

# *Nova Law Review*

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*Volume 36, Issue 1*

2011

*Article 3*

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## 2010-2011 Survey of Florida Law Affecting Business Owners

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## 2010–2011 SURVEY OF FLORIDA LAW AFFECTING BUSINESS OWNERS

BARBARA LANDAU\*

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I. INTRODUCTION

As in prior years, this year’s survey reviews Florida appellate court decisions of potential and immediate interest to business owners and their counsel. The cases include matters of first impression and decisions that address conflict between the Florida District Courts of Appeal. In addition, cases that clarify or expand upon existing principles of law or that appear to be of special interest or have unusual facts are discussed.

II. AGENCY

A. *Authority of Real Estate Closing Agent*

Did a real estate closing agent have apparent authority to bind a seller when the closing agent allowed the buyer to tender the real estate purchase

price a day late?<sup>1</sup> In *Denton v. Good Way Oil 902 Corp.*,<sup>2</sup> the Fourth District Court of Appeal said no.<sup>3</sup> Almost two years after the contract was signed, and having given Good Way Oil 902 Corporation (Buyer) extensions for its investigations, Mr. Denton (Seller), relying on the “time-is-of-the-essence” provision in the contract, set a closing date and “warned that the contract must be fully closed that day.”<sup>4</sup> The court observed that, “[a] closing agent generally owes a duty to both contracting parties only to supervise the closing in a reasonably prudent manner.”<sup>5</sup> The agent, “ha[ving] only the authority to conduct the closing,” did not have such apparent authority.<sup>6</sup> Buyer pointed to no conduct by Seller that would support a finding of apparent authority.<sup>7</sup> In fact, Seller’s actions were to the contrary.<sup>8</sup>

### B. *Liability of General Contractor’s Qualifying Agent*

Section 489.119(2) of the *Florida Statutes* requires general building contractors to have a “qualifying agent” to supervise construction activities of the general contractor.<sup>9</sup> Mr. Scherer (Qualifying Agent) served in that capacity for Scherer Construction & Engineering LLC (General Contractor).<sup>10</sup> The Villas Del Verde Homeowners Association (Association) sued the developer and General Contractor alleging construction defects and business code violations and sued Qualifying Agent—who was also a “principal” in the developer LLC—under section 553.84 of the *Florida Statutes*, alleging failure to properly supervise the construction of the community’s buildings.<sup>11</sup>

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1. *Denton v. Good Way Oil 902 Corp.*, 48 So. 3d 103, 107 (Fla. 4th Dist. Ct. App. 2010).

2. 48 So. 3d 103 (Fla. 4th Dist. Ct. App. 2010).

3. *Id.* at 108.

4. *Id.* at 105.

5. *Id.* at 107.

6. *Id.* at 108.

7. *See Denton*, 48 So. 3d at 108.

8. *Id.*

9. *Scherer v. Villas Del Verde Homeowners Ass’n*, 55 So. 3d 602, 603 (Fla. 2d Dist. Ct. App.), *review denied*, 63 So. 3d 751 (Fla. 2011); *see also* FLA. STAT. § 489.119(2) (2011).

10. *Scherer*, 55 So. 3d at 602.

11. *Id.* at 602–03; *see also* FLA. STAT. § 553.84 (2011). Association sued the developer and General Contractor, both of which were limited liability companies. *Scherer*, 55 So. 3d at 602–03. No appearance was made by the LLCs. *Id.* at 603.

Section 553.84 provides that a civil action for damages caused by building code violations may be brought by “[a]ny person or party, in an individual capacity or on behalf of a class of persons or parties, damaged.”<sup>12</sup> Such person has an action “against the person or party who committed the violation.”<sup>13</sup> The trial court entered a judgment against Qualifying Agent, individually, relying on section 553.84.<sup>14</sup> The Second District Court of Appeal reversed, noting that the Supreme Court of Florida had previously ruled “that a qualifying agent’s failure to perform his statutory duty does not give rise to a private cause of action against him.”<sup>15</sup> The Second District Court of Appeal, relying on *Murthy v. N. Sinha Corp.*,<sup>16</sup> held that even though General Contractor could do no building without a qualifying agent, Qualifying Agent’s failure to properly supervise the construction “was not a violation of the building code.”<sup>17</sup> Thus, the appellate court concluded that a private action against Qualifying Agent under section 553.84 was not proper, stating that “today we make explicit what is perhaps implicitly stated in *Murthy*: [A] qualifying agent’s breach of the duties imposed by chapter 489 does not give rise to” a building code violation claim under section 553.84 against such qualifying agent.<sup>18</sup>

### C. Health Care Facility Arbitration Agreements

*Stalley ex rel. Estate of L’Aine v. Transitional Hospitals Corp. of Tampa*<sup>19</sup> and *Lepisto v. Senior Lifestyle Newport Ltd. Partnership*<sup>20</sup> involved enforcement of arbitration agreements by health care facilities when sued, in the first case, by the personal representative of the estate of a former patient, and in the second, by a former resident and his spouse.<sup>21</sup> *Stalley* did not involve a power of attorney, but the hospital patient’s (Patient’s) spouse (Spouse) did, as part of the admission process, sign the admission papers.<sup>22</sup> The admission papers contained an arbitration of disputes provision, but the arbitration agreement was separate from the admissions agreement, and the

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12. *Id.* at 603 (quoting FLA. STAT. § 553.84).

13. *Id.* (quoting FLA. STAT. § 553.84).

14. *Id.*

15. *Scherer*, 55 So. 3d at 602.

16. 644 So. 2d 983 (Fla. 1994).

17. *Scherer*, 55 So. 3d at 604.

18. *Id.* (citing *Seabridge, Inc. v. Superior Kitchens, Inc.*, 672 So. 2d 848, 850 (Fla. 4th Dist. Ct. App. 1996) (per curiam)); see FLA. STAT. § 553.84).

19. 44 So. 3d 627 (Fla. 2d Dist. Ct. App. 2010).

20. 36 Fla. L. Weekly D1655 (4th Dist. Ct. App. Aug. 3, 2011).

21. *Id.* at D1655; *Stalley*, 44 So. 3d at 629.

22. *Stalley*, 44 So. 3d at 629.

admissions agreement did not incorporate by reference, or even refer to the arbitration agreement.<sup>23</sup> The personal representative of Patient's estate sued the hospital (Hospital) and others alleging wrongful death.<sup>24</sup> On motion by Hospital, the trial court stayed the action and ordered arbitration.<sup>25</sup> The Second District Court of Appeal reversed and remanded.<sup>26</sup> The trial court "seemed to conclude that one spouse is always the agent of the other as a matter of law."<sup>27</sup> "[Hospital] failed to present sufficient evidence to establish that [Spouse] was acting as [Patient's] agent when she signed the arbitration agreement or that [Patient] was the intended third-party beneficiary of that agreement."<sup>28</sup> Spouse did not have express authority to sign the arbitration agreement.<sup>29</sup> Spouse testified that she had authority to sign to get Patient admitted, but the Second District Court of Appeal said that the authority to sign medical consents did not extend to acts not necessary for Patient's care.<sup>30</sup> Since the "optional" arbitration agreement was not necessary for treatment, Spouse's right to sign Patient into the hospital was not tantamount to the authority to "waive[] some of [Patient's] constitutional rights."<sup>31</sup> Nor did Spouse have apparent authority, as there was no conduct on the part of Patient that gave rise to apparent authority.<sup>32</sup> Hospital argued that Patient's inaction—that is, his failure to disaffirm Spouse's authority—rather than any actual representation by Patient, "functioned as a representation" of Spouse's authority.<sup>33</sup> The Second District Court of Appeal rejected this argument.<sup>34</sup> Hospital's estoppel and ratification arguments were also rejected by the appellate court, as was its third-party beneficiary argument.<sup>35</sup> The court distinguished *Alterra Healthcare Corp. v. Graham ex rel. Estate of Linton*<sup>36</sup> where the arbitration clause was part of the residency agreement, since the nursing home resident "had accepted the benefits of the residency and the services provided and so was the intended third-party beneficiary of that entire agreement."<sup>37</sup>

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23. *Id.* at 632–33.

24. *Id.* at 629.

25. *Id.*

26. *Id.* at 633.

27. *Stalley*, 44 So. 3d at 632.

28. *Id.* at 633.

29. *Id.* at 630.

30. *Id.*

31. *Id.*

32. *Stalley*, 44 So. 3d at 630–31.

33. *Id.* at 631.

34. *Id.*

35. *Id.* at 631–33.

36. 953 So. 2d 574 (Fla. 1st Dist. Ct. App. 2007) (*per curiam*).

37. *Stalley*, 44 So. 3d at 633 (citing *Alterra Healthcare Corp.*, 953 So. 2d at 579).

In *Lepisto*, the spouse had been given a power of attorney by her husband prior to his admission as a resident.<sup>38</sup> However, the appellate court concluded that what the spouse signed was a document regarding her own financial responsibility with respect to her husband's nursing home admission.<sup>39</sup> She did not sign the admission agreement that contained the arbitration agreement as her husband's representative, nor did her husband sign the agreement.<sup>40</sup>

### III. ALTERNATIVE DISPUTE RESOLUTION

#### A. *Third-Party Beneficiary Bound by Arbitration Clause*

In *Lion Gables Realty Ltd. v. Randall Mechanical, Inc.*,<sup>41</sup> the Fifth District Court of Appeal addressed two issues; the first, being whether or not the entity against whom arbitration was sought was a third-party beneficiary of the arbitration agreement, and the second, being one of waiver by the movant of its arbitration claim.<sup>42</sup> The district court held that the status of a person as an intended beneficiary of an arbitration agreement is a "threshold issue" to be decided by the trial court.<sup>43</sup> For a third party to be bound by a contract containing an arbitration provision, it must be shown "that the parties clearly express, or the contract itself expresses, an intent to primarily and directly benefit [a] third party."<sup>44</sup> If such a showing can be made, then the third-party beneficiary will be bound by the contract arbitration provision.<sup>45</sup>

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38. *Lepisto v. Senior Lifestyle Newport Ltd. P'ship*, 36 Fla. L. Weekly D1655, D1655 (4th Dist. Ct. App. Aug. 3, 2011). The Fourth District Court of Appeal discussed *Stalley* but noted that the facts were distinguishable because in *Stalley*, the spouse did not have a power of attorney. *Id.* at D1656. In any case, the outcome in both cases was "no arbitration." *Id.* at D1657; *Stalley*, 44 So. 3d at 633.

39. *Lepisto*, 36 Fla. L. Weekly at D1656.

40. *Id.* at D1655.

41. 65 So. 3d 1098 (Fla. 5th Dist. Ct. App. 2011) (per curiam).

42. *Id.* at 1099 (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)).

43. *Id.* Since the first prong of the three-prong test under *Seifert* requires that the court find that there is a valid agreement *between the parties* before the court can compel the parties to arbitrate, there must first be a finding that the parties agreed to arbitrate, which, when there is a non-party to the contract involved, requires a determination that the non-party is a third party beneficiary of the arbitration agreement. *Id.* at 1099–1100 (citing *Seifert*, 750 So. 2d at 636; *Infinity Design Builders, Inc. v. Hutchinson*, 964 So. 2d 752, 755 (Fla. 5th Dist. Ct. App. 2007); *Fla. Power & Light Co. v. Rd. Rock, Inc.*, 920 So. 2d 201, 203 (Fla. 4th Dist. Ct. App. 2006)).

44. *Id.* at 1099 (quoting *Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259, 1261 (Fla. 5th Dist. Ct. App. 2002)).

45. *Lion Gables Realty Ltd.*, 65 So. 3d at 1099 (citing *Technical Aid Corp.*, 814 So. 2d at 1261).

With respect to the waiver issue, the Fifth District Court of Appeal noted that the second, third, and fourth districts, as well as the fifth district, have “consistently” held that participation, “before moving to compel arbitration,” in discovery related to the merits of the case constitutes a waiver of arbitration rights.<sup>46</sup> In this case, one of the parties seeking arbitration had sent out two notices to produce copies.<sup>47</sup> The appellate court noted that “[e]ven if conducting a minimal amount of merits discovery would be insufficient to waive a contractual right to arbitrate, we do not view these discovery requests as minimal.”<sup>48</sup> The Fifth District Court of Appeal then held that “[t]he law in Florida is clear that a party’s participation in merits discovery constitutes a waiver of arbitration.”<sup>49</sup>

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46. *Id.* at 1100 (citing *Gordon v. Shield*, 41 So. 3d 931, 933 (Fla. 4th Dist. Ct. App. 2010); *Green Tree Servicing, L.L.C. v. McLeod ex rel. Estate of McLeod*, 15 So. 3d 682, 688 (Fla. 2d Dist. Ct. App. 2009); *Olsen Electric Co. v. Winter Park Redevelopment Agency*, 987 So. 2d 178, 179 (Fla. 5th Dist. Ct. App. 2008); *Marks ex rel. Estate of Orlanis v. Oakwood Terrace Skilled Nursing & Rehab. Ctr.*, 971 So. 2d 811, 812 (Fla. 3d Dist. Ct. App. 2007)).

47. *Id.* at 1101.

48. *Id.*

49. *Id.* (citing *Gordon*, 41 So. 3d at 933; *Green Tree Servicing, L.L.C.*, 15 So. 3d at 694; *Olsen Electric Co.*, 987 So. 2d at 179; *Marks ex rel. Estate of Orlanis*, 971 So. 2d at 812); see Barbara Landau, *2008–2009 Survey of Florida Law Affecting Business Owners*, 34 NOVA L. REV. 71, 75–78 (2009) [hereinafter Landau, *2008–2009 Survey of Florida Law Affecting Business Owners*] (discussing *Green Tree Servicing, L.L.C.*, 15 So. 3d at 682); *DFC Homes of Fla. v. Lawrence*, 8 So. 3d 1281, 1282–84 (Fla. 4th Dist. Ct. App. 2009). Is any amount of merits related discovery participation “inconsistent” with seeking arbitration under the “totality of the circumstances” test? In *Green Tree Servicing, LLC*, the Second District Court of Appeal held that participation in merits related discovery “is generally inconsistent with arbitration” and “considered under the totality of the circumstances—will generally be sufficient to support a finding of a waiver of a party’s right to arbitration.” *Green Tree Servicing, L.L.C.*, 15 So. 3d at 694. In *Green Tree Servicing, LLC*, the discovery occurred after Green Tree Servicing, LLC filed the motion to compel arbitration, but before the motion was heard. See *id.* at 686. The Second District Court of Appeal held that “[e]ven where a party has filed a timely motion to compel arbitration,” that party may still waive its claim to arbitration by acting in a manner that is inconsistent with that claim. Landau, *2008–2009 Survey of Florida Law Affecting Business Owners*, *supra* note 49, at 76 (citing *Green Tree Servicing, L.L.C.*, 15 So. 3d at 688); *Sitarik v. JFK Med. Ctr. Ltd. P’ships*, 11 So. 3d 973, 974 (Fla. 4th Dist. Ct. App. 2009). In *Lawrence*, the court discussed the distinction between participating in court proceedings after the demand has been made for arbitration rather than before, but in finding no waiver, the court noted that the participation was “limited.” *Lawrence*, 8 So. 3d at 1283 (citing *Phillips v. Gen. Accident Ins. Co. of Am.*, 685 So. 2d 27, 29 (Fla. 3d Dist. Ct. App. 1996)). The Fifth District Court of Appeal in *Lion Gables Realty Ltd.* cited *Gordon*, as “recognizing that propounding discovery would waive [the] right to arbitrate.” *Lion Gables Realty Ltd.*, 65 So. 3d at 1100 (citing *Gordon*, 41 So. 3d at 933). However, *Gordon* involved mandatory pre-suit proceedings in an action alleging medical malpractice, and in that case, the Fourth District Court of Appeal found that the doctor’s participation in pre-suit proceedings

### B. *Enforcing Arbitration in Another State*

Two clients and two LLCs (Plaintiffs) in *Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC*<sup>50</sup> sued their former attorneys (two New York lawyers and their professional corporation) alleging malpractice.<sup>51</sup> The New York law firm asked the Florida trial court to order arbitration in New York under the arbitration clause contained in the law firm's retainer agreement with Plaintiffs.<sup>52</sup> The trial court declined to do so.<sup>53</sup> The Fourth District Court of Appeal did not agree that the trial court lacked the power to "compel arbitration in another state" in this case.<sup>54</sup> The fourth district quoted *Damora v. Stresscon International, Inc.*<sup>55</sup> where the Supreme Court of Florida held that "[a]n agreement to arbitrate future disputes in another jurisdiction is outside the authority of the Florida Arbitration Code . . . and . . . renders the agreement to arbitrate voidable at the instance of either party."<sup>56</sup> However, a Florida court can compel arbitration in another jurisdiction under the Federal Arbitration Act if the underlying transactions involve interstate commerce.<sup>57</sup> The Fourth District Court of Appeal found that the matter involved interstate commerce, as the parties consisted of an Arizona resident plaintiff, Florida corporations, New York defendants, and a New York plaintiff—involving the creation of a Florida corporation and the acquisition by it of another Florida corporation, and retainer agreement.<sup>58</sup>

In addition, Plaintiffs in *Mintz & Fraade, P.C.* argued that the mandatory fee arbitration provision was against the "strong public policy of Flori-

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mandated by statute did not constitute a waiver of the doctor's right to arbitration. *Gordon*, 41 So. 3d at 933–34.

50. 59 So. 3d 1173 (Fla. 4th Dist. Ct. App. 2011). Earlier proceedings in this case were reported in Landau, *2008–2009 Survey of Florida Law Affecting Business Owners*, *supra* note 49, at 125 (discussing *Beta Drywall Acquisition, L.L.C. v. Mintz & Fraade, P.C.*, 9 So. 3d 651, 652–53 (Fla. 4th Dist. Ct. App.), *review denied*, 22 So. 3d 538 (Fla. 2009)). Those proceedings challenged the trial court's exercise of personal jurisdiction over the New York lawyers. *Beta Drywall Acquisition, L.L.C.*, 9 So. 3d at 652. The Fourth District Court of Appeal held that the trial court erred when it dismissed the action for lack of personal jurisdiction. *Id.*

51. *Mintz & Fraade, P.C.*, 59 So. 3d at 1174.

52. *Id.*

53. *Id.* at 1174–75.

54. *Id.* at 1175–76.

55. 324 So. 2d 80 (Fla. 1975).

56. *Mintz & Fraade, P.C.*, 59 So. 3d at 1175 (alteration in original) (quoting *Damora*, 324 So. 2d at 82).

57. *Id.* (citing *Default Proof Credit Card Sys., Inc. v. Friedland*, 992 So. 2d 442, 444–45 (Fla. 3d Dist. Ct. App. 2008)).

58. *Id.* at 1175–76.

da.”<sup>59</sup> The district court acknowledged that special requirements are imposed by rules of the Florida Bar when it comes to enforcing arbitration agreements regarding legal fee disputes, but concluded that New York’s rules are similar to Florida’s and held that the agreement was enforceable.<sup>60</sup>

#### IV. ATTORNEYS’ FEES

Mr. Mady (Lessee) exhausted all of the non-judicial procedures required by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (MMWA)—a condition precedent to bringing suit against DaimlerChrysler Corporation (Manufacturer)—and then sued Manufacturer under the MMWA,<sup>61</sup> alleging breach of warranty.<sup>62</sup> Manufacturer made a first and then a second offer of judgment to Lessee, “pursuant to section 768.79 [of the *Florida Statutes*] and Florida Rule of Civil Procedure 1.442” in the amount of \$8500.<sup>63</sup> Lessee accepted the second offer, the terms of which provided for the payment to Lessee of \$8500 but did not include attorneys’ fees, did not include an admission by Manufacturer of liability, did “acknowledge[] that [Lessee] might seek attorneys’ fees,” did require that Lessee sign a release, and stated that the lawsuit be dismissed with prejudice.<sup>64</sup> Approximately six months later, Lessee asked the trial court for an award of costs as well as attorneys’ fees.<sup>65</sup> The trial court denied the request finding that Lessee had not met the “finally prevailed” test under the MMWA, and Lessee appealed.<sup>66</sup> In 2008, the Fourth District Court of Appeal, in *Mady v. DaimlerChrysler Corp. (Mady I)*<sup>67</sup> affirmed the trial court’s decision, but certified to the Supreme Court of Florida conflict between its decision and *Dufresne v. DaimlerChrysler Corp.*,<sup>68</sup> decided in 2008 by the Second District Court of Appeal.<sup>69</sup> The question before the Supreme Court of Florida was whether or not

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59. *Id.* at 1176 (quoting *Friedland*, 992 So. 2d at 444).

60. *Id.*

61. 15 U.S.C. §§ 2301–2312 (2006).

62. *Mady v. DaimlerChrysler Corp. (Mady II)*, 59 So. 3d 1129, 1130–31, 1133 (Fla. 2011).

63. *Id.* at 1130–31; FLA. STAT. § 768.79(2) (2011); FLA. R. CIV. P. 1.442.

64. *Mady II*, 59 So. 3d at 1131.

65. *Id.*

66. *Id.* (alteration in original).

67. 976 So. 2d 1212, 1216 (Fla. 4th Dist. Ct. App. 2008), *quashed by* 59 So. 3d 1129 (Fla. 2011).

68. 975 So. 2d 555 (Fla. 2d Dist. Ct. App. 2008).

69. *Mady II*, 59 So. 3d at 1130.

[a] consumer who has exhausted all non-judicial [pre-litigation conditions of the MMWA and then] secures a favorable formal settlement offer of judgment from a defendant which is accepted in a Florida legal action filed under the MMWA . . . ‘finally prevails’ [under the MMWA and thus] may be entitled to . . . costs [and] fees under the MMWA.<sup>70</sup>

Thus far, the Fourth District Court of Appeal said no,<sup>71</sup> the Second District Court of Appeal said yes,<sup>72</sup> and shortly after the Fourth District Court of Appeal’s decision in *Mady I*, the Third District Court of Appeal, in *San Martin v. DaimlerChrysler Corp.*,<sup>73</sup> “aligned itself with the [s]econd [d]istrict.”<sup>74</sup> Siding with the second district—and the third district—the Supreme Court of Florida held that for the purposes of the MMWA, an accepted offer of judgment “is the ‘functional equivalent of a consent decree’” and “bears the imprimatur of the court.”<sup>75</sup> Justice Canady dissented and would have denied attorneys fees under the MMWA.<sup>76</sup>

## V. BUSINESS ENTITIES AND AGREEMENTS

Mr. Berlin and Mr. Pecora each owned a fifty percent interest in several entities, which the Third District Court of Appeal referred to as the “Signature Entities,” which included Grand Partners, Inc.<sup>77</sup> They had entered into a distribution agreement that, among other things, gave the survivor a preemptive option—a right of first refusal—to purchase the assets of the Signature Entities, if the personal representative of the decedent’s estate found a buyer with respect to any assets of the entities, or the shares or partnership interests of the decedent.<sup>78</sup> Also, if the survivor found a buyer, the personal representative of the decedent’s estate would have a right of first refusal.<sup>79</sup> Mr. Berlin

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70. *Id.* at 1131.

71. *Mady I*, 976 So. 2d at 1215.

72. *Dufresne*, 975 So. 2d at 557.

73. 983 So. 2d 620, 625 (Fla. 3d Dist. Ct. App. 2008).

74. *Mady II*, 59 So. 3d at 1131.

75. *Id.* at 1133–34. How would the Supreme Court of Florida have ruled, had the parties, without resort to the offer of judgment procedure with the court retaining jurisdiction, merely settled the dispute and dismissed the action—a situation not before the court? The court did note a distinction between the offer of judgment situation with the court retaining jurisdiction, on the one hand, and a settlement by the parties prior to the filing suit, on the other. *Id.* at 1133.

76. *Id.* at 1137 (Canady, J., dissenting).

77. *Pecora v. Berlin*, 62 So. 3d 28, 29 (Fla. 3d Dist. Ct. App. 2011).

78. *Id.* at 31.

79. *Id.*

and Mr. Pecora “died on the same day, within hours of each other,” and although the opinion does not state who died first, Mrs. Pecora, “as the surviving spouse of Mr. Pecora, became the owner” of his ownership interest in the Signature Entities.<sup>80</sup> Mr. Berlin’s ownership interests passed to his estate, and his personal representative requested that a receiver be appointed to dispose of the Signature Entities’ assets and dissolve the entities.<sup>81</sup> Eventually, after one receiver had been appointed to replace several temporary receivers to manage and sell the assets of the Signature Entities, Mrs. Pecora asserted the right of first refusal set out in the distribution agreement when that receiver sought to sell Signature Grand.<sup>82</sup> Mrs. Pecora had already lost on a similar claim with respect to Signature Gardens Ltd., the trial court holding that she did not have a right of first refusal under the circumstances presented, and she had not appealed any of the orders related to that ruling.<sup>83</sup> The receiver opposed her present claim to a right of first refusal, moved for summary judgment, and the trial court granted summary judgment in favor of the receiver, again ruling that Mrs. Pecora did not have a right of first refusal with respect to a sale by a receiver.<sup>84</sup> The issue presented to the court was whether the right of first refusal as set out in the distribution agreement remained effective in the face of a court-supervised sale by a court appointed receiver.<sup>85</sup> Describing the issue as one of first impression in Florida, the Third District Court of Appeal, after citing numerous analogous cases in other jurisdictions, decided that the right of first refusal did not apply.<sup>86</sup> “The plain language of the Distribution Agreement compels a conclusion that the right of first refusal does not apply in a dissolution action where the court-appointed receiver is procuring the sale of corporate assets. The receiver, not the survivor or the personal representative, is the procuring party . . . .”<sup>87</sup> If the parties wanted the right of first refusal to apply in the event of a dissolution of the corporation or to other involuntary proceedings, or where a third party has found a buyer, the “[a]greement could have so provided.”<sup>88</sup>

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80. *Id.* at 29, 34.

81. *See id.* at 29.

82. *Pecora*, 62 So. 3d at 29–30.

83. *See id.* at 30.

84. *Id.* at 31.

85. *Id.*

86. *See id.* at 31–35 (citations omitted).

87. *Pecora*, 62 So. 3d at 35.

88. *Id.*

## VI. CONTRACTS

A. *Election of Remedies*

Mr. Pakalski (Seller) and CFC Pasadena Golf, LLC (Buyer) entered into a real estate contract.<sup>89</sup> The “preprinted form” contract provided that Buyer was to make a pre-closing first deposit of \$5000 plus—as provided in a section for additional terms—another deposit of \$150,000.<sup>90</sup> The additional terms section described the \$150,000 payment as a nonrefundable additional deposit that was to be immediately released to Seller.<sup>91</sup> After having made both deposits, Buyer breached the contract.<sup>92</sup> The contract provided that in the event of breach by Buyer, Seller had the option of collecting and retaining all deposits, “as liquidated damages,” or could sue for specific performance.<sup>93</sup> Seller, having left the original \$5000 of the deposit in escrow, sued Buyer for specific performance.<sup>94</sup> Buyer sought dismissal of the action, and the trial court dismissed the action, with prejudice, agreeing with Buyer that Seller’s retention of the \$150,000 deposit amounted to an election of remedies that prevented Seller’s suit for specific performance.<sup>95</sup> Seller appealed, and the Second District Court of Appeal, relying on *Bilow v. Benoit*,<sup>96</sup> reversed and remanded.<sup>97</sup> Seller did not make an election to waive its right to specific performance “simply by accepting and retaining the [\$150,000 additional] deposit as contemplated in the provision added to . . . the parties’ contract.”<sup>98</sup>

In *Plumbing Service Co. v. Progressive Plumbing, Inc.*,<sup>99</sup> another election of remedies case, The Plumbing Service Company (Sub-subcontractor) sued Progressive Plumbing, Incorporated, (Subcontractor), alleging that Subcontractor prevented Sub-subcontractor from completing work on a condominium project, allowing Sub-subcontractor to finish only 15 of 230 units

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89. Pakalski v. CFC Pasadena Golf, L.L.C., 42 So. 3d 869, 869 (Fla. 2d Dist. Ct. App. 2010).

90. *Id.*

91. *Id.* at 870.

92. *Id.*

93. *Id.*

94. Pakalski, 42 So. 3d at 870.

95. See *id.* at 870. The trial court, in dismissing the second amended complaint with prejudice, pointed out that based on the contract there was no point in trying to amend the complaint. See *id.*

96. 519 So. 2d 1114 (Fla. 1st Dist. Ct. App. 1988).

97. Pakalski, 42 So. 3d at 870–71.

98. *Id.* at 870.

99. 46 So. 3d 144 (Fla. 5th Dist. Ct. App. 2010).

contemplated by their agreement.<sup>100</sup> Sub-subcontractor collected in full from Subcontractor's surety—in an action brought under chapter 713 of the *Florida Statutes*—for Sub-subcontractor's work on the fifteen completed units.<sup>101</sup> In this regard, Subcontractor did not dispute that the work subject to the chapter 713 action was completed by Sub-subcontractor.<sup>102</sup> Subcontractor did, however, in Sub-subcontractor's suit against Subcontractor seeking to recover lost profits on the remaining units, dispute “the existence of a binding contract” and, in addition, contended that Sub-subcontractor was barred from collecting lost profits from Subcontractor under “[t]he election of remedies doctrine.”<sup>103</sup> The trial court granted summary judgment in favor of Subcontractor on the election of remedies theory and it was this order that was before the Fifth District Court of Appeal.<sup>104</sup> What the trial court ruled, was that Sub-subcontractor, by collecting “the reasonable value” of its services and materials from the surety, had elected its remedy and could not attempt to collect from Subcontractor.<sup>105</sup> The Fifth District Court of Appeal reversed.<sup>106</sup> Pursuing one remedy does not necessarily prevent the pursuance of others.<sup>107</sup> There were two scenarios under which the election of remedies doctrine could have been invoked, but neither applied here.<sup>108</sup> If a plaintiff receives complete satisfaction in an earlier action, then the plaintiff cannot get a double recovery in a later action.<sup>109</sup> Here, Sub-subcontractor could not have recovered, under chapter 713, for lost profits from the surety, so that scenario was inapplicable.<sup>110</sup> The other scenario would have required Sub-subcontractor to have sued Subcontractor for the reasonable value of the services or materials provided by Sub-subcontractor; that is, sued in quantum meruit.<sup>111</sup> Had that been the case, the action against Subcontractor would have been barred since Sub-subcontractor would have, under the election of remedies doctrine, waived its right to lost profits and Sub-subcontractor could not again have recovered what it had already recovered from the surety.<sup>112</sup>

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100. *See id.* at 145.

101. *Id.*

102. *Id.*

103. *Id.* (quoting *Barbe v. Villeneuve*, 505 So. 2d 1331, 1332 (Fla. 1987)).

104. *Plumbing Serv. Co.*, 46 So. 3d at 145.

105. *Id.*

106. *Id.* at 146.

107. *Id.*

108. *See id.*

109. *Plumbing Serv. Co.*, 46 So. 3d at 146.

110. *Id.*

111. *Id.*

112. *Id.*

### B. *Subcontractor as Third-Party Beneficiary of a Contract*

Mustapick Companies, Incorporated (General Contractor) and Mr. and Mrs. Esposito (Property Owners) were parties to a contract (Primary Contract) for the construction of a home.<sup>113</sup> General Contractor in turn engaged True Color Enterprises Construction, Incorporated (Subcontractor) to do the painting work on the house.<sup>114</sup> Property Owners sued Subcontractor alleging that Subcontractor's negligence enabled an arsonist to enter the premises "during the night and set fires" to the home causing damage to the premises.<sup>115</sup> The trial court dismissed the action, agreeing with Subcontractor's argument that it was the "third-party beneficiary" of the particular provision contained in the Primary Contract under which Subcontractor "claimed protection" from the allegations against it.<sup>116</sup> Property Owners appealed and Subcontractor cited *Mullray v. Aire-Lok Co.*<sup>117</sup> in support of its position that it was an intended third-party beneficiary of the Primary Contract.<sup>118</sup> The Fourth District Court of Appeal found this case to be of no help to Subcontractor.<sup>119</sup> Although *Mullray* can stand for the proposition that the owners of property can sustain an action for negligence against subcontractors, that does not mean that subcontractors become third-party beneficiaries of the main contract.<sup>120</sup> Subcontractor failed the intended third-party beneficiary test, which requires a clearly expressed intent to that effect on the part of both parties to the contract.<sup>121</sup>

### C. *Enforcement of a Contract by or Against an Unlicensed Subcontractor*

The numerous amendments over the past decade to several statutes dealing with enforcement of contracts by or against unlicensed contractors do not appear to have reduced the uncertainty in this area. For example, in one case involving a subcontractor, the trial court declined to enforce a build-

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113. *Esposito v. True Color Enters. Constr., Inc.*, 45 So. 3d 554, 555 (Fla. 4th Dist. Ct. App. 2010).

114. *Id.*

115. *Id.*

116. *Id.* The opinion does not specify what the terms of the contract were on which Subcontractor relied and sought to have applied to itself as a third-party beneficiary. *See id.* at 556.

117. 216 So. 2d 801 (Fla. 3d Dist. Ct. App. 1968).

118. *Esposito*, 45 So. 3d at 555-56.

119. *Id.* at 556.

120. *Compare id.* at 557, with *Mullray*, 216 So. 2d at 801, 803.

121. *Esposito*, 45 So. 3d at 555-56.

ing subcontractor's contract against its contractor.<sup>122</sup> The Third District Court of Appeal reversed.<sup>123</sup> The subcontractor did not have "a specialty contractor's license as required by the Miami-Dade County Code of Ordinances (MDCO)."<sup>124</sup> Failure to have the license subjected the subcontractor to various monetary and other penalties under the MDCO, but denial of enforceability of contracts was not among them.<sup>125</sup> Although the Third District Court of Appeal quoted the Supreme Court of Florida as stating that "[w]here a statute pronounces a penalty for an act, a contract founded upon such act is void, although the statute does not pronounce it void or expressly prohibit it,"<sup>126</sup> the Third District Court of Appeal, relying mainly on *Corbin on Contracts*<sup>127</sup> and the *Restatement (Second) of Contracts*,<sup>128</sup> decided that a contractual party who is unlicensed—in violation of an ordinance that provides penalties but is silent as to the violation's effect on the enforceability of the underlying contract—is not automatically precluded from a remedy for breach of contract.<sup>129</sup> In those cases, the trial court must engage in fact finding—as detailed in this opinion—to determine if the unlicensed plaintiff should be allowed to proceed.<sup>130</sup>

In another case, T & G Corporation (Contractor) sued an unlicensed contractor, Earth Trades, Incorporated (Subcontractor), for breach of contract.<sup>131</sup> The trial judge ruled in favor of Contractor.<sup>132</sup> Subcontractor appealed, claiming that the trial judge should have allowed it to raise, as an affirmative defense to enforcement of the contract by Contractor, knowledge on the part of Contractor of Subcontractor's "lack of a license."<sup>133</sup> The Fifth District Court of Appeal noted that Contractor's knowledge of the lack of a license was in dispute, but under the pertinent statute, section 489.128 of the *Florida Statutes*, as amended effective June 25, 2003, "a contract with an unlicensed contractor was unenforceable only by the unlicensed contractor."<sup>134</sup>

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122. *MGM Constr. Servs. Corp. v. Travelers Cas. & Sur. Co. of Am.*, 57 So. 3d 884, 885 (Fla. 3d Dist. Ct. App. 2011).

123. *Id.*

124. *Id.*

125. *Id.* at 886.

126. *Id.* at 887 (quoting *Town of Boca Raton v. Raulerson*, 146 So. 576, 577 (Fla. 1933)).

127. 15 *GRACE MCLANE GIESEL, CORBIN ON CONTRACTS* § 88.3 (rev. ed. 2003).

128. *RESTATEMENT (SECOND) OF CONTRACTS* § 181 (1981).

129. *MGM Constr. Servs. Corp.*, 57 So. 3d at 889.

130. *See id.* at 890.

131. *Earth Trades, Inc. v. T & G Corp.*, 42 So. 3d 929, 930 (Fla. 5th Dist. Ct. App. 2010).

132. *Id.*

133. *Id.*

134. *Id.*; *see also* FLA. STAT. § 489.128 (2011).

However, the Third District Court of Appeal, in a case where the contractor and the subcontractor each defended against claims by the other on the ground “that the other was an unlicensed contractor under section 489.128,” concluded that summary judgment was improper because of “genuine issues of material fact,” and included among the list of disputed facts was “the parties’ knowledge of each other’s lack of licensure.”<sup>135</sup>

In yet another case, the contractor-vendor (MMII) contracted with the Silvesters (Buyers) for the purchase and installation of an audio entertainment system in Buyers’ home.<sup>136</sup> After the installation was completed, Buyers refused to pay claiming that “MMII was an unlicensed contractor” and the contract was thus unenforceable.<sup>137</sup> The trial court agreed with Buyers.<sup>138</sup> The Fourth District Court of Appeal reversed.<sup>139</sup> “[T]here is no licensure requirement for selling and installing entertainment systems.”<sup>140</sup> The trial court misinterpreted sections 489.105(3) and 489.505(12) of the *Florida Statutes*.<sup>141</sup> MMII was neither a contractor nor an electrical contractor in the statutory sense.<sup>142</sup> The limited electrical work performed by MMII was incidental to its entertainment system sales and installation.<sup>143</sup>

However, in another case involving electrical work, the Third District Court of Appeal affirmed the trial court’s determination that the subcontractor, an installer of a digital satellite system, did need a license and thus could not enforce its contract against the contractor.<sup>144</sup> It should be noted that this was an appeal of a summary judgment and in affirming the trial court’s decision, the district court agreed that the subcontractor had failed to demonstrate there were disputed issues of material fact.<sup>145</sup> Judge Salter dissented, relying

135. *Austin Bldg. Co. v. Rago, Ltd.*, 63 So. 3d 31, 33 (Fla. 3d Dist. Ct. App. 2011).

136. *MMII, Inc. v. Silvester*, 42 So. 3d 876, 877 (Fla. 4th Dist. Ct. App. 2010) (per curiam). This case differed from the other cases reported in this Survey in that the dispute was not between the contractor and the subcontractor, but rather, was between the buyer and the contractor. Compare *id.*, with *Austin Bldg. Co.*, 63 So. 3d at 33. It is submitted that whether or not this is a distinction without a difference is not entirely clear. See *Master Tech Satellite, Inc. v. Mastec N. Am., Inc.*, 49 So. 3d 789, 795 (Fla. 3d Dist. Ct. App. 2010) (Salter, J., dissenting) (per curiam).

137. *MMII, Inc.*, 42 So. 3d at 877.

138. *Id.*

139. *Id.* at 878.

140. *Id.* at 877.

141. *Id.*; FLA. STAT. §§ 489.105(3), 505(12) (2011).

142. *MMII, Inc.*, 42 So. 3d at 877.

143. *Id.*

144. *Master Tech Satellite, Inc. v. Mastec N. Am., Inc.*, 49 So. 3d 789, 790–91 (Fla. 3d Dist. Ct. App. 2010) (per curiam).

145. *Id.* at 791.

in part on the Fourth District Court of Appeal decision<sup>146</sup> in *MMII, Inc. v. Silvester*.<sup>147</sup>

D. *Implied Warranties of Habitability, Fitness, and Merchantability as Applied to Real Estate Improvements to Common Areas*

In *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*,<sup>148</sup> Lakeview Reserve Homeowners Association, Incorporated (Association) sued Maronda Homes, Incorporated (Developer) alleging certain defects in Developer's construction of a water drainage system, private roadways, retention ponds, and pipes located underground.<sup>149</sup> The theory supporting Association's suit was "breach of the common law implied warranties of fitness and merchantability, also referred to as a warranty of habitability."<sup>150</sup> The trial court granted summary judgment in favor of Developer, relying on *Conklin v. Hurley*<sup>151</sup> and *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Federal Savings & Loan Ass'n of Martin County*,<sup>152</sup> and Association appealed.<sup>153</sup> Amicus curiae briefs were filed on behalf of Developer by Florida Home Builders Association and on behalf of Association by Community Associations Institute.<sup>154</sup> Developer contended that the water drainage system, private roadways, retention ponds, and pipes located underground did "not immediately support the residences" and that the common law implied warranties of fitness and merchantability did not apply to structures "not immediately support[ing] the residences."<sup>155</sup> After reviewing the evolving application of the rule of caveat emptor to home construction, and considering the facts and holdings of *Conklin* and *Port Sewall Harbor & Tennis Club Owners Ass'n*, the Fifth District Court of Appeal announced its test for determining if the common law implied warranty of habitability would apply under the facts presented in this case as to whether "in the absence of the

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146. *Id.* at 795 (Salter, J., dissenting).

147. 42 So. 3d 876 (Fla. 4th Dist. Ct. App. 2010) (per curiam).

148. 48 So. 3d 902 (Fla. 5th Dist. Ct. App. 2010), *review granted*, 58 So. 3d 261 (Fla. 2011).

149. *Id.* at 904.

150. *Id.* at 903-04.

151. 428 So. 2d 654 (Fla. 1983).

152. 463 So. 2d 530 (Fla. 4th Dist. Ct. App. 1985).

153. *Lakeview*, 48 So. 3d at 903-04.

154. Brief for Florida Home Builders Ass'n as Amici Curiae Supporting Appellee, *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, 48 So. 3d 902 (Fla. 5th Dist. Ct. App. 2010), *review granted*, 58 So. 3d 261 (Fla. 2011); Brief for Community Ass'ns Institute as Amici Curiae Supporting Appellant, *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, 48 So. 3d 902 (Fla. 5th Dist. Ct. App. 2010), *review granted*, 58 So. 3d 261 (Fla. 2011).

155. *Lakeview*, 48 So. 3d at 904.

service, is the home inhabitable, that is, is it an improvement providing a service essential to the habitability of the home? If it is, then the implied warranties apply.”<sup>156</sup> The court went on to hold that the “warranties of fitness for a particular purpose, habitability, and merchantability apply to structures in [the] common areas . . . [if they] immediately support the residence in the form of essential services.”<sup>157</sup> Thus, the Fifth District Court of Appeal interpreted the Supreme Court of Florida’s classification of improvements “immediately supporting the residence” as stated in *Conklin*, as including those “services essential to . . . habitability” such as a water drainage system, private roadways, retention ponds, and pipes located underground.<sup>158</sup> The Fifth District Court of Appeal certified conflict with the Fourth District Court of Appeal in *Port Sewall Harbor & Tennis Club Owners Ass’n*.<sup>159</sup> The Supreme Court of Florida accepted jurisdiction and several briefs on the merits have been filed by the parties and amicus curiae.<sup>160</sup>

## VII. EMPLOYMENT LAW

### A. *Non-Compete Agreement Enforced with Respect to Unsolicited Customer*

In *Hilb Rogal & Hobbs of Florida, Inc. v. Grimmel*,<sup>161</sup> the Fourth District Court of Appeal reinstated a temporary injunction that had been dissolved by the trial court.<sup>162</sup> The case makes it clear that a former employee may be prohibited by the terms of a valid non-compete agreement from “accepting an invitation from” an unsolicited customer of the former employer to do work for the customer.<sup>163</sup> The Fourth District Court of Appeal held that the general magistrate’s “finding of no legitimate business interest [under section 542.335 of the *Florida Statutes* was] clearly erroneous.”<sup>164</sup> This finding was adopted by the trial court initially, and reaffirmed in its decision after a hearing held after remand from an appeal to the Fourth District Court of Appeal.<sup>165</sup> In addition, the public interest requirement for granting of a

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156. *Id.* at 907–09.

157. *Id.* at 909.

158. *Conklin v. Hurley*, 428 So. 2d. 654, 655 (Fla. 1983); *Lakeview*, 48 So. 3d at 909.

159. *Lakeview*, 48 So. 3d at 909.

160. *See Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass’n*, Nos. SC10-2292, SC10-2336, 2011 WL 1537263, at \*1 (Fla. Apr. 20, 2011) (unpublished table decision).

161. 48 So. 3d 957 (Fla. 4th Dist. Ct. App. 2010).

162. *Id.* at 962.

163. *Id.* at 961.

164. *Id.* at 959, 961; FLA. STAT. § 542.335 (2011).

165. *Grimmel*, 48 So. 3d at 959, 962.

temporary injunction was satisfied because “the public has a cognizable interest in the protection and enforcement of contractual rights.”<sup>166</sup> Thus, the former employee would have to have shown that public policy considerations against enforcement substantially outweighed the interests established by the former employer who sought to enforce the covenant.<sup>167</sup> The district court held that “[t]he fact that the customers will have to use a different insurance broker does not make the enforcement of this agreement against public policy.”<sup>168</sup>

*B. Temporary Injunction Denied: Grandparent Corporation Could Not Enforce Pre-Existing Non-Compete Agreement Between Newly Acquired (Sub-subsidiary) Corporation and Newly Acquired Corporation's Former Employee*

Mr. Kimbler (Former Alltel Employee) was employed by Alltel Corporation (Alltel) and in 2002, signed a “nondisclosure and nonsolicitation agreement” (Non-Compete Agreement) with “Alltel or any of its affiliated companies.”<sup>169</sup> While Alltel and Cellco Partnership (Cellco) “were competitors, not affiliated companies,” when the Non-Compete Agreement was signed in 2002, in 2008, Alltel and Cellco entered into what was described as a “merger transaction” pursuant to a “plan of merger (reverse merger plan).”<sup>170</sup> As a result of the “merger” in 2009, Former Alltel Employee briefly became a Verizon employee, but within six months, went to work for Sprint/Nextel (New Employer).<sup>171</sup> Within a short time thereafter, Cellco instituted its action against Former Alltel Employee, alleging that Former Alltel Employee provided New Employer with valuable Alltel customer information, and Cellco sought an injunction against Former Alltel Employee based on the agreement with Alltel.<sup>172</sup> The trial court denied the request, and

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166. *Id.* at 962 (quoting *Pitney Bowes, Inc. v. Acevedo*, No. 08-21808-CIV, 2008 WL 2940667, at \*6 (S.D. Fla. July 28, 2008)). The Fourth District Court of Appeal stated that to uphold a temporary injunction, the former employer would have to prove “(1) the likelihood of irreparable harm, (2) the unavailability of an adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) that a temporary injunction will serve the public interest.” *Id.* at 959 (quoting *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1261 (Fla. 5th Dist. Ct. App. 2009)).

167. *See id.* at 962 (citing *Pitney Bowes, Inc.*, 2008 WL 2940667, at \*6).

168. *Id.*

169. *Cellco P’ship v. Kimbler*, 68 So. 3d 914, 916 (Fla. 2d Dist. Ct. App. 2011).

170. *Id.* at 915–16.

171. *Id.*

172. *Id.* at 916.

the second district court affirmed.<sup>173</sup> The Non-Compete Agreement was not assigned by Alltel to Cellco and did not contain an assignment clause.<sup>174</sup> Alltel still held the rights under the agreement with Former Alltel Employee.<sup>175</sup> The second district upheld the trial court's findings that Alltel no longer had a Florida retail cell phone business or Florida customer accounts, and concluded that "Alltel assigned its Florida customer contracts to Cellco."<sup>176</sup> Alltel's going out of the retail cell phone business in Florida was a defense to the alleged breach of the restrictive covenant, there no longer being a legitimate business interest to protect.<sup>177</sup> Cellco could not enforce the Non-Compete Agreement because Cellco could not have been an affiliate of Alltel when the agreement was signed because they were in fact then competitors.<sup>178</sup>

The Second District Court of Appeal acknowledged that section 542.335(1)(f) of the *Florida Statutes* does permit a nonparty to enforce a covenant in certain circumstances.<sup>179</sup> A third party may enforce a restrictive covenant when the "third-party beneficiary of the contract or an assignee or successor . . . is expressly named and authorized to enforce the [contract]."<sup>180</sup> The district court continued, "[a]nd here, the undisputed evidence was that Alltel and Cellco did not merge and that Alltel did not assign the restrictive covenant rights to Cellco. . . . Further, Cellco and Alltel are separate legal entities, and as such, Cellco—the parent corporation—cannot 'exercise the rights of its subsidiary.'"<sup>181</sup>

Although the mechanics and details of the transaction were not set forth in the opinion, the Second District Court of Appeal said that at the time the "merger" became effective in 2009, "Alltel assigned its Florida customer contracts to Cellco."<sup>182</sup> However, at the conclusion of its opinion, the Second District Court of Appeal held that Cellco was not an "assignee, or successor in interest to the Alltel [former employee]" and, as noted, that "Alltel and Cellco did not merge."<sup>183</sup> In order to fully appreciate the court's holding, it is important to emphasize what the district court noted in a footnote: "Cellco

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173. *Id.* at 916, 918.

174. *Cellco P'ship*, 68 So. 3d at 916.

175. *Id.* at 917.

176. *Id.* at 916.

177. *Id.* at 917.

178. *Id.*

179. *Cellco P'ship*, 68 So. 3d at 917; FLA. STAT. § 542.335(1)(f) (2011).

180. *Cellco P'ship*, 68 So. 3d at 917 (citing FLA. STAT. § 542.335(1)(f)).

181. *Id.* at 917–18 (quoting *Am. Int'l Grp., Inc. v. Cornerstone Buss.*, 872 So. 2d 333, 336 (Fla. 2d Dist. Ct. App. 2004)).

182. *Id.* at 916.

183. *Id.* at 917–18.

owns AirTouch Cellular, a nonparty to this action. In turn, AirTouch is the 100% owner of Alltel. But Cellco and Alltel remain separate legal entities.”<sup>184</sup> With that in mind, the reason the district court affirmed the trial court’s denial of the injunction becomes clearer.

### C. *Employer Held Immune from Negligence Action by Borrowed Employee*

In *Fossett v. Southeast Toyota Distributors, LLC*,<sup>185</sup> Ivy Fossett (Employee) was employed by Adecco, a help supply services company.<sup>186</sup> Adecco contracted with Southeast Toyota Distributors, LLC (SET) for Employee’s services.<sup>187</sup> Employee was seriously injured while on the job at SET.<sup>188</sup> Although Employee settled her workers’ compensation claim against Adecco, she also sued SET, alleging negligence.<sup>189</sup> The trial court granted SET’s motion for summary judgment, and Employee appealed.<sup>190</sup> SET, relying on section 440.11 of the *Florida Statutes*, claimed immunity “from liability for simple negligence [with respect] to any Adecco employee injured doing SET’s work,” that is, immunity by virtue of the workers’ compensation statute.<sup>191</sup> In order to be shielded from liability, SET had to show that Employee was subject to its general supervision.<sup>192</sup> Employee claimed that no one at SET supervised her, that is, that “she never received instruction from SET on how to do her job.”<sup>193</sup> She also testified that she worked at SET under the supervision of another Adecco employee.<sup>194</sup> However, SET

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184. *Id.* at 916 n.1.

185. 60 So. 3d 1155 (Fla. 1st Dist. Ct. App. 2011).

186. *Id.* at 1156.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Fossett*, 60 So. 3d at 1156.

191. *Id.* (citing FLA. STAT. § 440.11(2) (2011)).

192. *Id.* at 1157–58 (citing FLA. STAT. § 440.11(2)).

193. *Id.* at 1158.

194. *Id.* The First District Court of Appeal referred to the help supplied as being paid by the company supplying the help “but is under the direct or general supervision of the business to whom the help is furnished.” *Fossett*, 60 So. 3d at 1157 (quoting *St. Lucie Falls Prop. Owners Ass’n v. Morelli*, 956 So. 2d 1283, 1285 (Fla. 4th Dist. Ct. App. 2007)). The district court noted that “[t]he ‘general supervision’ section 440.11(2) contemplates, in incorporating OSHA Standard Industry Code Industry Number 7363, is the legal power to direct.” *Id.* at 1158. Thus, the First District Court of Appeal made it clear that the determination in the case before it did not turn on who was in direct supervision “of the work of the help supply services company employee,” as argued by Employee, but rather who had the “power to control” and supervise the work of the Employee. *Id.* As stated by the district court, “[t]he present case turns on ‘general supervision,’ not ‘direct supervision.’” *Id.*

had the right to supervise and to control—and that controlled.<sup>195</sup> The extent of the exercise of that right was “immaterial” and the district court affirmed.<sup>196</sup>

### VIII. FIDUCIARY DUTY AND GOVERNANCE

The litigation that gave rise to the matter before the Supreme Court of Florida in *Wendt v. La Costa Beach Resort Condominium Ass’n, Inc. (Wendt II)*,<sup>197</sup> was La Costa Beach Resort Condominium Association, Incorporated’s (Association’s) lawsuit that alleged breach of fiduciary duty on the part of certain directors of Association.<sup>198</sup> After a verdict was rendered in Association’s breach of fiduciary case, “the directors moved for a new trial,” and they also filed a separate action against Association seeking indemnification—under section 607.0850 of the *Florida Statutes*—for expenses the directors had incurred in defending against Association’s breach of fiduciary claims.<sup>199</sup> The trial court dismissed the indemnification complaint with prejudice, the directors appealed, and the trial court’s dismissal was upheld by the Fourth District Court of Appeal.<sup>200</sup> However, the Fourth District Court of Appeal had noted conflict<sup>201</sup> between its decision in *Wendt v. La Costa Beach Resort Condominium Ass’n, Inc. (Wendt I)*<sup>202</sup> and the decision of the First District Court of Appeal in *Turkey Creek Master Owners Ass’n. v. Hope*.<sup>203</sup> Section 607.0850 of the *Florida Statutes* directs corporations, under certain circumstances, to indemnify its officers’ and directors’ expenses incurred in legal proceedings arising from their positions.<sup>204</sup> The issue was whether section 607.0850 covers the situation where the corporation sues its own directors.<sup>205</sup> The Supreme Court of Florida agreed with the First District Court of Appeal which had answered the question in the affirmative, and the Supreme Court of Florida thus quashed the opinion of the fourth district.<sup>206</sup> The plain language of the statute does not forbid indemnification in such cases.<sup>207</sup>

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195. *Id.*

196. *Fossett*, 60 So. 3d at 1158.

197. 64 So. 3d 1288 (Fla. 2011) (per curiam).

198. *Id.* at 1229.

199. *Id.* (citing FLA. STAT. § 607.0850 (2011)).

200. *Id.*

201. *See id.*

202. 14 So. 3d 1179 (Fla. 4th Dist. Ct. App. 2009), *quashed by* 64 So. 3d 1228 (Fla. 2011).

203. 766 So. 2d 1245, 1247 (Fla. 1st Dist. Ct. App. 2000) (per curiam).

204. FLA. STAT. § 607.0850.

205. *Wendt II*, 64 So. 3d 1228, 1229 (Fla. 2011) (per curiam).

206. *Id.* at 1231.

207. *Id.*

However, the court “expressly [did] not reach the merits of whether indemnification is applicable under the facts of [the] case.”<sup>208</sup> Justice Quince dissented.<sup>209</sup>

On June 9, 2011, the same day as the Supreme Court of Florida issued its opinion in *Wendt II*,<sup>210</sup> the court rendered its decision in *Banco Industrial de Venezuela C.A. v. de Saad*.<sup>211</sup> The decision of the Third District Court of Appeal, discussed in the *2009–2010 Survey of Florida Law Affecting Business Owners*, in some detail, was quashed.<sup>212</sup> There were two main issues involved; one, the indemnification issue, and the other, a breach of contract issue.<sup>213</sup> With respect to the indemnification claim by de Saad (Officer/Employee)—as she was referred to in the *2009–2010 Survey of Florida Law Affecting Business Owners*—the Supreme Court of Florida set forth several reasons why the indemnification by Banco Industrial De Venezuela C.A., Miami Agency (Bank) was not available to Officer/Employee.<sup>214</sup> First, the court held that section 607.0850 of the *Florida Statutes* did not apply to the corporate entity against which Officer/Employee made the claim since Bank was a foreign corporation—a Venezuelan bank that had been authorized to do business in the state of Florida.<sup>215</sup> The court pointed out that even though foreign corporations authorized to do business in Florida have substantially the same rights and obligations as domestic corporations, there are exceptions, and one exception is that under section 607.1505(3) of the *Florida Statutes*, Florida may not regulate the “internal affairs of a foreign corporation” even though the corporation has been authorized to do business in Florida.<sup>216</sup> The Supreme Court of Florida held that “[c]orporate indemnification is one such matter of internal affairs.”<sup>217</sup> Officer/Employee argued that

208. *Id.*

209. *Id.* (Quince, J., dissenting).

210. *Wendt II*, 64 So. 3d at 1228.

211. 68 So. 3d 895, 901 (Fla. 2011).

212. *Id.* at 901; see Barbara Landau, *2009–2010 Survey of Florida Law Affecting Business Owners*, 35 NOVA L. REV. 1, 9–11 (2010) [hereinafter Landau, *2009–2010 Survey of Florida Law Affecting Business Owners*].

213. *Banco*, 68 So. 3d at 897. The summary judgment awarding Officer/Employee \$1,058,023.82 was quashed, and the Supreme Court of Florida held that Bank “did not breach the employment contract by keeping [Officer/Employer] on unpaid suspension.” *Id.* at 901. The court quashed the third district’s decision, and remanded “for entry of final judgment in favor of [Bank].” *Id.*

214. *Id.* at 898–900; see Landau, *2009–2010 Survey of Florida Law Affecting Business Owners*, *supra* note 212, at 9–11.

215. *Banco*, 68 So. 3d at 898–99.

216. *Id.* at 898 (quoting FLA. STAT. § 607.1505(3) (2011)).

217. *Id.* (citing *Chatlos Found., Inc. v. D’Arata*, 882 So. 2d 1021, 1023 (Fla. 5th Dist. Ct. App. 2004)).

Bank made section 607.0850 applicable to itself when it entered into an employment agreement with Officer/Employee that contained a Florida choice of law provision.<sup>218</sup> The Supreme Court of Florida dealt with that argument by pointing out that in making Florida law the applicable law, Bank, as a foreign corporation was under the express language of the Florida statute and “not subject to regulation” by Florida with respect to its internal affairs.<sup>219</sup> The court did not end its analysis of the indemnification issue there, however.<sup>220</sup> Rather, the court held that even if the foreign corporation was subject to the indemnification statute, Officer/Employee did not satisfy the statutory requirements for indemnification.<sup>221</sup> The court emphasized the “by reason of the fact” language of section 607.0850(1); that is, that the person must have been a party “by reason of the fact” of his status as an officer or employee.<sup>222</sup> The court noted that Officer/Employee “was not prosecuted ‘by reason of the fact’ that she was a corporate officer . . . . [S]he was prosecuted for her conduct, not on account of her position. This conduct was not required by her position as a corporate officer and was, in fact, contrary to corporate policy.”<sup>223</sup>

## IX. JURISDICTION AND VENUE

### A. *Personal Jurisdiction and the Internet*

Two Worlds United (Plaintiff) had its principal place of business in Tampa.<sup>224</sup> Plaintiff sued a California resident, Mr. Zylstra (Defendant), and others, claiming that Defendant “posted defamatory statements [about Plaintiff] on a website owned and operated by [Defendant].”<sup>225</sup> Defendant contested the Florida court’s personal jurisdiction over him by filing an affidavit stating that his solely owned corporation owned the website and that he did not personally post anything on the website regarding Plaintiff.<sup>226</sup> Plaintiff did not rebut Defendant’s affidavit, and Defendant was thus protected by the corporate shield doctrine.<sup>227</sup> Plaintiff relied on *Internet Solutions Corp. v.*

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218. *Id.*

219. *Id.* at 898–99.

220. *Banco*, 68 So. 3d at 899.

221. *Id.*

222. *Id.*; FLA. STAT. § 607.0850(1) (2011).

223. *Banco*, 68 So. 3d at 900 (citations omitted).

224. *Two Worlds United v. Zylstra*, 46 So. 3d 1175, 1176 (Fla. 2d Dist. Ct. App. 2010).

225. *Id.*

226. *Id.* at 1177–78.

227. *Id.* at 1178 (citing *Doe v. Thompson*, 620 So. 2d 1004, 1006 (Fla. 1993)).

*Marshall*,<sup>228</sup> but the Second District Court of Appeal found Plaintiff's reliance on *Internet Solutions Corp.* misplaced because there, "the nonresident owner and operator of the website personally posted defamatory statements regarding the plaintiff" in that case.<sup>229</sup> In addition, the district court pointed out that the corporate shield doctrine was not addressed in the *Internet Solutions Corp.* decision.<sup>230</sup> Plaintiff also lost on the issue regarding section 48.193(2) "substantial and not isolated activity" in Florida because Defendant "testified that he ha[d] not lived in Florida since 1994" and visited "only a few times a year to [see] family and friends."<sup>231</sup> These, under *Radcliffe v. Gyves*,<sup>232</sup> the court said, were insufficient contacts to satisfy personal jurisdiction requirements under section 48.193(2).<sup>233</sup> Finally, Defendant's attempt to recover his attorney fees under section 57.105 of the *Florida Statutes* did not amount to a waiver of the defense of lack of personal jurisdiction.<sup>234</sup> The motion for fees "was defensive and did not seek affirmative relief."<sup>235</sup>

In a case involving a complaint for violation of the Florida Securities and Investor Protection Act,<sup>236</sup> Mr. Elias (Plaintiff) alleged that Enzyme Environmental Solutions, Inc. (Defendant Corporation) was "a Nevada corporation, located in . . . Indiana, [but] conducting business in . . . Florida."<sup>237</sup> The individual defendants were officers of the Defendant Corporation.<sup>238</sup> One of the individual defendants stated "that he live[d] in Indiana and ha[d] never resided, worked, or operated a business in Florida."<sup>239</sup> He also stated that "[h]e [did] not have a telephone, post office box, or office in Florida."<sup>240</sup> The other individual defendant's declaration was similar, but, "he lived in Florida from 1988 until 1990."<sup>241</sup> Plaintiff alleged that he was the victim of a securities "pump and dump" fraud perpetrated via the Internet.<sup>242</sup> The individual

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228. 39 So. 3d 1201 (Fla. 2010).

229. *Two Worlds United*, 46 So. 3d at 1178.

230. *Id.*

231. *Id.* (quoting FLA. STAT. § 48.193 (2) (2011)).

232. 902 So. 2d 968 (Fla. 4th Dist. Ct. App. 2005).

233. *Two Worlds United*, 46 So. 3d at 1178 (citing *Radcliffe*, 902 So. 2d at 972 n.4).

234. *Id.* at 1177; FLA. STAT. § 57.105 (2005); see *Heineken v. Heineken*, 683 So. 2d 194, 197–98 (Fla. 1st Dist. Ct. App. 1996).

235. *Two Worlds United*, 46 So. 3d at 1177.

236. FLA. STAT. § 517.011 (2011).

237. *Enzyme Env'tl. Solutions, Inc. v. Elias*, 60 So. 3d 1158, 1159 (Fla. 4th Dist. Ct. App. 2011).

238. *Id.* at 1159–60.

239. *Id.* at 1160.

240. *Id.*

241. *Id.*

242. *Elias*, 60 So. 3d at 1160.

defendants argued that they did not have sufficient minimum contacts with Florida “to comport with due process,” and the appellate court agreed with them.<sup>243</sup>

In the instant case, there is no evidence that the false statements were purposefully directed toward the residents of Florida. Assuming the defendants were actually trying to “pump and dump” their stock, they were targeting anyone and everyone who might go on the Internet to read about stocks on websites that publish information about stocks.<sup>244</sup>

The two cases just discussed involved jurisdiction and the Internet.<sup>245</sup> The next case also involved the Internet, and even though the appellant had “filed a notice of voluntary dismissal,” the Fourth District Court of Appeal stated it decided not to dismiss “[b]ecause we believe that this case involves an issue of great public importance.”<sup>246</sup> Instead of dismissing, the Fourth District Court of Appeal, in *Caiazza v. American Royal Arts Corp.*,<sup>247</sup> reviewed the subject of personal jurisdiction under Florida law and then discussed the application of the law to the Internet.<sup>248</sup> The court cited *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,<sup>249</sup> as a leading case dealing with how an internet site affects personal jurisdiction.<sup>250</sup> *Zippo Manufacturing Co.*’s analysis placed the site owner on a spectrum of commercial interactivity ranging from passive to active and/or clearly doing business.<sup>251</sup> However, the Fourth District Court of Appeal, while acknowledging that “a clear majority of federal courts ha[ve] adopted the *Zippo* [*Manufacturing Co.*] analytical framework,” rejected it as controlling in Florida.<sup>252</sup> The district court concluded that doing business over the Internet did not fundamentally change Florida’s analysis under section 48.193(1)—as to specific jurisdiction—and section 48.193(2)—as to general jurisdiction—in determining the existence of minimum contacts for due process purposes as applied to specific jurisdiction determinations or in determining the existence of minimum

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243. *Id.* at 1161.

244. *Id.* at 1162.

245. *See* *Two Worlds United v. Zylstra*, 46 So. 3d 1175, 1176 (Fla. 2d Dist. Ct. App. 2010); *Elias*, 60 So. 3d at 1160.

246. *Caiazza v. Am. Royal Arts Corp.*, 36 Fla. L. Weekly D1174, D1174 (4th Dist. Ct. App. June 1, 2011) (per curiam).

247. 36 Fla. L. Weekly D1174 (4th Dist. Ct. App. June 1, 2011) (per curiam).

248. *See id.* at D1174-77.

249. 952 F. Supp. 1119 (W.D. Pa. 1997).

250. *Caiazza*, 36 Fla. L. Weekly at D1176 (citing *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

251. *Id.* (citing *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

252. *Id.*

contacts in the general jurisdiction context.<sup>253</sup> The district court stated that with respect to minimum contacts, “we choose to continue to apply a traditional minimum contacts analysis in personal jurisdiction questions, whether or not the [I]nternet is involved.”<sup>254</sup>

### B. *Venue-Joint Residency Rule Did Not Apply*

In *Pill ex rel. Estate of Bassali v. Merco Group of the Palm Beaches, Inc.*,<sup>255</sup> there were corporate and individual defendants located in Miami-Dade County.<sup>256</sup> The defendants were sued in Palm Beach County where the cause of action accrued.<sup>257</sup> The defendants successfully moved the trial court to transfer venue to Miami-Dade County citing the joint residency venue rule.<sup>258</sup> The Fourth District Court of Appeal reversed, holding that venue was properly laid in Palm Beach County.<sup>259</sup> Section 47.011 of the *Florida Statutes* allows the plaintiff to choose as venue “the county where the defendant resides, where the cause of action accrued, or where the property [subject to] litigation is located.”<sup>260</sup> The joint residency rule requires venue “in the county where . . . individual . . . and corporate defendant[s] share a residence, [provided that it] is also the [county] where the cause of action accrued.”<sup>261</sup> In other words, “the joint residency rule applies only when venue is based upon residency.”<sup>262</sup> In this case, the cause of action accrued in Palm Beach County, which the plaintiff was permitted to choose as the venue under section 47.011, notwithstanding the joint residency of the defendants.<sup>263</sup>

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253. See *id.* (citing FLA. STAT. § 48.193 (2011); *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1216 n.11 (Fla. 2010); *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989); *Renaissance Health Publ’g, L.L.C. v. Resveratrol Partners, L.L.C.*, 982 So. 2d 739, 742 (Fla. 4th Dist. Ct. App. 2008)).

254. *Id.* at D1177.

255. 56 So. 3d 890 (Fla. 4th Dist. Ct. App. 2011).

256. *Id.* at 891.

257. *Id.*

258. *Id.*

259. *Id.* at 892.

260. *Pill ex rel. Estate of Bassali*, 56 So. 3d at 891 (emphasis omitted) (quoting FLA. STAT. § 47.011 (2011)).

261. *Id.* at 892 (emphasis omitted) (quoting *Brown v. Nagelhout*, 33 So. 3d 83, 84 (Fla. 4th Dist. Ct. App.), review granted, 48 So. 3d 835 (Fla. 2010)).

262. *Id.* at 891.

263. *Id.* at 891–92; FLA. STAT. § 47.011.

## X. MORTGAGES

A. *Constructive Notice Was Given Despite Property Description Error in Mortgage*

Fidelity Bank of Florida (Bank) took back a first mortgage on certain real estate.<sup>264</sup> This mortgage document, the “first-recorded mortgage,” was correct as to the identity of the owner of the property, and the lot and subdivision were correctly stated.<sup>265</sup> While the plat book was also correctly described, the mortgage incorrectly stated the plat book page as page three; the correct page, however, was page eight.<sup>266</sup> Bank filed a foreclosure action and joined another mortgagee (Other Mortgagee) as a defendant.<sup>267</sup> On motion for summary judgment, the trial court agreed with Other Mortgagee that Bank’s error put Other Mortgagee in a superior position.<sup>268</sup> The Fifth District Court of Appeal reversed the trial court’s entry of summary judgment in favor of Other Mortgagee, holding that notwithstanding Bank’s error, Other Mortgagee had constructive notice of Bank’s earlier recorded mortgage.<sup>269</sup> The district court “direct[ed] the trial court to enter summary judgment” in favor of Bank which judgment was to declare the superior position of Bank.<sup>270</sup>

B. *Florida’s Recording Statute is Still a Notice Statute*

Mr. and Mrs. Burkes (Borrowers) owed money to Argent Mortgage Company, LLC (Argent) and Wachovia Bank, N.A. (Wachovia) on notes and mortgages they had given to each lender.<sup>271</sup> The Wachovia mortgage was signed on August 31, 2004, but was not recorded until January 5, 2005.<sup>272</sup> The Argent mortgage was signed on December 10, 2004, and the date of recording was January 31, 2005.<sup>273</sup> Borrowers defaulted on the mort-

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264. *Fid. Bank of Fla. v. Nguyen*, 44 So. 3d 1238, 1239 (Fla. 5th Dist. Ct. App. 2010), review denied, 57 So. 3d 846 (Fla. 2011).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Fid. Bank of Fla.*, 44 So. 3d at 1239 (citing *Sickler v. Melbourne State Bank*, 159 So. 678, 679 (Fla. 1935); *Merrell v. Ridgely*, 57 So. 352, 353 (Fla. 1912)).

270. *Id.*

271. *Argent Mortg. Co. v. Wachovia Bank, N.A.*, 52 So. 3d 796, 798 (Fla. 5th Dist. Ct. App. 2010).

272. *Id.*

273. *Id.*

gages and in consolidated foreclosure actions<sup>274</sup> the issue became which lender had priority.<sup>275</sup> The trial court ruled for Wachovia, but the Fifth District Court of Appeal reversed.<sup>276</sup> The trial court accepted Wachovia's argument that Florida's recording statute, section 695.01 of the *Florida Statutes*, had to be read together with section 695.11 of the *Florida Statutes*, which deals with the sequence of recording, and "determining the time at which an instrument [is] deemed to be recorded," which the argument went, made Florida's statute a statute of the race-notice variety rather than a notice statute.<sup>277</sup> The Fifth District Court of Appeal summarized the differences between a notice statute, a race statute, and a race-notice statute.<sup>278</sup> The district court noted that commentators and a long line of cases in Florida have concluded that section 695.01 is a notice statute, so that a lender taking for value and without notice takes priority over an earlier lender for value who fails to record loan documents prior to the loan by the second lender, even if the second lender's recording took place after the first lender's recording, that is, regardless of the order of recording.<sup>279</sup> In order for Wachovia to have prevailed, it would have been necessary to prove that Argent had actual notice of Wachovia's loan at the time it loaned money to Borrowers, and "the trial court [had] made findings on facts not in dispute, including . . . Argent's lack of actual or constructive notice" of the Wachovia mortgage when the Argent mortgage was executed.<sup>280</sup>

### C. *Municipal Ordinance Creating Lien Priority Violates Priority of Recording Statute*

The next case, *City of Palm Bay v. Wells Fargo Bank, N.A.*<sup>281</sup> involves section 695.11 of the *Florida Statutes*.<sup>282</sup> The Fifth District Court of Appeal held that a local ordinance that gave the city's code enforcement liens priority over all other nongovernmental liens, regardless of the order of recording in accordance with the provisions of section 695.11, was in violation of that statute, and thus, the statute controlled.<sup>283</sup> The district court referred to "the common law principle of first in time, first in right" noting that "instruments

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274. *Id.* at 798 n.1.

275. *Id.* at 798.

276. *Argent Mortg. Co.*, 52 So. 3d at 797, 801.

277. *Id.* at 798, 800; *see also* FLA. STAT. §§ 695.01, 695.11 (2011).

278. *Argent Mortg. Co.*, 52 So. 3d at 798–99.

279. *Id.* at 799–801 (citations omitted); FLA. STAT. § 695.01.

280. *Argent Mortg. Co.*, 52 So. 3d at 798.

281. 57 So. 3d 226 (Fla. 5th Dist. Ct. App.), *review granted*, 61 So. 3d 410 (Fla. 2011).

282. *Id.* at 227; FLA. STAT. § 695.11.

283. *City of Palm Bay*, 57 So. 3d at 227; FLA. STAT. § 695.11.

such as mortgages and liens will generally follow the first in time rule.”<sup>284</sup> The district court concluded that “[t]he only way ordinance 97–07 can be effective is by violating [the Florida statute].”<sup>285</sup> Thus, the Fifth District Court of Appeal ruled in favor of the holder of a prior recorded mortgage.<sup>286</sup> It should be noted that unlike the situation in *Argent Mortgage Co. v. Wachovia Bank, N.A.*,<sup>287</sup> this was not a “notice” case.<sup>288</sup> This was a case of a city enacting an ordinance that created priority for certain liens.<sup>289</sup> The Fifth District Court of Appeal granted the City of Palm Bay’s motion to certify the following question to the Supreme Court of Florida:

Whether, under Article VIII, section 2(b), Florida Constitution, section 166.021, Florida Statutes and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to a code enforcement board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages?<sup>290</sup>

D. *Mortgage Documents Could Not Override Requirements of Civil Procedure Rule for Ex Parte Appointment of Receiver*

In *DeSilva v. First Community Bank of America*,<sup>291</sup> First Community Bank of America (Lender) began proceedings to foreclose the mortgage it owned on Mr. DeSilva’s (Borrower’s) property.<sup>292</sup> As part of the proceedings, the trial court, ex parte, upon request of Lender for expedited appointment, appointed a receiver for the property.<sup>293</sup> This was accomplished by Lender filing “an unverified motion to appoint a receiver on an expedited basis.”<sup>294</sup> Lender alleged in the motion that a receiver could “avoid complaints from neighbors, and . . . possible code violations,” that a receiver would facilitate the eventual sale of the property to “unidentified potential buyers,” and that the loan documents called for a receiver if Borrower de-

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284. *City of Palm Bay*, 57 So. 3d at 227.

285. *Id.*

286. *Id.* at 228.

287. 52 So. 3d 796 (Fla. 5th Dist. Ct. App. 2010).

288. Compare *id.* at 799, with *City of Palm Bay*, 57 So. 3d at 227.

289. *City of Palm Bay*, 57 So. 3d at 227.

290. *City of Palm Bay v. Wells Fargo Bank N.A.*, 67 So. 3d 271, 271 (Fla. 5th Dist. Ct. App.) (per curiam), review granted, 61 So. 3d 410 (Fla. 2011).

291. 42 So. 3d 285 (Fla. 2d Dist. Ct. App. 2010).

292. *Id.* at 287.

293. *Id.*

294. *Id.*

faulted.<sup>295</sup> The Second District Court of Appeal reversed and remanded.<sup>296</sup> Lender failed to comply with Florida Rule of Civil Procedure 1.610 so as to allow the trial court to appoint a receiver without notice or hearing on its motion.<sup>297</sup> That rule requires, among other things, that the movant show in an affidavit or a verified pleading by “‘*specific facts* . . . that immediate and irreparable injury, loss, or damage *will* result to the movant before the adverse party can be heard in opposition.’”<sup>298</sup> That was not done here.<sup>299</sup> Lender failed to “affirmatively assert[] that the actual value of the property [is] insufficient to cover the debt,” and there was “no evidence that this was the case.”<sup>300</sup> The case also reminds us that even if the mortgage documents provide for the appointment of a receiver in the event of default, that does not mean that the requirements of the procedural rule do not apply.<sup>301</sup>

E. *Statute of Limitations Applicable to Assignor Applies to Assignee of Mortgage*

Ms. Tucker (Guarantor) guaranteed mortgage loans made by the U.S. Small Business Association to some companies.<sup>302</sup> LPP Mortgage Ltd. (Assignee) was the assignee of the loans.<sup>303</sup> When the companies defaulted, Assignee sued to foreclose, apparently against Guarantor’s property.<sup>304</sup> The trial court ruled that the foreclosure action was barred by the six-year statute of limitations.<sup>305</sup> Assignee appealed, and the Third District Court of Appeal reversed.<sup>306</sup> An assignee enjoys “the rights and benefits” of the assignor, including “the benefit of the statute of limitations applicable to the assignor’s

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295. *Id.* at 287–88.

296. *DeSilva*, 42 So. 3d at 287.

297. *Id.* at 288 (citing FLA. R. CIV. P. 1.610).

298. *Id.* (quoting FLA. R. CIV. P. 1.610(a)(1)(A)). The other requirements of the rule include “the movant’s attorney certifies in writing [as to] why notice should not be required” and the court’s inclusion in its order its findings and reasons as to what the irreparable harm may be, and why the receiver was appointed *ex parte*. *Id.* (quoting FLA. R. CIV. P. 1.610(a)(1)(B)).

299. *Id.*

300. *DeSilva*, 42 So. 3d at 288.

301. *Id.* (citing *Seasons P’ship I v. Kraus–Anderson, Inc.*, 700 So. 2d 60, 61 (Fla. 2d Dist. Ct. App. 1997)).

302. *LPP Mortg. Ltd. v. Tucker*, 48 So. 3d 115, 116 (Fla. 3d Dist. Ct. App. 2010) (*per curiam*), *review denied*, 60 So. 3d 1055 (Fla. 2011).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 116–17.

foreclosure action.”<sup>307</sup> Under section 2415 of the *United States Code*<sup>308</sup> and *United States v. Thornburg*,<sup>309</sup> the federal government has an unlimited time to foreclose on mortgaged property.<sup>310</sup> Assignee stepped into the shoes of the federal government with respect to unlimited time to foreclose.<sup>311</sup>

## XI. TAXES

In *Boca Airport, Inc. v. Florida Department of Revenue*,<sup>312</sup> Boca Airport, Inc., Galaxy Aviation, Inc., and Aviation Center, Inc. (Companies) were fixed base operators (FBOs).<sup>313</sup> They “lease[d] government-owned airport properties” and “provide[d] goods and services to the general aviation public.”<sup>314</sup> “In 2008, the [Florida] Department of Revenue issued notices of its intent to [levy] intangible personal property taxes on the leasehold interest [of each company].”<sup>315</sup> Companies claimed “exempt[ion] from [the] intangible . . . tax under sections 196.199(2)(a) and 196.012(6) [of the] *Florida Statutes*.”<sup>316</sup> The Fourth District Court of Appeal acknowledged that Companies, as FBOs, were exempt from ad valorem taxation under those sections, but Companies were not exempt from intangible taxation under section 199.023(1)(d) of the *Florida Statutes*.<sup>317</sup>

## XII. TORTS

### A. Defamation

NITV, LLC and Mr. Baker were competitors in the voice stress analysis business whereby they distributed the software and provided training to law enforcement agencies on the use of these programs.<sup>318</sup> In 2005, “NITV prepared two documents entitled ‘Law Enforcement Alert’ and ‘Law Enforce-

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307. *Tucker*, 48 So. 3d. at 116 (citations omitted).

308. 28 U.S.C. § 2415 (2006).

309. 82 F.3d 886 (9th Cir. 1996).

310. *Tucker*, 48 So. 3d at 117; *Thornburg*, 82 F.3d at 894; 28 U.S.C. § 2415(c).

311. *Tucker*, 48 So. 3d at 117.

312. 56 So. 3d 140 (Fla. 4th Dist. Ct. App. 2011).

313. *Id.* at 140–41.

314. *Id.* at 141.

315. *Id.* The years involved were 1998 through 2007 for one company, 1994 through 2007 for another, and 1985 through 2007 for another. *Id.*

316. *Boca Airport, Inc.*, 56 So. 3d at 142; see FLA. STAT. §§ 196.199(2)(a), 196.012(6) (2011).

317. *Boca Airport, Inc.*, 56 So. 3d at 144; see FLA. STAT. § 199.023(1)(d) (2005) (repealed 2006).

318. *NITV, L.L.C. v. Baker*, 61 So. 3d 1249, 1250–51 (Fla. 4th Dist. Ct. App. 2011).

ment Scam Alert.”<sup>319</sup> These documents were published to more than 300 law enforcement agencies in Illinois “and as many as 8500 other departments” in the United States.<sup>320</sup> Mr. Baker sued NITV, LLC alleging defamation, and the jury returned a verdict in his favor in the amount of \$575,000, consisting of \$225,000 for “loss of ability to earn money in the past,” \$100,000 for “loss of ability to earn money in the future,” and \$250,000 for damage to reputation.<sup>321</sup> The Fourth District Court of Appeal affirmed in part and reversed in part.<sup>322</sup> Mr. Baker did not submit competent substantial evidence to support the jury’s verdict with respect to damages for past and future loss of ability to earn money, and the appellate court found that Mr. Baker’s testimony was “vague and ill defined.”<sup>323</sup> In addition, in 2006, his business income increased substantially.<sup>324</sup> The appellate court vacated the judgment as to \$325,000 in damages.<sup>325</sup> However, the \$250,000 award for damage to reputation was not disturbed.<sup>326</sup> “Words which are actionable in themselves, or per se, necessarily import general damages and need not be pleaded or proved but are conclusively presumed to result.”<sup>327</sup>

*B. Suit by Former Employee Against Supervisor for Tortious Interference with Business Relationship*

After her employment was terminated, a former employee (Employee) sued her former supervisor (Supervisor) “for tortious interference with an advantageous business relationship.”<sup>328</sup> Employee alleged that Supervisor’s “hostile statements and . . . hostile acts” directed against Employee led to her job termination.<sup>329</sup> Supervisor’s motion to dismiss on the ground that she and Employee were co-employees of the business was granted.<sup>330</sup> Employee appealed.<sup>331</sup> The Third District Court of Appeal noted that it was necessary for Employee to allege: 1) “a relationship between [Employee] and her em-

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319. *Id.* at 1251.

320. *Id.*

321. *Id.* at 1250.

322. *Id.*

323. *NITV, L.L.C.*, 61 So. 3d at 1253.

324. *Id.*

325. *Id.* at 1254.

326. *Id.*

327. *Id.* (quoting *Bobenhausen v. Cassat Ave. Mobile Homes, Inc.*, 344 So. 2d 279, 281 (Fla. 1st Dist. Ct. App. 1977)).

328. *Alexis v. Ventura*, 66 So. 3d 986, 987 (Fla. 3d Dist. Ct. App. 2011).

329. *Id.*

330. *Id.*

331. *Id.*

ployer, under which [she] ha[d] legal rights;" 2) that Supervisor had "knowledge of the relationship;" 3) "intentional and unjustified interference with that relationship;" 4) "[b]y a third party;" and 5) that Employee suffered damages that were "caused by the [Supervisor's] interference."<sup>332</sup> The appellate court said the appeal turned on whether Supervisor was a "third party" under the circumstances.<sup>333</sup> The appellate court also said the general rule is that an employee's action against a supervisor/co-employee for tortious interference will not lie because the supervisor/co-employee is not considered a third party but rather "is considered a party to the employment relationship."<sup>334</sup> However, there is an exception, and the third party requirement is satisfied if it is alleged that the supervisor/co-employee "was not acting on the employer's behalf or was acting to its detriment."<sup>335</sup> The court explained that "an allegation" of "malicious motivation" does not automatically mean that the co-employee is acting beyond the scope of employment.<sup>336</sup> "However, the privileged interference enjoyed by a party . . . to [a] business relationship is not absolute. The privilege is divested when [a party to the relationship] 'acts solely with ulterior purposes and . . . not in the principal's best interest.'"<sup>337</sup> In this case, "the allegation that [Supervisor] acted with the *sole ulterior purpose*" of causing Employee's job to be terminated—thus not acting on the employer's behalf—kept Employee's complaint from being dismissed.<sup>338</sup>

### C. *Negligent Misrepresentation v. Fraudulent Misrepresentation*

Specialty Marine & Industrial Supplies (Purchaser) was considering entering into a contract with Venus (Seller) and others to purchase certain real estate.<sup>339</sup> Purchaser learned of a boundary dispute concerning the property, but when questioned, Seller assured Purchaser that the boundary issue "was 'not a big deal' and that there was a survey [to] support[] [Seller's] position."<sup>340</sup> The contract was signed, and Purchaser hired a surveyor who con-

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332. *Id.*

333. *Alexis*, 66 So. 3d at 987.

334. *Id.* at 988 (quoting *Rudnick v. Sears, Roebuck & Co.*, 358 F. Supp. 2d 1201, 1206 (S.D. Fla. 2005)).

335. *Id.*

336. *Id.*

337. *Id.* at 988 (quoting *O.E. Smith's Sons, Inc. v. George*, 545 So. 2d 298, 299 (Fla. 1st Dist. Ct. App. 1989)).

338. *Alexis*, 66 So. 3d at 988.

339. *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So. 3d 306, 308 (Fla. 1st Dist. Ct. App. 2011).

340. *Id.*

firmed Seller's statement about the property's boundary.<sup>341</sup> The deal closed for \$450,000, but it turned out that the property boundary was in fact not as represented and the actual boundary made the property unsuitable for use by Purchaser for the purpose intended.<sup>342</sup> Purchaser sued Seller for damages, alleging among other things, that Seller was liable for its negligent misrepresentation of the property boundary.<sup>343</sup> The jury, on a comparative negligence basis, found that Seller was the cause of ninety percent of Purchaser's damages and awarded Purchaser \$360,000, that is, the cause of ninety percent of the \$400,000 claimed damages.<sup>344</sup> The trial court ruled for Seller on its motion for judgment notwithstanding the jury verdict.<sup>345</sup> Purchaser appealed, Seller cross-appealed,<sup>346</sup> and the First District Court of Appeal reversed in part, reinstating the jury verdict in favor of Purchaser and ruling that Purchaser was entitled to an award of prejudgment interest.<sup>347</sup> The First District Court of Appeal discussed the differences between negligent misrepresentation alleged by Purchaser and fraudulent misrepresentation.<sup>348</sup> With respect to negligent misrepresentation, a plaintiff must allege that:

“1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false; 2) the defendant was negligent in making the statement because he should have known the representation was false; 3) the defendant intended to induce the plaintiff to rely and [sic] on the misrepresentation; and 4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation.”<sup>349</sup>

On the other hand, a fraudulent misrepresentation claim will be sustained only if the plaintiff can show: “1) a false statement concerning a material

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341. *Id.*

342. *Id.*

343. *Id.* Purchaser also sued the surveyor for negligence and that claim was settled before trial. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 308.

344. *Id.* at 308, 311.

345. *Id.* at 309.

346. *Id.* at 307. There was an award to Purchaser on another ground, a ground not raised by Purchaser. *Id.* at 309. The trial court awarded Purchaser damages of \$35,000 for breach of warranty, but when Purchaser asked for prejudgment interest on this award, the trial court said no. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 309. The cross-appeal of the breach of warranty holding was apparently one of “[t]he remaining issues raised on appeal and cross-appeal [that was] rendered moot by [the court’s] reversal of the judgment under review.” *See id.* at 312.

347. *See id.* at 309–10.

348. *Id.* at 309.

349. *Id.* (quoting *Simon v. Celebration Co.*, 883 So. 2d 826, 832 (Fla. 5th Dist. Ct. App. 2004)).

fact; 2) the representor's [sic] knowledge that the representation is false; 3) an intention that the representation induce another to act on it; and 4) consequent injury by the party acting in reliance on the representation."<sup>350</sup> An important difference between negligent misrepresentation and fraudulent misrepresentation is that the former requires proof of *justifiable* reliance while the latter does not.<sup>351</sup> The trial court found that Purchaser did not justifiably rely on Seller's reliance, thus improperly usurping the jury findings and verdict to the contrary, which were sustained by competent substantial evidence.<sup>352</sup> Even though the surveyor was also at fault, "there [was] no requirement that [Purchaser's] reliance on [Seller's] misrepresentations be the sole or even the predominant cause of [Purchaser's] decision to purchase the property" as long as the "reliance [was] a substantial factor in determining the course of conduct that result[ed] in [Purchaser's] loss."<sup>353</sup> Comparative negligence applies to claims of negligent misrepresentation, and the element of justifiable reliance does not, under Florida law, fail as a matter of law, just because, as argued by Seller, Purchaser undertakes an investigation.<sup>354</sup>

#### D. *Waiver of Liability and Indemnification for Claim of Minor Child*

A mother (Mother) took her thirteen-year-old daughter (Daughter), to a boutique (Defendant) to have Daughter's ears pierced.<sup>355</sup> As part of the procedure, Mother signed "a release from liability" on behalf of herself and her minor Daughter and agreed to indemnify Defendant and its employees from liability for "negligent acts or omissions."<sup>356</sup> After the procedure, Daughter developed an infection in one ear that "required hospitalization and extensive medical treatment" and resulted in permanent damage.<sup>357</sup> Mother, as parent and natural guardian of her child, sued Defendant for negligence resulting in a jury verdict and judgment amount of \$69,740.<sup>358</sup> Defendant, nevertheless, then obtained a judgment from the trial court against Mother individually,

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350. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 310 (emphasis omitted) (quoting *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) (per curiam)); *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985)).

351. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 310.

352. *Id.* at 310–11.

353. *Id.* at 311 (quoting *Stev-Mar, Inc. v. Matvejs*, 678 So. 2d 834, 838 (Fla. 3d Dist. Ct. App. 1996)).

354. *Id.* at 310–11.

355. *Claire's Boutiques, Inc. v. Locastro*, 36 Fla. L. Weekly D1001, D1001 (4th Dist. Ct. App. May 11, 2011).

356. *Id.*

357. *Id.*

358. *Id.*

“but not in her capacity as [Daughter’s] mother,” that was based on the release of liability/indemnity agreement for more than \$200,000, which included Defendant’s attorney fees and the judgment against it.<sup>359</sup> The Fourth District Court of Appeal upheld the judgment against Defendant for negligence, but reversed the judgment against Mother on the indemnification claim.<sup>360</sup> The appellate court, based on the rationale of *Kirton v. Fields*,<sup>361</sup> ruled the release of liability/indemnification agreement to be in violation of public policy.<sup>362</sup> In *Kirton*, the Supreme Court of Florida determined that public policy prevented the enforcement of a pre-injury release executed by a minor’s parents on behalf of the minor, for a tort arising from the minor’s injuries suffered while participating in a commercial activity.<sup>363</sup> The court found that there was even more reason in this case to cite public policy concerns<sup>364</sup> and quoted *Johnson ex rel. Estate of Gillespie v. New River Scenic Whitewater Tours, Inc.*:<sup>365</sup> “[A]llowing a parent to indemnify a third party for its tortious conduct towards the parent’s minor child would result in a serious affront to the doctrine of parental immunity.”<sup>366</sup> The Fourth District Court of Appeal held that indemnification agreements by a guardian create a conflict between parent and child.<sup>367</sup> Quoting the Court of Appeals of New York in *Valdimer ex rel. Valdimer v. Mount Vernon Hebrew Camps, Inc.*,<sup>368</sup> the Fourth District Court of Appeal said “[c]learly, a parent who has placed himself in the position of indemnitor will be a dubious champion of his infant child’s rights.”<sup>369</sup> Judge Levine concurred as to the affirmation on the negligence award, but dissented on the indemnification issue.<sup>370</sup>

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359. *Id.*

360. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1003.

361. 997 So. 2d 349 (Fla. 2008).

362. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1002–03 (citing *Kirton v. Fields*, 997 So. 2d 349, 357-58 (Fla. 2008)).

363. *Kirton*, 997 So. 2d at 358.

364. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1002–03.

365. 313 F. Supp. 2d 621 (S.D. W. Va. 2004).

366. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1002 (alteration in original) (quoting *Johnson ex rel. Estate of Gillespie*, 313 F. Supp. 2d at 632).

367. *See id.* at D1003 (citing *Childress ex rel. Childress v. Madison Cnty.*, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989)).

368. 172 N.E.2d 283 (N.Y. 1961).

369. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1003 (quoting *Valdimer ex rel. Valdimer*, 172 N.E.2d at 285).

370. *Id.* (Levine, J., concurring in part and dissenting in part).

### E. *Respondeat Superior*

Mr. Graf (Employee) worked as a driver for a limousine service (Employer).<sup>371</sup> On the date in question, Employee drove his car to work, parked it on a ramp outside the business office while he went inside to turn in his paperwork for the day, but left his keys in the ignition.<sup>372</sup> A thief stole Employee's car, and while driving the car, injured Mr. Allan (Plaintiff) in an auto accident.<sup>373</sup> Plaintiff sued Employee for negligence and also sued Employer under the theory of respondeat superior.<sup>374</sup> Employer prevailed on a motion for summary judgment.<sup>375</sup> The Fourth District Court of Appeal affirmed.<sup>376</sup> The appellate court held that Employer could not be held vicariously liable for Employee's negligence in leaving keys in the ignition of his own car.<sup>377</sup> Although the car owner, that is Employee, could be held responsible, the court refused to extend the law to cover the owner's employer.<sup>378</sup>

## XIII. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

### A. *Prejudgment Writ of Replevin*

*PNCEF, LLC v. South Aviation, Inc.*<sup>379</sup> is a prejudgment writ of replevin case under section 78.055 of the *Florida Statutes*.<sup>380</sup> The underlying action was brought by PNCEF, LLC (Lender) against the borrowers (Borrowers) in Illinois to recover a certain aircraft.<sup>381</sup> Borrowers responded by alleging that the aircraft had been leased to a Florida lessee (Lessee), and the aircraft was located in Broward County.<sup>382</sup> In addition, Borrowers alleged that "[L]essee [had] filed liens against the aircraft and [was] refus[ing] to return the aircraft because of the liens."<sup>383</sup> Lender then sued Lessee in Broward County for replevin seeking a prejudgment writ of replevin.<sup>384</sup> Lessee raised several

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371. Allan v. Graf, 43 So. 3d 151, 152 (Fla. 4th Dist. Ct. App. 2010).

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. Allan, 43 So. 3d at 152.

377. *Id.*

378. *Id.* at 153.

379. 60 So. 3d 1120 (Fla. 4th Dist. Ct. App. 2011).

380. *Id.* at 1121; FLA. STAT. § 78.055 (2011).

381. *PNCEF, L.L.C.*, 60 So. 3d at 1121.

382. *Id.*

383. *Id.*

384. *Id.* The verified complaint contained allegations of conversion and sought injunctive relief. *Id.*

defenses, including lack of jurisdiction over three of the aircrafts because of their absence from Broward County during all or part of the day that Lender filed its verified complaint, and that since Illinois had already asserted its jurisdiction over the aircraft, it was improper for the Florida court to also exercise jurisdiction over the planes.<sup>385</sup> The Fourth District Court of Appeal held that none of these alleged jurisdictional issues would constitute an impediment to the issuance of a writ of replevin as long as the court had in personam jurisdiction over the possessor or person entitled to possession of the item to be replevied, that is, Lessee.<sup>386</sup> Having in personam jurisdiction gave the court the authority to order the possessor to return the item to Florida.<sup>387</sup> However, the appellate court noted that the lower court could not issue further orders that act directly on the aircraft until its physical location in Florida was confirmed.<sup>388</sup>

### B. *Sale of Collateral*

*Southern Developers & Earthmoving, Inc. v. Caterpillar Financial Services Corp.*<sup>389</sup> addresses the necessity and methods of proving the “commercial reasonableness” of the sale of collateral by the lender in order to obtain a deficiency judgment against the defaulting debtor on the debtor’s promissory note under section 679.610(2) of the *Florida Statutes*.<sup>390</sup> If the debtor raises the issue of commercial reasonableness, then the secured party must show “that every aspect of [the] disposition was commercially reasonable.”<sup>391</sup> If the debtor can prove that the “sale of [its] collateral [was] commercially unreasonable, a presumption arises that ‘the fair market value of the collateral at the time of repossession was equal to the [full] amount of the . . . debt.’”<sup>392</sup>

### C. *Possessory Lien*

The next case deals with a possessory lien under section 713.58 of the *Florida Statutes*.<sup>393</sup> *Commercial Jet, Inc. (Commercial)* made repairs and did

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385. *PNCEF, L.L.C.*, 60 So. 3d at 1122.

386. *Id.* at 1125.

387. *Id.*

388. *Id.*

389. 56 So. 3d 56 (Fla. 2d Dist. Ct. App. 2011).

390. *Id.* at 60; FLA. STAT. § 679.610(2) (2011).

391. *S. Developers & Earthmoving, Inc.*, 56 So. 3d at 60 (citing *Weiner v. Am. Petrofina Mktg., Inc.*, 482 So. 2d 1362, 1364–65 (Fla. 1986)).

392. *Id.* at 61 (quoting *Weiner*, 482 So. 2d at 1365).

393. *Commercial Jet, Inc. v. U.S. Bank, N.A.*, 45 So. 3d 887, 887 (Fla. 3d Dist. Ct. App. 2010), *review granted*, 61 So. 3d 410 (Fla. 2011); FLA. STAT. § 713.58(3) (2011).

maintenance work on a jet owned by U.S. Bank, N.A. (Owner) and operated by Silver Jet.<sup>394</sup> However, before Commercial had been paid the balance claimed to be due,<sup>395</sup> Commercial returned the airplane to Silver Jet.<sup>396</sup> Commercial recorded a claim of lien—under both section 713.58 and section 329.51 of the *Florida Statutes*—and brought suit to foreclose its purported lien.<sup>397</sup> Owner moved for summary judgment on the grounds that Commercial did not have possession of the plane when it filed its claim of lien.<sup>398</sup> Owner successfully argued that the claim to a section 713.58 lien was lost when possession was given up.<sup>399</sup> Commercial contended that section 329.51 amended section 713.58 and that a valid lien could “be created simply by recording a claim of lien within ninety days” after the services are provided.<sup>400</sup> The Third District Court of Appeal rejected Commercial’s argument and concluded that section 329.51 was only “a notice statute” and “[did] not create any new lien rights.”<sup>401</sup> Judge Schwartz dissented, concluding that section 329.51, which deals with repairs to aircraft, was more than a notice statute.<sup>402</sup>

#### D. *Right of Set-Off*

*BankAtlantic v. Estate of Glatzer*<sup>403</sup> presented an unusual issue. Dr. Glatzer’s 100% owned professional association (Borrower) owed BankAtlantic (Bank) money as evidenced by a promissory note and mortgage.<sup>404</sup> Dr. Glatzer (Decedent) guaranteed the debt.<sup>405</sup> In addition to the note, mortgage, and Decedent’s personal guarantee, the promissory note contained “a right of setoff” that allowed Bank to collect its debt by taking funds from—and even freezing—any accounts that Borrower maintained at Bank.<sup>406</sup> Decedent died, and his death was “an event of default under [the] note.”<sup>407</sup> Borrower’s account at Bank apparently was not frozen by Bank at the time of, or after De-

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394. *Commercial Jet, Inc.*, 45 So. 3d at 887–88.

395. *See id.* at 887. The opinion does not indicate if Owner or Silver Jet contested that there were monies due, or the amount thereof. *Id.* at 887–88.

396. *Id.* at 887.

397. *Id.*; FLA. STAT. § 713.58(3); *Id.* § 329.51(2009).

398. *Commercial Jet, Inc.*, 45 So. 3d at 888.

399. *Id.*; § 713.58(3) (2011).

400. *Commercial Jet, Inc.*, 45 So. 3d at 888.

401. *Id.* (construing FLA. STAT. § 329.51 (2009)).

402. *See id.* at 889 (Schwartz, J., dissenting) (construing FLA. STAT. § 329.51).

403. 61 So. 3d 1222 (Fla. 3d Dist. Ct. App. 2011).

404. *Id.* at 1222.

405. *Id.* at 1223.

406. *Id.* at 1222–23.

407. *Id.* at 1223.

cedent's death, and the personal representative of Decedent's estate obtained probate court orders allowing the transfer by the personal representative of funds in Borrower's accounts to an estate depository account.<sup>408</sup> Bank appealed, and the Third District Court of Appeal reversed and remanded.<sup>409</sup> Bank's "possessory and contractual rights to set-off [were] impaired" when funds were transferred to the estate depository account at another bank.<sup>410</sup> Decedent's stock was an estate asset, but Borrower's bank accounts, being assets of the corporate Borrower, were "a step removed from the Estate."<sup>411</sup> The Third District Court of Appeal concluded that the estate "essentially ignored the separate corporate existence of the professional association and that entity's obligations to its own creditors."<sup>412</sup>

#### E. *Re-recording of Judgment (Debtor-Creditor)*

The holding in *Sun Glow Construction, Inc. v. Cypress Recovery Corp.*<sup>413</sup> is straightforward and to the point. The Fifth District Court of Appeal held "that the re-recording of a certified copy of a judgment after the expiration of the original judgment lien imposes a new lien on real property held by the judgment debtor" even though "[t]he statute is silent" on the issue.<sup>414</sup> The holding applies when the judgment creditor fails to affect an extension of the judgment lien under section 55.10(1) of the *Florida Statutes* prior to the expiration of the lien.<sup>415</sup> The Fifth District Court of Appeal quoted the Fourth District Court of Appeal's decision in *Franklin Financial, Inc. v. White*,<sup>416</sup> saying "[l]ike a child that wanders out of a queue, the newly rerecorded judgment lien has lost its place and must go to the back and stand behind all previously recorded judgment liens."<sup>417</sup>

#### F. *Garnishment*

Caproc Third Avenue, LLC (Judgment Creditor) obtained a writ of garnishment against Donisi Insurance's (Judgment Debtor's) account with Bank

408. See *Estate of Glatzer*, 61 So. 3d at 1222–23.

409. *Id.* at 1223.

410. *Id.*

411. *Id.*

412. *Id.*

413. 47 So. 3d 371 (Fla. 5th Dist. Ct. App. 2010).

414. *Id.* at 372–74.

415. FLA. STAT. § 55.10(1) (2011); *Sun Glow Constr., Inc.*, 47 So. 3d at 372, 374.

416. 932 So. 2d 434 (Fla. 4th Dist. Ct. App. 2006).

417. *Sun Glow Constr., Inc.*, 47 So. 3d at 373 (quoting *Franklin Fin., Inc.*, 932 So. 2d at 437).

of America.<sup>418</sup> Judgment Debtor moved to have the writ dissolved and filed an affidavit claiming the “wages exception” exemption under section 222.12 of the *Florida Statutes* from garnishment.<sup>419</sup> Judgment Creditor’s attorney filed an affidavit in the proceedings contesting Judgment Debtor’s claimed wages exemption.<sup>420</sup> The trial court dissolved the writ finding the attorney’s affidavit insufficient.<sup>421</sup> Judgment Creditor appealed, and the Fourth District Court of Appeal affirmed.<sup>422</sup> Section 222.12 of the *Florida Statutes* requires that the affidavit in opposition be made “by the party who sued out the process.”<sup>423</sup> An affidavit by the attorney for that party does not qualify.<sup>424</sup>

On the other hand, in the next case—which came before the Second District Court of Appeal on a motion for summary judgment and which the appellate court reversed, finding that there was a genuine issue of material fact unresolved—the issue was how much the garnishee, Cortez Community Bank, owed the garnishor pursuant to four writs of garnishment served on the bank on October 2, 2008.<sup>425</sup> On the same date, the bank filed responses to the writ in letter form, and the letters were signed by the bank’s senior vice president and chief operating officer.<sup>426</sup> It was not until more than four months later, on February 12, 2009, that the bank’s counsel filed answers to the writs.<sup>427</sup> Section 77.06(1) of the *Florida Statutes* states that “[s]ervice of the writ shall make garnishee liable for all debts due by him or her to defendant . . . at the time of the service of the writ or at any time between the service and the time of the garnishee’s answer.”<sup>428</sup> The writ response letters filed by the bank’s senior vice president and chief operating officer were ignored because a corporation cannot represent itself *pro se*.<sup>429</sup> Therefore, the amount owed by the garnishee bank was calculated with liability to the date the bank’s counsel filed answers—February 12, 2009.<sup>430</sup>

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418. *Caproc Third Ave., L.L.C. v. Donisi Ins., Inc.*, 67 So. 3d 312, 312(4th Dist. Ct. App. 2011).

419. *Id.*; see FLA. STAT. § 222.12.

420. *Caproc Third Ave., L.L.C.*, 67 So. 3d at 313.

421. *Id.*

422. *Id.* at 315.

423. *Id.* (quoting FLA. STAT. § 222.12).

424. *Id.*

425. *Cortez Cmty. Bank v. Cobb*, 56 So. 3d 80, 81(Fla. 2d Dist. Ct. App. 2011).

426. *Id.*

427. *Id.*

428. FLA. STAT. § 77.06(1).

429. *Cobb*, 56 So. 3d at 81 (citing *Nicholson Supply Co. v. First Fed. Sav. & Loan Ass’n of Hardee Cnty.*, 184 So. 2d 438, 440 (Fla. 2d Dist. Ct. App. 1966)).

430. *Id.*

In another garnishment case, *Baker v. Storfer*,<sup>431</sup> the issue was whether or not commissions paid by an employer to “a commissioned employee” constituted “salary or wages” for purposes of the garnishment statute—section 77.0305 of the *Florida Statutes*.<sup>432</sup> The Fourth District Court of Appeal ruled “that commissions are ‘wages,’ for purposes of section 77.0305.”<sup>433</sup>

#### XIV. CONCLUSION

Hundreds of Florida appellate opinions issued in the past year might be said to affect the conduct of business by Florida business owners. Of course, this survey deals only with some of those cases. It is not surprising, however, that after several years of difficult economic times, there was a plethora of breach of contract, mortgage foreclosure, and other debtor creditor decisions rendered by Florida’s appellate courts in the past year. Therefore, a greater number of such decisions were included in this year’s survey than in prior years. That, however, should not detract from the other significant appellate decisions in the past year that continued to clarify and refine Florida law in many areas affecting business owners, as reflected in this year’s survey. One particularly important area in which there were substantial developments over the prior few years, as well as in the past year, involves the enforceability of releases signed by parents on behalf of their minor children. Another involves the question of when a Florida court may properly exercise personal jurisdiction over a nonresident whose contacts with Florida are, in whole or in part, through the Internet. While important guidance has been provided in both of these areas, numerous questions remain, and undoubtedly additional guidance will be forthcoming.

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431. 51 So. 3d 652 (Fla. 4th Dist. Ct. App. 2011) (per curiam).

432. *Id.* at 652; see FLA. STAT. § 77.0305.

433. *Baker*, 51 So. 3d at 653; see FLA. STAT. § 77.0305.