrawn*, 26 Fla. L. Weekly 2109 (4th Dist. Ct. App. Aug. 29, 2001) (filling an identical opinion).

882. *Id.*

883. *Id.*

884. *Id.*

885. *Id.*

886. *Suntrust Bank*, 26 Fla. L. Weekly at D513.

mortgage.⁸⁸⁷ When the property went into foreclosure, appellant discovered the priority difficulties.⁸⁸⁸ The trial court denied appellant relief.⁸⁸⁹

The appeals court reversed, holding that the previous two cases upon which the trial court relied were incorrect, and that appellant was entitled to relief under the equitable subrogation doctrine.⁸⁹⁰ However, the appellate court held that appellant was only entitled to equitable subrogation to the extent that appellee would be no worse off than it would have been if appellant's original mortgage had not been satisfied.⁸⁹¹

XXI. OPTIONS

*Sander v. Ball.*⁸⁹² Buyer was interested in seller's land, but the parties anticipated that part of the seller's land would be taken by the county.⁸⁹³ So, buyer purchased a purchase option.⁸⁹⁴ The price would be \$483,351, but provided that the buyer would get credit for whatever the county paid for the acreage taken.⁸⁹⁵ Furthermore, it placed a maximum price of \$30,000 times the number of acres left after the condemnation.⁸⁹⁶ The option further provided that it would continue until October 24, 1998, but would be automatically extended until the seller had received the condemnation proceeds.⁸⁹⁷ So, in effect, the option did not include a time limit. Regretting the deal, the seller filed this action to have the option declared null and void.⁸⁹⁸ The buyer apparently counterclaimed for reformation and won in the trial court.⁸⁹⁹ The Fifth District Court of Appeal reversed.⁹⁰⁰

The court concluded that the option was void because it violated the Rule Against Unreasonable Restraints on Alienation.⁹⁰¹ Consequently, the court did not consider the assertion that the option violated the Rule Against

887. *Id.*

888. *Id.*

889. *Id.*

890. *Id.* at D514.

891. *Suntrust Bank*, 26 Fla. L. Weekly at D514-15.

892. 781 So. 2d 527 (Fla. 5th Dist. Ct. App. 2001).

893. *Id.* at 528.

894. *Id.*

895. *Id.* at 529.

896. *Id.*

897. *Sander*, 781 So. 2d at 528.

898. *Id.* at 528.

899. *Id.*

900. *Id.* at 531.

901. *Id.*

Perpetuities. The maximum price set by the option made it sufficiently similar to the fixed price repurchase option held invalid in *Inglehart v. Phillips*.⁹⁰² As the Supreme Court of Florida said in *Inglehart*, “[t]he validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property. Once that effect is determined, common sense should dictate whether it is reasonable or unreasonable.”⁹⁰³ An option with a price cap and no time limit failed that test.⁹⁰⁴

The rule could not be avoided by reforming the option as the trial court had done.⁹⁰⁵ It simply added a time limit based upon circumstances in which the agreement was reached.⁹⁰⁶ Reformation, however, is available only to make the writing reflect what the parties had actually agreed.⁹⁰⁷ It cannot be used to cure a defect in that agreement.⁹⁰⁸ Here, the parties had not even discussed a time limit for the option, so the court could not supply the term under the guise of reforming the document.⁹⁰⁹

XXII. SALES

Buttner v. Talbot.⁹¹⁰ Seller was a real estate broker.⁹¹¹ Buyer was an attorney who had represented the seller in previous real estate matters.⁹¹² Seller was in financial trouble.⁹¹³ A valuable property was encumbered by liens and mortgages.⁹¹⁴ Worse, it was about to be auctioned off for unpaid taxes.⁹¹⁵ They agreed to the following deal: buyer would loan seller the money to pay off the tax deficit and seller would sell the land to a land trust that buyer would create.⁹¹⁶ The contract, which buyer hired another attorney

902. 383 So. 2d 610 (Fla. 1980).

903. *Sander*, 781 So. 2d at 529 (quoting *Inglehart v. Phillips*, 383 So. 2d 610, 614–15 (Fla. 1980)).

904. *Id.*

905. *Id.* at 530.

906. *Id.*

907. *Id.*

908. *Sander*, 781 So. 2d at 530.

909. *Id.*

910. 784 So. 2d 538 (Fla. 4th Dist. Ct. App. 2001).

911. *Id.* at 539.

912. *Id.*

913. *Id.*

914. *Id.*

915. *Buttner*, 784 So. 2d at 539.

916. *Id.*

to draft, required seller to deliver marketable title.⁹¹⁷ An addendum provided that if the sale was not consummated, the seller would give buyer a note for the tax money advanced and secure that with a mortgage on the property.⁹¹⁸

Buyer did advance the cash seller needed, and seller used that to pay off the taxes.⁹¹⁹ Then, it appears that seller had second thoughts about the wisdom of the deal because his accountant advised him that the price was too low.⁹²⁰ Buyer insisted on closing and had a title search done.⁹²¹ Several liens and encumbrances were discovered and seller was notified that they would have to be cleared.⁹²² Seller claimed he did not have the money to do that and refused to close, so buyer filed suit for specific performance.⁹²³

Seller's first defense was impossibility, that is, that he could not deliver marketable title.⁹²⁴ That defense was rejected.⁹²⁵ The marketable title provision was in the contract to protect the buyer, not the seller.⁹²⁶ It could be waived by the buyer.⁹²⁷ In this case, the buyer had done so by insisting on closing.⁹²⁸ The addendum requiring the seller to execute a note and mortgage for the money advanced did not change that.⁹²⁹ The addendum was only designed to provide buyer protection against the loss of the money she had already advanced if the sale was not completed due to unmarketable title.⁹³⁰

Seller also asserted that buyer was the trustee for a trust that had not yet been created and, therefore, could not bring the action.⁹³¹ The district court pointed out that this argument had not been raised below until the motion for rehearing.⁹³² Consequently, it had been waived.⁹³³ However, the court offered the dicta that it would not have been a successful argument

917. *Id.*

918. *Id.*

919. *Id.*

920. *Buttner*, 784 So. 2d at 540.

921. *Id.*

922. *Id.*

923. *Id.*

924. *Id.*

925. *Buttner*, 784 So. 2d at 540.

926. *Id.* at 541.

927. *Id.*

928. *Id.*

929. *Id.*

930. *Buttner*, 784 So. 2d at 541.

931. *Id.*

932. *Id.* at 540.

933. *Id.*

anyway.⁹³⁴ Under Florida law, a conveyance may be made to a person as trustee without reference to any trust document or beneficiary.⁹³⁵ Consequently, the plaintiff could have completed the closing by taking title in a deed to her as trustee. Since she had the ability to close, she could enforce the contract by specific performance.

Seller also claimed the contract lacked consideration.⁹³⁶ This argument failed because the contract called for buyer to execute a purchase money mortgage and allow seller to live on the property for two years in addition to advancing the cash to pay off the back taxes.⁹³⁷

Finally, seller asserted that buyer should be denied equitable relief because she had unclean hands.⁹³⁸ The essence of this claim rested on plaintiff being a lawyer who had represented him in the past and the price being, allegedly, inadequate.⁹³⁹ The court found this claim unconvincing.⁹⁴⁰ Buyer did not act as a lawyer in this transaction.⁹⁴¹ Another lawyer had been engaged to draft the documents.⁹⁴² All that the record reflects is a case of "seller's remorse" once it had enjoyed part of the benefits of the deal.⁹⁴³

*Cavallaro v. Stratford Homes.*⁹⁴⁴ The buyers put down a \$500 deposit and signed an agreement reserving a particular lot in the defendant's development.⁹⁴⁵ Under the terms of the agreement, the parties were expected to enter into a formal construction, purchase, and sale contract which would provide for the construction of a house by seller on the designated lot and the subsequent sale of that lot to the buyers.⁹⁴⁶ The reservation agreement provided that if the construction, purchase, and sale contract was not executed within fourteen days, either party could void the lot reservation agreement.⁹⁴⁷ A dispute arose and the buyers sued for specific performance of the sales agreement.⁹⁴⁸ The seller's defense was that the parties had never

934. *Id.*

935. FLA. STAT. § 689.07(1) (2001).

936. *Buttner*, 784 So. 2d at 541.

937. *Id.*

938. *Id.*

939. *Id.*

940. *Id.*

941. *Buttner*, 784 So. 2d at 539.

942. *Id.*

943. *Id.* at 541.

944. 784 So. 2d 619 (Fla. 5th Dist. Ct. App. 2001).

945. *Id.* at 621.

946. *Id.*

947. *Id.*

948. *Id.*

reached agreement on the terms of the contract of sale and, even if they had, enforcement was barred by the Statute of Frauds.⁹⁴⁹ The trial court awarded summary judgment to the seller.⁹⁵⁰

The record below revealed that the parties had gone through several different sets of plans and pricing calculations.⁹⁵¹ However, they had never reached a final agreement as to the essential terms of construction and the ultimate price.⁹⁵² Consequently, the summary judgment was affirmed.⁹⁵³ The court went on to offer interesting dicta about the Statute of Frauds.⁹⁵⁴ In this case, there admittedly was not a single document that was signed by the buyers and the seller.⁹⁵⁵ Buyers sought to satisfy the Statute of Frauds by combining an agreement and addendum that had been signed by them with the seller's price list.⁹⁵⁶ Assuming the price list was a writing "signed" by the seller, the court still found the list insufficient because there was nothing in the unsigned writing referencing the signed writing.⁹⁵⁷

The court also rejected the attempt to invoke the doctrine of part performance to take the contract out of the Statute of Frauds.⁹⁵⁸ When dealing with a contract for the sale of land, only delivery of possession will be sufficient part performance to take the contract out of the Statute of Frauds.⁹⁵⁹ In this case, the buyers were never put into possession, so the doctrine was inapplicable.⁹⁶⁰

Furthermore, the seller could not be held liable for breaching an obligation of good faith or fair dealing.⁹⁶¹ Those are duties that are imposed on a party in the performance of the contract.⁹⁶² However, those duties never arose because, "in this case . . . the parties never reached an agreement or executed an enforceable contract."⁹⁶³

949. *Cavallaro*, 784 So. 2d at 621.

950. *Id.* at 620.

951. *Id.* at 621.

952. *Id.* at 622.

953. *Id.*

954. *Cavallaro*, 784 So. 2d at 621.

955. *Id.*

956. *Id.* at 621-22.

957. *Id.* at 622.

958. *Id.*

959. *Cavallaro*, 784 So. 2d at 622.

960. *Id.*

961. *Id.*

962. *Id.*

963. *Id.*

Kroitzsch v. Steele.⁹⁶⁴ Mr. and Mrs. Kroitzsch encountered serious financial difficulties and lost their home in a mortgage foreclosure sale.⁹⁶⁵ Title was acquired by Federal National Mortgage Association ("FNMA").⁹⁶⁶ At that point, Mr. and Mrs. Kroitzsch came into some money and wanted to buy the house back from FNMA.⁹⁶⁷ Under the circumstances of their financial problems, they believed that they could not make the purchase in their own names, so they arranged for Varner to be the buyer, using their money, and then execute a lease to Mr. and Mrs. Kroitzsch.⁹⁶⁸ Only Mr. Kroitzsch signed the one-year lease.⁹⁶⁹ The tenants never paid rent or a security deposit.⁹⁷⁰

The problem arose when Varner sold the house to the buyers four years later.⁹⁷¹ Varner told them the tenants were residing in the house, but that they were behind in their rent.⁹⁷² He also showed them the lease.⁹⁷³ The buyers drove by the property and observed that the house was occupied as they had been told.⁹⁷⁴ They also checked the public records which confirmed that Varner was the owner of record and the title seemed to be unencumbered.⁹⁷⁵ After becoming the owners, the buyers were never paid any rent, so they began this eviction proceeding.⁹⁷⁶ The trial court ordered the eviction of the tenants, but the district court of appeal reversed.⁹⁷⁷

"[S]uccessors to legal title take title subject to those equitable interests of which they have notice."⁹⁷⁸ The plaintiffs here did not have actual notice that Mr. and Mrs. Kroitzsch were the equitable owners of the land rather than merely delinquent tenants.⁹⁷⁹ However, there were delinquent tenants in possession under a written lease that had never been properly executed and that appeared to have expired years earlier.⁹⁸⁰ Thus, "there were

964. 768 So. 2d 514 (Fla. 2d Dist. Ct. App. 2000).

965. *Id.* at 515.

966. *Id.*

967. *Id.*

968. *Id.*

969. *Kroitzsch*, 768 So. 2d at 516.

970. *Id.*

971. *Id.*

972. *Id.*

973. *Id.*

974. *Kroitzsch*, 768 So. 2d at 516.

975. *Id.*

976. *Id.*

977. *Id.* at 516-17.

978. *Id.* at 517.

979. *Kroitzsch*, 768 So. 2d at 516.

980. *Id.*

sufficient red flags raised in this residential purchase to require further inquiry by the [b]uyers.⁹⁸¹ But the plaintiffs did not make the inquiry that a reasonably prudent buyer would have made under the circumstances.⁹⁸² They did not contact the tenants to find out what claims they might have.⁹⁸³ They did not get an estoppel certificate from the tenants.⁹⁸⁴ They did not get an affidavit from the seller before the closing.⁹⁸⁵ They did not get title insurance protecting against the claims of the occupants.⁹⁸⁶ All they did was ask the seller and check the public records.⁹⁸⁷ That is not sufficient.⁹⁸⁸ Consequently, they took subject to Mr. and Mrs. Kroitzsch's interest and could not evict them.⁹⁸⁹

XXIII. TAXATION

*Fairhaven South, Inc. v. McIntyre.*⁹⁹⁰ The issue here is whether the trial court erred in upholding the property appraiser's denial of Fairhaven's applications for a homestead exemption on the ground that Fairhaven failed to establish that the property was used for a charitable purpose.⁹⁹¹

A nonprofit home for the aged qualified for homestead exemption under section 196.1975 of the 1995 *Florida Statutes* if: 1) it qualifies as a not-for-profit corporation under section 501(c)(3) of the *Internal Revenue Code*; and 2) at least seventy-five percent of its residents are either over the age of sixty-two or are disabled, partially or permanently.⁹⁹²

Fairhaven applied for a homestead exemption for the years 1996, 1997, and 1998, and attached documentation that its corporate charter is not-for-profit and a certificate of exemption under section 501(c)(3) of the *Internal Revenue Code*.⁹⁹³ It also established that at least seventy-five percent of its residents were over the age of sixty-two or were totally and permanently

981. *Id.* at 518.

982. *Id.*

983. *Id.*

984. *Kroitzsch*, 768 So. 2d at 518.

985. *Id.*

986. Plaintiffs did get a title insurance policy, but it contained the usual exception for claims of parties in possession. *Id.*

987. *Id.*

988. *Id.*

989. *Kroitzsch*, 768 So. 2d at 518.

990. 26 Fla. L. Weekly D1466 (2d Dist. Ct. App. June 8, 2001).

991. *Id.*

992. *Id.* at D1467.

993. *Id.*

disabled, that some portions of the home were used exclusively for religious or medical purposes, and that at least twenty-five percent of the home's residents had incomes below the maximum limitation.⁹⁹⁴ The property appraiser denied Fairhaven's applications, asserting that Fairhaven must also "meet the requirements of section 196.195 (determining the profit or nonprofit status of an applicant) and section 196.196 (determining whether property is entitled to charitable . . . exemption)." ⁹⁹⁵ Fairhaven appealed.⁹⁹⁶

The appellate court reversed, holding that the trial court should have based its decision solely on section 196.1975.⁹⁹⁷ The appellate court examined the legislative history of section 196.1975 and Article VII, Section 6(e) of the Florida Constitution in reaching its decision.⁹⁹⁸ Prior to 1987, the exemption of a non profit home for the aged was based on Article VII, Section 3(a) of the Florida Constitution.⁹⁹⁹ At that time, property was required to be used for charitable, educational, literary, scientific, or religious purposes.¹⁰⁰⁰ Section 196.1975(7) now provides that subsection 3 relates to Article VII, Section 3(a) of the Florida Constitution, and the remaining subsections implement section 6(e) of the constitution, for purposes of granting homestead exemptions to homes for the aged.¹⁰⁰¹

Because Fairhaven met the requirements of the *Internal Revenue Code* and those of section 196.1975(1) and (2), it was entitled to homestead exemption for 1996 through 1998, without regard to the "charitable" use of the property.¹⁰⁰²

Florida Governmental Utility Authority v. Day.¹⁰⁰³ The issue here was whether a property owner must file suit within sixty days of receipt of assessment when the property owner is a governmental utility.¹⁰⁰⁴ Appellant appealed a final summary judgment entered by the circuit court against it,

994. *Id.*

995. *Fairhaven South, Inc.*, 26 Fla. L. Weekly D1467.

996. *Id.*

997. *Id.*

998. *Id.*

999. *Id.*

1000. *Fairhaven South, Inc.*, 26 Fla. L. Weekly at D1467.

1001. *Id.* Article VII, Section 6(e) of the Florida Constitution provides: "[b]y general law and subject to conditions specified therein, the [l]egislature may provide to renters, who are permanent residents, ad valorem tax relief on all ad valorem tax levies. Such ad valorem tax relief shall be in the form and amount established by general law." FLA. CONST. art. VII, § 6(e).

1002. *Fairhaven South, Inc.*, 26 Fla. L. Weekly at D1467.

1003. 784 So. 2d 494 (Fla. 5th Dist. Ct. App. 2001).

1004. *Id.* at 495.

the Osceola County property appraiser, and the tax collector, after the court found appellant's complaint to be untimely.¹⁰⁰⁵

The utility was created by an interlocal agreement in accordance with the Florida Intergovernmental Cooperation Act of 1969.¹⁰⁰⁶ The tax collector disallowed the tax exemption to the utility because the utility was created under chapter 163 of the *Florida Statutes* and not chapter 196.¹⁰⁰⁷ Appellant argued that section 163.01(7)(g)(4) of the *Florida Statutes* specifically provided for exemptions "for entities created by interlocal agreements."¹⁰⁰⁸ The utility received a tax assessment that did not reflect its exempt status and filed suit.¹⁰⁰⁹ The assessor tried to get the suit dismissed because it was not filed within sixty days of the assessment.¹⁰¹⁰ This court held that the utility was not subject to the sixty-day period of section 194.171(2) of the *Florida Statutes* because the lawsuit did not challenge the tax assessment, the valuation of the property, but rather, only the classification of the property for valuation purposes.¹⁰¹¹

Greater Orlando Aviation Authority v. Crotty.¹⁰¹² The issue here was whether a privately operated hotel, located on municipal property is subject to property taxes?¹⁰¹³

The City of Orlando appealed a judgment in favor of the property appraiser for Orange County, which ruled that real and personal property used in the operation of a hotel on airport property was subject to ad valorem taxation.¹⁰¹⁴

The Greater Orlando Airport Authority (GOAA), an agency of the city of Orlando, occupied, used, controlled, and operated an airport built on land owned by the city.¹⁰¹⁵ Article VII, Section 3(a) of the Florida Constitution made land owned by a municipality exempt from ad valorem taxation under certain circumstances.¹⁰¹⁶ "The trial court ruled that the property was not

1005. *Id.*

1006. *Id.* See also FLA. STAT. § 163.01 (2001).

1007. *Day*, 784 So. 2d at 495.

1008. *Id.*

1009. *Id.* at 496.

1010. *Id.*

1011. *Id.* at 497. Classification at issue was status as a non-exempt governmental entity.

Id.

1012. 775 So. 2d 978 (Fla. 5th Dist. Ct. App. 2000).

1013. *Id.* at 979.

1014. *Id.*

1015. *Id.*

1016. *Id.* at 980.

exempt because GOAA was using it for private, profit-making purposes."¹⁰¹⁷ In affirmation of the case, the appellate court agreed with the trial court's conclusion that the hotel property did not provide for the comfort, convenience, safety, and happiness of the citizens of Orlando.¹⁰¹⁸ The purpose of the hotel was to serve persons who resided elsewhere and required public accommodations.¹⁰¹⁹

*The Sebring Airport Authority v. McIntyre.*¹⁰²⁰ The issue was whether an ad valorem tax exemption is valid when property is being used for a governmental-proprietary purpose.¹⁰²¹

Appellants got a review of the decision of the District Court of Appeal of Florida which made a part of section 196.012(6) of the 1994 *Florida Statutes* unconstitutional.¹⁰²² The portion that was invalidated would have created an ad valorem tax exemption for certain private enterprises by statutorily defining these types of activities as "serv[ing] a governmental, municipal, or public purpose or function."¹⁰²³

The appellate court found operation of the raceway to be commercial, proprietary, profit, and not governmental functions.¹⁰²⁴ The exemptions covered in the statute deal with "governmental-governmental" uses as opposed to "governmental-proprietary" uses.¹⁰²⁵ Legislatively deeming a governmental-proprietary purpose to be a "governmental-governmental" purpose did not change its true nature and did not result in the constitutional awarding of a tax exemption where, absent the legislation, there clearly could be no exemption.¹⁰²⁶ It is not for the court or legislature to decide who shall receive tax exemptions when we have the Florida Constitution by which to abide.¹⁰²⁷

*Wal-Mart Stores, Inc. v. Todora.*¹⁰²⁸ The issue in this case was whether sales tax should be included in the valuation of property.¹⁰²⁹

1017. *Crotty*, 775 So. 2d at 980.

1018. *Id.* at 981.

1019. *Id.*

1020. 783 So. 2d 238 (Fla. 2001).

1021. *Id.* at 240.

1022. *Id.* at 242.

1023. *Id.*

1024. *Id.* at 246-47.

1025. *McIntyre*, 783 So. 2d at 242.

1026. *Id.*

1027. *Id.* at 243.

1028. 791 So. 2d 29 (2d Dist. Ct. App. 2001).

1029. *Id.* at 30.

This case involved the assessment of tangible personal property used in one of Wal-Mart's stores, such as store fixtures and equipment.¹⁰³⁰ The question was whether any sales tax included as part of the original purchase price of the property, as reported on the tax return, was a "cost of sale" that must be deducted when determining just valuation.¹⁰³¹ The appellate court found no error in the assessment, and Wal-Mart's argument about not reducing the tax for valuation unavailing.¹⁰³² Since this court disagreed with an earlier decision, it certified the question based on conflict to the Supreme Court of Florida.¹⁰³³

*Wells v. Vallier.*¹⁰³⁴ This is a substituted opinion for the earlier opinion.¹⁰³⁵ The issue in the case was whether the appellants qualified for the homestead exemption for property taxes.¹⁰³⁶ The trial court granted a final summary judgment in favor of appellee.¹⁰³⁷

The appellee's sole reason for denying the homestead exemption tax deduction to the appellant was that the appellant received a \$100 per year residency based property tax credit in the State of New Hampshire.¹⁰³⁸ Other than receiving the tax credit in New Hampshire, the appellants for the past sixteen years: 1) have maintained a valid Florida's drivers license; 2) had one or more motor vehicles registered in Florida; 3) have been registered voters in Florida; 4) listed their Florida residence as their address for federal income tax purposes; 5) maintained their primary personal checking and savings accounts in Florida; 6) have been physically present for an average of seven to eight months a year; 7) had their primary physicians, accountants, brokers and church within Florida; 8) maintained family keepsakes; and 9) have executed their last will and testament in Florida.¹⁰³⁹

The appellate court held that while a tax credit received in another state may be a consideration in determining the individual is a permanent resident of the State of Florida, it alone is not a conclusive determining factor.¹⁰⁴⁰ The appellate court found that the overwhelming weight of the evidence

1030. *Id.*

1031. *Id.*

1032. *Id.* at 31.

1033. *Todora*, 791 So. 2d at 31.

1034. 773 So. 2d 1197 (Fla. 2d Dist. Ct. App. 2000).

1035. *Id.* at 1198. For the earlier opinion, see *Wells v. Vallier*, 25 Fla. L. Weekly D1280a (2d Dist. Ct. App. May 26, 2000).

1036. *Wells*, 773 So. 2d at 1198.

1037. *Id.*

1038. *Id.*

1039. *Wells*, 773 So. 2d at 1198.

1040. *Id.*

proved that appellants were residents of the State of Florida and have complied with the requirements for receiving a homestead tax exemption.¹⁰⁴¹

XXIV. TAX DEEDS

*Sugarmill Woods Oaks Village Ass'n v. Wires.*¹⁰⁴² The issue in this case was whether the issuance of a tax deed to a lot extinguished a homeowner association's lien placed on such lot.¹⁰⁴³

The declaration of covenants recorded prior to issuance of the tax deed permitted the homeowners association to record a lien in its favor for delinquent payments of homeowner association assessments, pursuant to the declaration prior to the issuance of the tax deed.¹⁰⁴⁴ The association placed such a lien on the subject property prior to the tax deed.¹⁰⁴⁵

In construing section 617.312 of the *Florida Statutes*, the appellate court found "[t]he [l]egislature could have expressly provided that liens assessed against lots by homeowners associations also survive the issuance of a tax deed; however, it did not."¹⁰⁴⁶ With that, the appellate court affirmed the lower court's decision in favor of the appellees.¹⁰⁴⁷

XXV. TITLE INSURANCE

*Chicago Title Insurance Co. v. Butler.*¹⁰⁴⁸ The issue in this case was whether certain statutes prohibiting title insurance agents from rebating a portion of their premiums is unconstitutional.¹⁰⁴⁹ The Supreme Court of Florida after considering the arguments of both sides found the statutes unconstitutional.¹⁰⁵⁰ The court found the anti-rebate statutes infringed on the citizens' property rights and unconstitutionally restricted the citizens' rights to freely bargain for services.¹⁰⁵¹

1041. *Id.*

1042. 766 So. 2d 487 (Fla. 5th Dist. Ct. App. 2000).

1043. *Id.* at 488.

1044. *Id.* at 489.

1045. *Id.* at 488.

1046. *Id.* at 489.

1047. *Wires*, 766 So. 2d at 489–90.

1048. 770 So. 2d 1210 (Fla. 2000).

1049. *Id.* at 1211.

1050. *Id.*

1051. *Id.* at 1215.

XXVI. ZONING

*Dixon v. City of Jacksonville.*¹⁰⁵² The issue here was whether a hotel is a proper use consistent with the counties' comprehensive plan when the hotel is to be built in an area zoned RPI.¹⁰⁵³ Appellants challenged an order of the circuit court denying appellants' motion for an injunction to prevent the implementation of an ordinance adopted by appellee, which would have rezoned certain real property to permit construction of a hotel.¹⁰⁵⁴

Appellee adopted a comprehensive plan for development and later adopted an ordinance to rezone certain portions of the real property to permit construction of a hotel on a site.¹⁰⁵⁵ Appellants tried to get a temporary and/or permanent injunction to prevent the implementation of the ordinance and argued that appellee's comprehensive plan for development did not permit construction of the hotel at the site.¹⁰⁵⁶ The trial court denied appellants' injunction.¹⁰⁵⁷

The appellate court applied the strict scrutiny standard in its review of the ordinance to see if it was consistent with the comprehensive plan for development.¹⁰⁵⁸ The appellate court found that the trial court erred in its interpretation of appellee's comprehensive plan.¹⁰⁵⁹ The appellate court ruled the hotel was not a proper land use consistent with any type of permissible use under the comprehensive plan's functional land use designation.¹⁰⁶⁰

*City of Jacksonville Beach v. Car Spa, Inc.*¹⁰⁶¹ The issue in this case was whether the city properly denied Car Spa, Inc.'s application for a conditional use permit.¹⁰⁶²

Car Spa filed an application for a conditional use permit for a car wash, automotive service, and gas service facility.¹⁰⁶³ The staff of the Jacksonville Beach Planning Commission concluded the use was consistent with relevant zoning and comprehensive plan policies, and recommended approval with

1052. 774 So. 2d 763 (Fla. 1st Dist. Ct. App. 2000).

1053. *Id.* at 764.

1054. *Id.*

1055. *Id.*

1056. *Id.*

1057. *Dixon*, 774 So. 2d at 764.

1058. *Id.*

1059. *Id.*

1060. *Id.* at 765-66.

1061. 772 So. 2d 630 (Fla. 1st Dist. Ct. App. 2000).

1062. *Id.* at 631.

1063. *Id.*

certain conditions.¹⁰⁶⁴ The Commission held a public hearing following which, the Commission denied the conditional use permit.¹⁰⁶⁵ Car Spa filed a petition for writ of certiorari in the circuit court alleging that the application for conditional use, as well as the record of the public hearing, clearly reflects that all criteria were met by Car Spa's proposed use and that there was no substantial or competent evidence of any fact proving or even inferring that the conditional use would be contrary to the public interest.¹⁰⁶⁶

The appellate court reviewed the circuit court's decision based on whether the circuit court (1) "afforded procedural due process" and (2) "applied the correct law."¹⁰⁶⁷

The circuit court concluded that Car Spa carried its initial burden of demonstrating entitlement to the conditional use permit, and as a result, the burden shifted to the city to demonstrate that Car Spa had not satisfied the relevant code criteria, and that the conditional use requested was, therefore, contrary to the public interest.¹⁰⁶⁸ The appellate court found that at that point, the circuit court failed to review the entire record to make its determination and only used portions of the record, and re-weighed the evidence, substituting its own judgement for that of the Planning Commission as to the relative weight of the evidence.¹⁰⁶⁹ The appellate court found that the circuit court rejected testimony of a professional land-use planner regarding non compliance of the proposed use with the comprehensive plan and that it also rejected testimony of an individual who had conducted tests to determine whether noise levels associated with the proposed use violated local noise ordinances.¹⁰⁷⁰ In addition, the circuit court failed to include the testimony of neighbors regarding traffic problems and realtors as to the value of the property.¹⁰⁷¹ The appellate court reversed and remanded the lower court's decision.¹⁰⁷²

*Lee v. St. Johns County Board of County Commissioners.*¹⁰⁷³ This case dealt with how long one has to bring an action when there are allegedly inconsistent actions which aggrieve a party.¹⁰⁷⁴

1064. *Id.*

1065. *Id.*

1066. *Car Spa, Inc.*, 772 So. 2d at 631.

1067. *Id.* (quoting *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).

1068. *Id.*

1069. *Id.* at 631-32.

1070. *Id.* at 632.

1071. *Car Spa, Inc.*, 772 So. 2d at 632.

1072. *Id.*

1073. 776 So. 2d 1110 (Fla. 5th Dist. Ct. App. 2001).

1074. *Id.* at 1111-12.

Here, appellee developers filed an application to re-zone land from rural to a planned urban development, and appellee Board of County Commissioners re-zoned the land.¹⁰⁷⁵ The county zoning agency then approved appellee's final development plan for the property.¹⁰⁷⁶ Appellant requested a review of this approval from appellee, which ultimately agreed with the agency's decision.¹⁰⁷⁷

Less than thirty days later, appellant filed suit alleging that the re-zoning of the property and the order approving the final development plan were inconsistent with the county's comprehensive plan.¹⁰⁷⁸ The trial court dismissed the suit as untimely filed.¹⁰⁷⁹ On review, the appellate court reversed.¹⁰⁸⁰

The appellate court held that in order to challenge allegedly inconsistent actions under section 163.3215 of the *Florida Statutes*, appellant had to sue the governmental entity whose actions aggrieved her within thirty days of such actions.¹⁰⁸¹ Appellant missed the deadlines for the zoning agency's actions, but her claim as to the appellee board's approval of the development plan was timely.¹⁰⁸² The court decided that because appellee's board had the right to review the zoning agency's actions de novo, its decision was the final one which commenced the running of the thirty day time limit.¹⁰⁸³

XVII. 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.

1075. *Id.* at 1111.

1076. *Id.*

1077. *Id.*

1078. *Lee*, 776 So. 2d at 1111-12.

1079. *Id.* at 1111.

1080. *Id.*

1081. *Id.* at 1112.

1082. *Id.*

1083. *Lee*, 776 So. 2d at 1113.

