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Property Law: 1998 Survey of Florida Law

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I. INTRODUCTION

In this survey, we have discussed those judicial decisions and legislation produced between July 1, 1997 and June 30, 1998 that we believed would be of particular interest to Florida real estate practitioners and others interested in Florida real estate law. Not every case or statutory change could be included. As in past years, the volume was significant. Real property law continued to evolve in interesting ways. Our goal was to inform the reader, but on occasion we have felt called upon to voice disagreement.

II. ATTORNEYS' FEES

A. *Attorneys' Fees in General*

Cuervo v. West Lake Village II Condominium Ass'n.[1] A new board of directors was elected and took control of the Association's books and accounts. The Association, however, contested the election. It filed a non-binding arbitration pursuant to section 718.1255 of the *Florida Statutes* and also filed suit for injunctive relief and damages. [2] The Association won the arbitration, and the court ordered the books and accounts returned.[3] The new board then filed an answer and affirmative defenses. It also filed a counterclaim. Up until this point, the Association had been represented by the Siegfried firm. However, the counterclaim against the board stimulated the involvement of the Association's insurance carrier who brought in its own lawyers, the Pyska firm, to defend against the counterclaim. The Association won a partial summary judgment and successfully moved for attorneys' fees.[4] The amount of the attorneys' fees was at issue in this appeal.[5]

1. 709 So. 2d 598 (Fla. 3d Dist. Ct. App. 1998).
2. *Id* at 598; *see* FLA. STAT. § 718.1255 (1993).
3. *Cuervo*, 709 So. 2d at 599.
4. *Id.*

The essence of the argument was that having different firms handle the claim and the counterclaim produced a duplication of efforts. Therefore, they should not have to pay two law firms to do what could have been done by one. The court agreed, finding that "the gravamen of both the main action and counterclaim action centered around the issue of the validity of the appellants' election as directors of the association and their actions of taking control of the association's funds and records."[6] On remand, the trial court would have to determine the attorneys' fees based on the reasonable efforts of one law firm, which was to be calculated by reducing the amount awarded to the Siegfried firm by the value of the services performed by the Pyska firm.[7]

Jarvis v. Papineau.[8] A real estate broker sued for a commission or, in the alternative, for unjust enrichment. Following a nonjury trial, the court found for the plaintiff and awarded $5000 plus interest and attorneys' fees.[9] On appeal, the Second District Court of Appeal reversed the attorneys' fees award.[10] The court recited the familiar rule that "[a]ttorney's fees cannot be taxed in any cause unless authorized by contract or statute," but there was nothing in the record to suggest either basis for awarding fees in this case.[11] The following cases are organized in reference to that rule. The next section covers attorneys' fees agreements, and the sections that follow focus on particular statutes under which attorneys' fees may be awarded.

B. *Attorneys' Fees Recoverable by Agreement*

Careers USA, Inc. v. Sanctuary of Boca, Inc.[12] This case involved a lease. A dispute arose over the meaning of the rent provision. The tenant filed suit for declaratory judgment and reformation. The trial court found the lease to be unambiguous and awarded summary judgment to the landlord.[13] The landlord then filed a motion for attorney's fees under the lease provision that stated: "*[i]n any litigation between the parties hereto to enforce the terms and conditions of this Lease*, the prevailing party shall be entitled to recover all costs incurred in such action, including attorneys' fees."[14] Following the lead of the Third and Fifth District Courts of

5. *Id.*
6. *Id.*
7. *Id.* at 600.
8. 708 So. 2d 1035 (Fla. 2d Dist. Ct. App. 1998).
9. *Id.* at 1035.
10. *Id.*
11. *Id.*
12. 705 So. 2d 1362 (Fla. 1998).
13. *Id.* at 1362–63.
14. *Id.* (quoting the lease agreement).

Appeal,[15] the trial court denied the motion on the theory that the declaratory judgment action was an action to interpret rather than to enforce the terms of the lease, but the Fourth District reversed.[16]

The Supreme Court of Florida approved in an unanimous opinion written by Senior Justice Grimes.[17] He reasoned that the landlord needed to defend against the declaratory judgment action in order to enforce the terms of the lease.[18] Consequently, whether the landlord should recover the costs should not be decided by the form of action chosen.[19] The court rejected the policy argument that litigants should be encouraged to utilize declaratory judgment proceedings rather than have one party sue claiming the other had already breached.[20] The court went on to acknowledge that the numerous possible wordings of an attorneys' fees clause makes scrutinizing the language used critical.[21] It is, however, disappointing that the court did not pursue that point; it could have emphasized this was a matter of contract interpretation and the tools of contract interpretation should have been brought to bear.

Hollub v. Clancy.[22] The buyer successfully sued the seller of a warehouse for failing to disclose that the warehouse would have to be connected to the municipal sewer system within ninety days at considerable expense. The buyer then filed a motion for attorneys' fees pursuant to the attorneys' fees clause in the contract. This appeal challenged the amount of attorneys' fees awarded.[23]

The buyer had paid its attorneys a $20,000 nonrefundable fee and entered into a contingent fee agreement with its attorneys providing, to the extent the recovery exceeded $50,000, buyer's attorneys would get forty percent in addition to the original $20,000, but if the recovery were less than $50,000, the attorneys would have to be satisfied with $20,000. Later, the agreement was amended to provide that the buyer's attorney would get the greater of a reasonable attorneys' fee as awarded by the trial court or the contingent fee described above.[24] The trial court awarded reasonable attorneys' fees in excess of forty percent of the recovery. The sellers argued

15. Martin L. Robbins, M.D., P.A. v. I.R.E. Real Estate Fund, Ltd., 608 So. 2d 844 (Fla. 3d Dist. Ct. App. 1992); Ocala Warehouse Inv., Ltd. v. Bison Co., 416 So. 2d 1269 (Fla. 5th Dist. Ct. App. 1982).

16. *Careers*, 705 So. 2d at 1363.

17. *Id.* at 1362, 1364.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Careers*, 705 So. 2d at 1364.

22. 706 So. 2d 16 (Fla. 3d Dist. Ct. App. 1997).

23. *Id.* at 17.

24. *Id.* at 18 (citing the agreement).

this required them to pay buyer's attorneys more than the buyer had been obligated to pay them.[25] The district court rejected this argument because it was indistinguishable from a fee arrangement upheld by the Supreme Court of Florida in *Kaufman v. MacDonald*.[26]

Sellers were, however, successful with their second point on appeal. They argued that the buyer had hired too many lawyers and could not collect reasonable attorneys' fees for all their work.[27] The case was factually simple, but buyers had hired both a sole practitioner and a small law firm. The seller's expert had testified that a single lawyer would have sufficed during the pretrial stages, but admitted that an additional lawyer would not be impermissible for the trial. The court rejected any claim that additional lawyers were needed due to the fact that the general partners of the buyer brought the action on its behalf; the record did not reveal any hint of conflict of interest between the partners, among themselves, or between them and the partnership.[28] The court concluded that there was simply no need for more than one lawyer at hearings, depositions, or to work on the pleadings.[29] However, there is something odd about the losing sellers arguing that the buyer could have won the case against them with less time and effort. After all, if their case were so weak, why did they go to trial? Nonetheless, the case was remanded to limit a reasonable attorneys' fee to one lawyer in the pretrial stages.[30]

In addition, some of the billing seemed to be based on units of one hour or more. In twelve instances, the sole practitioner billed for an hour or more to review a one- or two-page order or pleading. The court found this unacceptable and it ordered that bills based on unreasonable billing units be eliminated on remand.[31]

C. *Attorneys' Fees Recoverable under Section 57.105 of the Florida Statutes*

Kelly v. Tworoger.[32] Two years after the closing, the buyer of a condominium unit sued the sellers based on the claim that roof leaks were latent defects that the sellers had failed to disclose. Eventually, the buyer took a voluntary dismissal, and the sellers moved for attorneys' fees. The contract provided: "[i]n connection with any arbitration or litigation arising

25. *Id.*
26. *Id.* (citing Kaufman v. MacDonald, 557 So. 2d 572 (Fla. 1990)).
27. *Hollub*, 706 So. 2d at 18.
28. *Id.* at 18–19.
29. *Id.* at 19.
30. *Id.*
31. *Id.*
32. 705 So. 2d 670 (Fla. 4th Dist. Ct. App. 1998).

out of this Contract, the prevailing party . . . shall be entitled to recover all costs incurred including attorney's fees."[33] Concluding that the provision applied, the trial court granted the motion, and the Fourth District Court of Appeal affirmed.[34]

The court, in an opinion written by Judge Gross, reasoned that the nature of this action was for breach of the duty to disclose that is implied by law into the contract based on *Johnson v. Davis*.[35] Consequently, this litigation did arise out of the contract as contemplated by the attorneys' fees provision.[36] It was not like an action for fraud in the inducement which would be based on the inducer's fraudulent conduct rather than the contract.[37]

Attorneys' fees could not, however, be assessed under the contractual provision against a person who had unsuccessfully sought to be joined as a plaintiff in this action because the dismissal with prejudice of his joinder petition established that he was not a party to the contract.[38] That did not mean attorneys' fees could not be recovered. Because this claim was frivolous, they could be assessed under Florida statute.[39] The case was remanded for specific findings as to the number of hours involved in dealing with each unsuccessful plaintiff and the reasonable hourly rate for the attorneys.[40]

The court also offered some interesting *dicta* on the fraud in the inducement situation.[41] It suggested that it was time to reject the denial of attorneys' fees where the contract has been rescinded due to fraud in the inducement based upon *Katz v. Van Der Noord*.[42] Such a change might be emotionally satisfying, based upon a vague claim of doing justice, but it would be illogical and expand contractual liability for fees beyond what might have been reasonably expected by the parties. This author[43] hopes that no court will take that leap. If such a change is appropriate, then the legislature should decide prospectively that it is time to expand the right to

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33. *Id.* at 671 (quoting the contract).

34. *Id.*

35. *Id.* at 672 (citing Johnson v. Davis, 480 So. 2d 625 (Fla. 1985)).

36. *Id.*

37. *Kelly*, 705 So. 2d at 672 (distinguishing the fraudulent inducement cases such as, Location 100, Inc. v. Gould S.E.L. Computer Sys., Inc. 517 So. 2d 700 (Fla. 4th Dist. Ct. App. 1987) and Dickson v. Dunn, 399 So. 2d 447 (Fla. 5th Dist. Ct. App. 1981)).

38. *Id.* at 673.

39. *Id.*; *see* FLA. STAT. § 57.105(1) (1995).

40. *Kelly*, 705 So. 2d at 673.

41. *Id.* at 672–73.

42. *Id.* at 672 (citing Katz v. Van Der Noord, 546 So. 2d 1047 (Fla. 1989)).

43. Professor Ronald Benton Brown.

recover attorneys' fees to a situation where there is no contract and the defense was not frivolous.

Judge Klein specially concurred.[44] He noted that an appellate court can only review the trial court's judgment on attorneys' fees by means of common law certiorari if the case were voluntarily dismissed.[45] The standard of review under common law certiorari is higher than for matters that are reviewed on appeal. Judge Klein expressed the opinion that there did not appear to be a good reason for the different treatment, so he hoped that the Appellate Rules Committee would consider the incongruity produced and recommend that the supreme court amend the rules to produce a uniform standard of review regarding the grant of attorneys' fees.[46]

Shahan v. Listle.[47] The Johnsons sought to have a city ordinance invalidated. In such cases, section 163.3215 of the *Florida Statutes* required that the complainants file a verified copy of the complaint with the city no later than thirty days after the conduct that was the basis of the complaint.[48] The city had thirty days to respond and, the complainants had to institute their action in court no later than thirty days after the end of the city's thirty-day response time. The Johnsons filed a copy of the complaint with the city, but it was not verified. The city did not respond, so the Johnsons filed for administrative review by the Department of Community Affairs, which ruled in the Johnsons' favor.[49] Then the Johnsons filed a *pro se* complaint for a temporary injunction.[50]

After receiving a motion for summary judgment and a request for attorneys' fees, the Johnsons retained a lawyer, John Shahan. Based on the Johnsons' failure to file the verified complaint with the city as required by the statute, the trial court granted summary judgment against them.[51] It also awarded attorneys' fees under section 57.105 of the *Florida Statutes* and divided the payment obligation between the Johnsons and Shahan, their lawyer. Shahan appealed.[52]

The Second District Court of Appeal reversed.[53] It reasoned that the action was not frivolous because the Johnsons' failure to comply with the statutory condition precedent to filing their action could have been waived

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44. *Kelly*, 705 So. 2d at 673 (Klein, J., concurring).
45. *Id.* at 673.
46. *Id.* at 673–74.
47. 703 So. 2d 1090 (Fla. 2d Dist. Ct. App. 1997).
48. *Id.* at 1091; *see* FLA. STAT. § 163.3215 (1995).
49. *Shahan*, 703 So. 2d at 1091.
50. *Id.*
51. *Id.*
52. *Id.*; *see* FLA. STAT. § 57.105 (1995).
53. *Shahan*, 703 So. 2d at 1092.

by the defendants.[54] If it had been waived, then the Johnsons might have won. After all, they did have standing and they had won the administrative hearing. This seems far-fetched. If the point of the statute is to eliminate litigation that should not have been brought, it seems counterproductive to encourage litigation that is based upon the hope that the defendants will be incompetent enough to waive a valid and obvious defense, but this decision is consistent with earlier district court cases.[55]

Whitehead v. Dreyer.[56] This is another case where the court mandated the imposition of attorneys' fees against a plaintiff and his attorney based upon section 57.105 of the *Florida Statutes*.[57]

D. *Attorneys' Fees Under the Construction Lien Act*

Hollub Construction Company v. Narula.[58] When a dispute arose during the building of a home, the owner stopped paying the contractor. The contractor filed a construction lien, filed a suit to enforce its lien, and made a demand for arbitration. The homeowner filed counterclaims in the arbitration. The arbitration award provided $192,000 for the contractor against the owner and $150,000 for the owner against the contractor. The contractor was ordered to pay forty percent of the arbitration costs and the owner sixty percent. However, the arbitration award did not specifically proclaim either to be the prevailing party or specify what part of the award was interest. When the parties went back to court, each claimed attorneys' fees under the construction lien statute as the prevailing party.[59] The trial court declared it could not determine who was the prevailing party and denied attorneys' fees to both.[60] The Third District Court of Appeal reversed.[61] It held that the award of attorneys' fees was mandatory under the statute, so the court was required to determine who prevailed.[62] The owners had not filed their counterclaim in the suit to enforce the construction lien; they had only filed it in the arbitration. Consequently, in the construction lien suit, the contractor had prevailed on the only significant issue, its claim

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54. *Id.* at 1091–92.

55. *Id.* at 1092. *See* Solimando v. Aloha Med. Ctr., 594 So. 2d 850 (Fla. 2d Dist. Ct. App. 1992); *see also* Piancone v. Engineering Design, Inc., 534 So. 2d 896 (Fla. 5th Dist. Ct. App. 1988).

56. 698 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1997).

57. *Id.* This case is discussed in detail in the section on brokerage agreements and commissions. *See* discussion *infra* Part III.B.

58. 704 So. 2d 689 (Fla. 3d Dist. Ct. App. 1997).

59. *Id.* at 690; *see* FLA. STAT. § 713.29 (1995).

60. *Narula*, 704 So. 2d at 690.

61. *Id.* at 691.

62. *Id.* at 690.

against the owner. Under the statute, that made the contractor entitled to attorneys' fees.[63]

E. *Attorneys' Fees in Eminent Domain Proceedings*

Pierpont v. Lee County.[64] The Supreme Court of Florida reviewed three district court decisions together.[65] In each case, the condemning authority did a quick take, i.e., opted to take possession of the property prior to the final judgment in the condemnation case.[66] Under the procedure provided by statute,[67] the authority must have an appraisal done.[68] Then the authority must make a good faith estimate based upon the appraisal.[69] If the quick take petition is approved by the court, the authority must deposit the amount of the good faith estimate into the registry of the court.[70] In each case, following the deposit, the condemning authority made a written offer that was significantly greater than the good faith estimate. When it came time to calculate the attorneys' fees due to the landowners' lawyers, the question arose how those figures should be used in the calculation.[71]

The statute provided that attorneys' fees were to be calculated based upon the benefits the attorneys achieved for their clients.[72] The statute defined the benefit as the difference between the first written offer made by the condemning authority and the final condemnation judgment or settlement amount.[73] Here, the landowners' attorneys claimed that the betterment should be calculated using the good faith estimate as the first written offer.[74] The Supreme Court of Florida rejected that argument.[75] The unanimous opinion pointed out the difference between an offer and an estimate.[76] The

63. *Id.* at 691; *see* FLA. STAT. § 713.29 (1995).

64. 710 So. 2d 958 (Fla. 1998).

65. *Id.*; Lee County v. Pierpont, 693 So. 2d 994 (Fla. 2d Dist. Ct. App. 1997); Lee County v. A & G Invs., 693 So. 2d 999 (Fla. 2d Dist. Ct. App. 1997); Lee County v. Barnett Banks, Inc., 711 So. 2d 34 (Fla. 2d Dist. Ct. App. 1997). *See* Ronald Benton Brown and Joseph M. Grohman, *Property Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 269, 275–77 (1997).

66. *Pierpoint*, 710 So. 2d at 959.

67. FLA. STAT. § 74.031 (1993).

68. *Pierpoint*, 710 So. 2d at 960; *see* FLA. STAT. § 74.031 (1993).

69. *Pierpoint*, 710 So. 2d at 960; *see* FLA. STAT. § 74.031 (1993).

70. *Pierpoint*, 710 So. 2d at 960; *see* FLA. STAT. § 74.031 (1993).

71. *Pierpoint*, 710 So. 2d at 959–60.

72. *Id.* at 960–61; *see* FLA. STAT. § 73.092 (Supp. 1994).

73. *Pierpoint*, 710 So. 2d at 960–61.

74. *Id.* at 960.

75. *Id.*

76. *Id.* at 960–61.

court reasoned that the legislature also knew the difference.[77] Critically, nothing in the statutes gave the landowner the power to accept the good faith estimate.[78]

Moreover, there was no constitutional mandate to use the good faith estimate in calculating attorneys' fees.[79] The *Florida Constitution* requires the payment of "full compensation" to a person whose private property has been taken for public use,[80] but the Justices saw no denial of "full compensation" in these situations.[81] The rule is that the legislature has the power to enact reasonable attorneys' fees provisions, and there was nothing inherently unreasonable about calculating attorneys' fees on the first written offer rather than the good faith estimate.[82] The court pointed out, however, that this does not allow the condemning authority to minimize or avoid payment of attorneys' fees by failing to make a timely written offer.[83] Such conduct might result in the statute being unconstitutional as applied.[84]

Justice Wells wrote a brief concurrence.[85] He urged the legislature to amend the statute to allow calculation of attorneys' fees based on the good faith estimate.[86] It would be bad policy to allow the authority to make a good faith estimate and then deviate from it in making an offer to settle the case.[87] That position had been argued by Judge Blue in his district court dissent,[88] which also pointed out that there was nothing in the statute to prevent the landowner from accepting the good faith estimate as an offer.[89]

Boulis v. Department of Transportation.[90] The condemnee claimed prejudgment interest on the costs expended in preparing for trial. His theory was that if he did not receive interest, he would be deprived of his property without due process of law. The Fifth District Court of Appeal rejected the claim because there was no legal precedent for it.[91] However, noting that the claim for prejudgment interest seemed supported by logic and fair play, the

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77. *Id.*
78. *Pierpoint*, 710 So. 2d at 961.
79. *Id.* at 960.
80. FLA. CONST. art. X, § 6.
81. *Pierpoint*, 710 So. 2d at 960.
82. *Id.*
83. *Id.*
84. *See supra* note 2 and accompanying text. *See also Pierpoint*, 710 So. 2d at 961.
85. *Pierpoint*, 710 So. 2d at 961 (Wells, J., concurring).
86. *Id.*
87. *Id.*
88. Lee County v. Pierpont, 693 So. 2d 994, 997–98 (Fla. 2d Dist. Ct. App. 1997) (Blue, J., dissenting).
89. *Id.* at 998.
90. 709 So. 2d 206 (Fla. 5th Dist Ct. App. 1998).
91. *Id.* at 206–07.

court certified the question to the supreme court "as being one of great public importance."[92]

Department of Transportation, State of Florida v. Robbins and Robbins, Inc.[93] The parties settled the eminent domain action following mediation. The problem was in the calculation of the attorneys' fees. The expert testified that the reasonable hourly rate for the landowners' attorneys should be higher than what they actually billed. Then the expert used those rates to establish the lodestar figure. The trial judge then doubled the lodestar, using the risk multiplier to reflect the complexity of the case.[94] The district court reversed because it considered this procedure as an "improper 'double-decker' award."[95] The proper procedure would be to establish a reasonable hourly rate which did not exceed what the attorneys requested in their testimony. That should be applied to the hours worked to reach the lodestar. Then, the benefit obtained by the attorneys for their client could be used to adjust the fee.

The trial court had made two other errors. It "improperly included the paralegal hours as part of the attorneys' hours to get a 'blended' effective hourly rate."[96] The attorneys' fees should include hours expended by paralegals and legal assistants, but those hours should be billed at a reasonable rate.[97] As the court noted, "it is not logical to use a paralegal to help on a client's case because it is cheaper for the client, then seek to recoup the paralegal time at an attorney rate from the condemning authority."[98] Moreover, the trial court should not have awarded attorneys' fees for time preparing for the attorneys' fees hearing.[99] The condemning authority is obligated only to pay the condemnee's reasonable attorneys' fees and not attorneys' fees incurred by the attorneys in collecting those fees.[100]

State Department of Transportation v. Hall.[101] In this quick taking, the department filed a good faith estimate of $20,000 and deposited that amount in the registry of the court. The landowner objected because the estimate did not include business damages. The department later presented an offer of judgment for $126,400 to "settle all claims including business damages."[102] The parties eventually settled for $147,500. However, in

92. *Id.* at 207.
93. 700 So. 2d 782 (Fla. 5th Dist. Ct. App. 1997).
94. *Id.* at 784.
95. *Id.* at 784–85.
96. *Id.* at 785.
97. *Id.*
98. *Robbins*, 700 So. 2d at 785.
99. *Id.*
100. *Id.*
101. 707 So. 2d 1163 (Fla. 1st Dist. Ct. App. 1998).
102. *Id.* at 1164 (quoting department's offer).

calculating attorneys' fees, the question was the betterment achieved by the landowner's attorney. The trial court calculated attorneys' fees based on the betterment of $127,500 that the landowner's attorney had achieved, i.e., the difference between the good faith estimate and the eventual settlement.[103] The court refused to base betterment on the difference between the settlement price and the offer of judgment because it found the offer of judgment to be defective for failing to provide an itemization, including specifying what portion was attributable to business damages.[104] The department appealed and the First District Court of Appeal reversed.[105]

Offers of judgment in eminent domain actions were covered in section 73.032(1)(a) of the *Florida Statutes*.[106] It did not require the offer of judgment to itemize the damages. It required that the offer settle all pending claims, summarize relevant conditions, and state the total amount of the offer.[107] This offer of judgment satisfied the statute, and it was not ambiguous.[108] It contained no defect that would have prevented the court from concluding the case, including calculating the attorneys' fee.[109] Consequently, the attorneys' fee should have been calculated from the betterment achieved above this offer.[110]

State Department of Transportation v. Interstate Hotels Corp.[111] The trial court awarded prejudgment interest on an award of attorneys' fees in an eminent domain case, but the Third District Court of Appeal reversed.[112] The only district court precedent was from the second district,[113] so the trial court was bound to follow it and committed reversible error by not doing so.[114] While not similarly bound to follow another district, the third district panel decided to do so, expressing their entire agreement with the earlier opinion.[115]

State Department of Transportation v. Labelle Phoenix Corporation.[116] After the Department of Transportation's offer was refused,

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103. *Id.* at 1163.
104. *Id.*
105. *Id.* at 1164.
106. *Hall*, 707 So. 2d at 1164; *see* FLA. STAT. § 73.032(1)(a) (1993).
107. *Hall*, 707 So. 2d at 1164.
108. *Id.*
109. *Id.*
110. *Id.*
111. 709 So. 2d 1387 (Fla. 3d Dist. Ct. App. 1998).
112. *Id.* at 1387.
113. *Id.* (citing State Dep't of Transp. v. Brouwer's Flowers, Inc., 600 So. 2d 1260 (Fla. 2d Dist. Ct. App. 1992)).
114. *Id.*
115. *Id.*
116. 696 So. 2d 947 (Fla. 2d Dist. Ct. App. 1997).

the Department utilized the quick take procedure.[117] Finally, the parties stipulated to the worth of the property, and a judgment was entered accordingly.[118] Then it was time to award attorneys' fees. Because a quick take appears in Chapter74 of the *Florida Statutes*, which is entitled "PROCEEDINGS SUPPLEMENTAL TO EMINENT DOMAIN," the trial court utilized section 73.092(2) reasoning that it expressly applied to "other supplemental proceedings."[119] Under subsection (2), which used the lodestar method of calculating attorneys' fees, the court awarded $3,672.50 even though the stipulated price was only $3,800 above what the Department had originally offered.[120] The Department appealed, arguing that section 73.092(1), which calculated attorneys' fees based upon the benefits achieved for the client, should have been used.[121] The Second District Court of Appeal agreed.[122]

The fact that the quick take chapter was entitled a "supplemental proceeding" was not the controlling factor.[123] Section 73.092(1) was intended for cases in which a monetary award was the object.[124] In contrast, section 73.092(2) was intended for use in such cases as defeating an order of taking or proceedings to determine the parties' respective rights.[125] Therefore, it was inappropriate to use the latter subsection method in this case which produced a monetary award.[126] Accordingly, the attorney's fee was reduced to one-third of the benefit, $1,254.[127]

F. *Attorneys' Fees in Landlord-Tenant Litigation*

Florida Department of Health and Rehabilitative Services v. Morse.[128] The tenant vacated at the end of the lease period. Based on the claim that the tenant had breached the lease by leaving the premises in an "extensively damaged condition," the landlord successfully sued for property damage and

117. *Id.* at 948.
118. *Id.*
119. *Id.*; *see* FLA. STAT. § 73.092(2) (1995).
120. *Labelle*, 696 So. 2d at 948; *see* FLA. STAT. § 73.092(2) (1995).
121. *Labelle*, 696 So. 2d at 948; *see* FLA. STAT. § 73.092(1) (1995).
122. *Labelle*, 696 So. 2d at 948.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Labelle*, 696 So. 2d at 948.
128. 708 So. 2d 640 (Fla. 3d Dist. Ct. App. 1998).

lost rent.[129] The trial court also awarded attorneys' fees to the landlord although the lease did not have any provision for attorneys' fees.[130]

The landlord had argued that it was entitled to attorneys' fees under section 82.231 of the *Florida Statutes*.[131] However, the district court pointed out that this section only authorizes the court to award attorneys' fees in an action by the landlord for possession where attorneys' fees are authorized by law.[132] Consequently, the attorneys' fees award in this case was wrong on two counts. First, the action here was not an action for possession of the premises.[133] Secondly, even in actions to which it applies, section 83.231 is not an independent basis for awarding attorneys' fees.[134] It merely authorizes the award of those fees in that procedural setting when there is an independent basis for the award.[135] In this case, there was no contractual basis for awarding attorneys' fees, and there had been no finding of fact below that would justify awarding attorneys' fees based on section 57.105(1) of the *Florida Statutes* on the theory that the losing party had failed to raise a "justiciable issue of law or fact."[136] Therefore, the attorneys' fees award was reversed.[137]

III. BROKERS

A. *Discipline and Licensing*

Arias v. State Department of Business & Professional Regulation.[138] A couple was interested in leasing a house shown to them by the licensee. The licensee called the owner to finalize the deal, but the owner asked her, "[a]re they Black?" The licensee answered, "[y]es." The owner then refused to approve the lease, even though the licensee told her that she was not supposed to discriminate. After talking with her broker, the licensee explained the situation to the prospective tenants and suggested they hire a lawyer. A complaint was filed with the Department of Housing and Urban Development ("HUD"), and the owner was ordered to pay a $10,000 civil fine and $35,000 compensatory damages to each of the prospective

129. *Id.* at 641.
130. *Id.*
131. *Id.*; *see* FLA. STAT. § 82.231 (1995).
132. *Morse*, 708 So. 2d at 641; *see* FLA. STAT. § 82.231 (1995).
133. *Morse*, 708 So. 2d at 641.
134. *Id.*; *see* FLA. STAT. § 82.231 (1995).
135. *Morse*, 708 So. 2d at 641–42; *see* FLA. STAT. § 82.231 (1995).
136. *Morse*, 708 So. 2d at 642; *see* FLA. STAT. § 57.105(1) (1995).
137. *Morse*, 708 So. 2d at 642.
138. 710 So. 2d 655 (Fla. 3d Dist. Ct. App. 1998).

renters.[139] The licensee was also found to have violated the law, fined $100, and ordered to attend fair housing training.[140]

Then the Department of Business and Professional Regulation filed an administrative complaint against the licensee.[141] Based on the same facts, which the licensee did not dispute, the Florida Real Estate Commission ("FREC") fined her $1,000, suspended her license for two years, and sentenced her to one year of probation.[142] She brought this appeal, and the Third District Court of Appeal reversed.[143]

A licensee can be disciplined for violating a duty imposed on her by law.[144] However, the board is required by statute to adopt disciplinary guidelines that "*specify a meaningful range of designated penalties based upon the severity and repetition of specific offenses.*"[145] FREC had failed to adopt guidelines for violation of duties imposed by law. Lack of guidelines "left the licensee in a predicament ripe for arbitrary and erratic enforcement, and obviously provided no standards sufficiently governed by the legislature as to constitute a judicially reviewable discretion."[146]

> [T]he legislature could not have intended section 475.25(1)(b) to be a carte blanche for the Commission to suspend real estate professionals [*sic*] license for the violation of any legal duty without meaningful notice of likely penalties and without a mechanism in place to ensure that such penalties would be consistently applied by the Commission.[147]

The gross discrepancy between the penalty imposed by HUD and the penalty imposed by FREC illustrated the problem with lack of standards. Of course, communicating information to the owner about race was improper, but absent appropriate guidelines, so was FREC's disciplinary order.

Milliken v. Department of Business and Professional Regulation.[148] Milliken was convicted of criminal possession of cocaine with the intent to distribute.[149] The FREC held an informal hearing, found him guilty of

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139. *Id.* at 656.
140. *Id.*
141. *Id.* at 657.
142. *Id.*
143. *Arias*, 710 So. 2d at 661.
144. *Id.* at 657; *see* FLA. STAT. § 475.25(1)(a) (1997).
145. *Arias*, 710 So. 2d at 658 (citing FLA. STAT. § 455.2273 (1997)).
146. *Id.* at 659.
147. *Id.*
148. 709 So. 2d 595 (Fla. 5th Dist. Ct. App. 1998).
149. *Id.* at 597.

violating section 475.25(1)(f) of the *Florida Statutes*,[150] and suspended his real estate license.[151] Milliken raised five points on appeal.[152] Three merit discussion here.

First, section 475.25(1)(f) of the *Florida Statutes* provided for suspension or revocation of the real estate license where the licensee had been convicted or found guilty of a crime relating to brokerage activities or involving moral turpitude or fraudulent or dishonest dealings.[153] Milliken claimed that the cocaine possession conviction did not fit any of these categories. The district court found otherwise.[154] "We have no problem with concluding [cocaine possession with the intent to sell] is a crime involving moral turpitude."[155]

Milliken challenged the use of an informal hearing, but the district court found that Milliken had never objected to the informal procedure.[156] Milliken also challenged the panel's decision because no testimony or documentation had been presented at the hearing.[157] However, Milliken had asked for permission to speak to the FREC panel. When asked if there were anything he wanted to tell the panel, he had freely admitted being convicted of the crime.[158] Consequently, the panel had an adequate basis for its decision.[159]

Finally, FREC suspended his license until his criminal probation ended, and he paid FREC's investigative costs.[160] Suspensions under section 475.25(1) may not exceed ten years, so a suspension order should not be written in a way that the period might possibly exceed that period.[161] Consequently, the matter was remanded to FREC so that the suspension period would explicitly be prevented from exceeding the ten-year period.[162]

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150. He was also found to have violated section 475.25(1)(n) of the *Florida Statutes* which states: "confined in any county jail, postadjudication . . . confined in any state or federal prison." *Id.*; *see* FLA. STAT. § 475.25(1)(n) (1997). However, that subsection is not addressed in this opinion. *Milliken*, 709 So. 2d at 597.

151. *Milliken*, 709 So. 2d at 596.

152. *Id.* at 596–97.

153. *Id.*; *see* FLA. STAT. § 475.25(1)(f) (1997).

154. *Milliken*, 709 So. 2d at 596.

155. *Id.* at 597.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Milliken*, 709 So. 2d. at 597–98.

160. *Id.* at 596.

161. *Id.* at 597.

162. *Id.* at 597–98. On remand, the order was also to be corrected to reflect that it was to last for his period on parole rather than on probation. *Id.*

Nelson v. Department of Business and Professional Regulation.[163] A licensed real estate broker allegedly set off a smoke bomb in a public office as an act of political protest. Adjudication was withheld when he pled *nolo contendere* to charges of battery and criminal mischief, but he was placed on eighteen months of probation.[164] Then, the Department of Business and Professional Regulation brought disciplinary proceedings against him. The department fined him and placed him on probation for ninety days because it concluded that he had been found guilty of "a crime which directly relates to the activities of a licensed real estate salesperson or involves moral turpitude or fraudulent or dishonest dealings."[165] The broker appealed.[166]

The Fifth District Court of Appeal focused on the question of moral turpitude because this crime obviously did not involve brokerage activities, "or a fraudulent or dishonest dealing."[167] Examples it found of moral turpitude included a physician selling bogus diplomas, bookmaking, and manslaughter by criminal negligence.[168] It held that reversal was required because this crime "d[id] not show a 'baseness or depravity' that [would] impugn his ability to deal fairly with the public to the extent that suspension of his broker's license is warranted."[169]

Judge Sharp concurred specially.[170] She agreed that reversal was required, but challenged the legislature to spell out what categories of crimes warranted sanctions under this category because the term "moral turpitude" was essentially meaningless and its application might lead to capricious results.[171] Furthermore, it might be constitutionally infirm, as it is a term that fails to provide sufficient warning as to what activities are proscribed.[172]

Walker v. Florida Department of Business and Professional Regulation.[173] A real estate salesperson needed to complete fourteen hours of classroom instruction in order to renew her license. To satisfy this requirement, she took a correspondence course.[174] At the end of the course,

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163. 707 So. 2d 378 (Fla. 5th Dist. Ct. App. 1998).

164. *Id.* at 378.

165. *Id.*; *see* FLA. STAT. § 475.25(1)(f) (1993). Note that this subsection allows the licensee to be disciplined if he has "been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime." FLA. STAT. § 475.25(1)(f) (1993).

166. *Nelson*, 707 So. 2d at 378.

167. *Id.* at 379.

168. *Id.*

169. *Id.*

170. *Id.* at 379 (Sharp, J., concurring specially).

171. *Nelson*, 707 So. 2d at 380.

172. *Id.* at 379–80.

173. 705 So. 2d 652 (Fla. 5th Dist. Ct. App. 1998).

174. How a correspondence course qualified as hours of classroom instruction was not addressed by the court.

she did not submit the examination answer sheet for grading, but she represented on her license renewal application that she had completed the educational requirement. The FREC sent her application back because it lacked evidence that she had completed the educational requirement. Then she sent in the examination answer sheet to be graded. She passed the exam and submitted the scored sheet, but the irregularities in the application were noticed, and an investigation was begun. FREC held an informal hearing. Despite the licensee's uncontradicted testimony that she thought she had sent in the exam sheet at the end of the course and that her failing to submit the exam sheet was an explainable oversight caused by distracting events in her personal life,[175] her license was revoked.[176]

On appeal, the licensee challenged the use of an informal hearing.[177] The district court found no irregularity because the licensee had specifically requested an informal hearing and had never requested that the informal hearing be terminated and a formal hearing begun in its place.[178] Thus, she had waived her right to a formal hearing.[179]

The licensee also claimed that the license revocation was too severe a penalty for the conduct involved, but the district court concluded that this would not be a valid basis for relief.[180] In reviewing agency action, the court is expressly prohibited from substituting its own judgment on matters that are within the agency's discretion.[181] FREC is specifically empowered by statute to revoke a license that was obtained by "fraud, misrepresentation, or concealment."[182]

The case really turned on whether there was sufficient evidence that the license renewal had been obtained by "fraud, misrepresentation, or concealment." FREC had the burden of proving intent. The majority, after reviewing the record, concluded that there was sufficient circumstantial evidence of intent to satisfy the competent substantial evidence standard.[183] To emphasize that point, Judge Dauksch wrote a special concurrence.[184] The agency panel saw and heard the witnesses, so it had the job of judging credibility.[185] It had the prerogative of believing or disbelieving any witness,

175. Walker had stated that the distracting events in her life were that her father had died and she had changed jobs. *Walker*, 705 So. 2d at 655 (Sharp, J., dissenting).

176. *Id.* at 653.

177. *Id.*

178. *Id.* at 653–54.

179. *Id.* at 654.

180. *Walker*, 705 So. 2d at 654.

181. *Id.*; *see* FLA. STAT. § 120.68(12) (1995).

182. *Walker*, 705 So. 2d at 654; *see* FLA. STAT. § 475.25(1) (1995).

183. *Walker*, 705 So. 2d at 654.

184. *Id.* at 655 (Dauksch, J., concurring specially).

185. *Id.*

even one who was uncontradicted.[186] Judge Sharp disagreed.[187] In her dissent, she asserted that the clear and convincing evidence standard had not been met by FREC because the licensee had given an uncontradicted and credible explanation of her conduct in submitting the inaccurate application.[188]

B. *Brokerage Agreements and Commissions*

The Florida Legislature has now made it possible for a broker to have two of his salespeople act as sole agents for different parties to a real estate transaction.[189] The broker can designate the salespersons assigned to each party.[190] Designated salespersons are allowed only when the property involved is nonresidential[191] and only where the parties have assets exceeding one million dollars.[192] The parties must sign disclosure statements indicating that their assets are sufficient and requesting designated salespersons to act as their agents.[193] The act provides language to be included in the disclosure form, including the warning that the salesperson is allowed to tell the broker confidential information; but, the broker cannot reveal it to the other party or use it to the detriment of the confidante.[194] This may be acceptable in a commercial setting where the parties are likely to be sophisticated and represented by legal counsel, but it may well prove impossible to keep confidences from being violated in most brokerages, where the emphasis is on completing the transaction. Worse, it may be impossible to allay public fears that confidences are being violated. The benefits brokers get from this act may not justify the suspicions generated.

Century 21 Real Estate of South Florida, Inc. v. Braun & May Realty, Inc.[195] Braun & May was a franchisee of Century 21. The franchise

186. *Id.*

187. *Id.* at 655 (Sharp, J., dissenting).

188. *Walker*, 705 So. 2d at 655.

189. Brokerage Relationship Disclosure Act, ch. 98-250, §10, 1998 Fla. Laws 2199, 2199 (to be codified at FLA. STAT. § 475.2755).

190. *Id.*

191. Nonresidential property is property that is not residential as defined in section 475.276 (1)(a) of the *Florida Statutes* as "improved residential property of four units or fewer . . . unimproved residential property intended for [the] use of four units or fewer, or the sale of agricultural property of 10 acres or fewer." FLA. STAT. § 475.276(1)(a) (1997) (citations omitted).

192. Brokerage Relationship Disclosure Act, ch. 98-250, §10, 1998 Fla. Laws 2199, 2199 (to be codified at FLA. STAT. § 475.2755).

193. *Id.*

194. *Id.*

195. 706 So. 2d 878 (Fla. 3d Dist. Ct. App. 1997).

agreement provided that it would last for a specific duration and, if not renewed, would be "deemed to be operating on a month-to-month basis."[196] The original term ended, and it was not renewed. Braun & May continued to operate as a Century 21 franchisee for some time before it gave notice of its intent to discontinue the relationship. This dispute arose over what commissions Century 21 was entitled to under the franchise agreement.[197]

Paragraph eighteen of the agreement provided that Century 21 was entitled to commissions on: 1) revenues from transactions in process on the date of termination; 2) revenues produced by referrals from other Century 21 offices prior to termination; and 3) revenues produced by listings procured while a Century 21 franchisee.[198] The critical phrase was "termination."[199] Braun & May argued that the agreement had never been "terminated."[200] It had simply not been renewed, so no commissions were due under paragraph eighteen.[201] Convinced by this argument, the trial court granted summary judgment, but the district court reversed.[202]

Judge Shevin's opinion concluded that a month to month franchise agreement operates like a month to month tenancy.[203] It automatically renews until terminated by one of the parties.[204] Braun & May's notice that it intended to discontinue the franchise relationship was such a termination notice.[205] That termination triggered application of paragraph eighteen regarding commissions.[206]

Easton-Babcock & Associates, Inc. v. Fernandez.[207] The broker had a listing for a building owned by Fernandez. The broker showed the property to Noriega in 1992, and the parties reached an agreement in principle that was memorialized in the confirmation letter of October 28, 1992.[208] Then Fernandez informed the broker that he would be unable to go through with the sale because a foreclosure was pending. In fact, a foreclosure action had been brought against the property, but it had already been resolved and voluntarily dismissed. Believing Fernandez's statement that the threatened foreclosure prevented the sale, the broker did not insist on its commission

196. *Id.*
197. *Id.* at 878–79.
198. *Id.* (citing paragraph 18 of the franchise agreement).
199. *Id.* at 879.
200. *Century 21*, 706 So. 2d at 879.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Century 21*, 706 So. 2d at 879.
206. *Id.*
207. 706 So. 2d 916 (Fla. 3d Dist. Ct. App. 1998).
208. *Id.* at 917.

and let the matter drop until it discovered that the sale had been consummated eleven months later based on identical terms. Then, the broker demanded a commission, and, when Fernandez refused, he brought this suit.[209]

The jury rendered a verdict in favor of the broker.[210] When the trial judge granted the seller's motion for a judgment notwithstanding the verdict, the broker appealed.[211] The trial judge apparently relied upon the Supreme Court of Florida's opinion in *Richland Grove & Cattle Co. v. Easterling*[212] for the proposition that it was a question of law whether the broker had abandoned the listing contract.[213] This reliance on *Easterling* was misplaced. That case dealt with a listing contract that did not have an expiration date.[214] The supreme court had decided that whether the reasonable time implied into such contracts had expired was a question of law.[215]

The case at bar, however, turned on the question of whether the seller had intentionally excluded the broker from the negotiations that produced the sale.[216] Under the listing contract, the broker was entitled to a commission if it was the procuring cause of the sale. To be the procuring cause, the broker must have brought the buyer and seller together and effectuated the sale through continuous negotiations that the broker initiated unless the broker has been intentionally excluded from the negotiations.[217] The evidence in the record was susceptible to a reasonable inference that this broker had been intentionally excluded, so it was error for the trial judge to substitute his conclusion for that of the jury.[218]

Mays v. Hadden.[219] The owner of a radio station entered into a listing agreement with a broker that provided for a commission if: 1) the station were sold during the term of the agreement; 2) the broker presented an offer for the asking price which the owner rejected; or 3) a contract of sale were entered into within twelve months after the listing agreement was terminated. The listing agreement did not have a specific duration, but provided it would last at least 180 days. However, after two months the owner entered into a lease management agreement with a third party and

209. *Id.* at 917–18.
210. *Id.* at 918.
211. *Id.*
212. 526 So. 2d 685 (Fla. 1988).
213. *Fernandez*, 706 So. 2d at 918.
214. *Easterling*, 526 So. 2d at 686.
215. *Id.* at 687–88.
216. *Fernandez*, 706 So. 2d at 919.
217. *Id.*
218. *Id.* at 919–20.
219. 709 So. 2d 132 (Fla. 5th Dist. Ct. App. 1998).

canceled the listing.[220] The broker sued. Apparently accepting the argument that a lease management agreement is generally the first step in the eventual sale of a radio station, the trial court awarded him the brokerage commission.[221] On appeal the district court reversed.[222]

The court held that there was both competent and substantial evidence that the contract had been breached by the owner's premature cancellation,[223] but the contract explicitly provided only three situations in which the broker would be entitled to a commission and premature cancellation was not one of them.[224] The contract had been drafted by the broker who was experienced in this type of sale.[225] The court seemed to have been invoking the rule that a contract should be interpreted against the drafter who had the opportunity to choose the wording most in his own favor.[226] Furthermore, the court seemed to have been suggesting that there was no reason to find an agreement to pay a commission implied in favor of a broker with this level of expertise. He should have anticipated this possible outcome and made sure that the agreement expressly provided for a commission in these circumstances if that is what the parties agreed upon. The majority concluded that the broker's damages in breach of this contract were limited to his out of pocket expenses.[227]

Judge Dauksch carried this logic one step further in his dissent.[228] He reasoned that the lease management agreement was reasonably foreseeable and not a breach of the contract because the broker could still have produced a buyer and earned his commission.[229] Unfortunately, the dissent does not mention the owner's having canceled the listing agreement. The majority opinion seems to focus on that as the breach,[230] while the dissent does not explain why the owner's unilateral cancellation would not be a breach entitling the broker to damages.

Whitehead v. Dreyer.[231] A real estate broker and a ranch owner entered into a written brokerage contract that provided a commission would be paid "if the ranch [were] sold to either the State of Florida, The Trust for Public

220. *Id.* at 133.
221. *Id.*
222. *Id.* at 134.
223. *Id.*
224. *Mays*, 709 So. 2d at 134.
225. *Id.* at 133.
226. *Id.* at 134.
227. *Id.*
228. *Id.* at 134 (Dauksch, J., dissenting).
229. *Mays*, 709 So. 2d at 134.
230. *Id.*
231. 698 So. 2d 1278 (Fla. 5th Dist. Ct. App. 1997).

Lands, the CARL Program or the St. Johns Management District."[232] None of these bought the land and the agreement was canceled. Eighteen months later, an officer of the Audubon Society informed the Walt Disney World Company that the ranch was available for wetlands mitigation purposes. Disney pursued the lead and bought the ranch. The broker then brought this action claiming a brokerage contract.[233] The broker claimed to be the procuring cause because he had first suggested the strategy of finding a corporate buyer who could use the land for mitigation. The trial court, finding the complaint to be without merit, granted summary judgment against the broker and then assessed attorneys' fees against both the broker and his attorneys.[234]

The Fifth District Court of Appeal affirmed.[235] To be the procuring cause, the broker "must bring the parties together and effect a sale through continuous negotiations inaugurated by him."[236] There was no allegation in the complaint that this broker had introduced the parties or inaugurated negotiations between them. Nor was there any allegation that would qualify the broker for the exception to that rule, i.e., that the parties had "intentionally excluded" him from negotiations after he had introduced them.[237] The broker's having suggested what turned out to be a successful marketing strategy would not be a sufficient basis for claiming a commission in the absence of an express contract to the contrary.

IV. CONDOMINIUMS

Graves v. Ciega Verge Condominium Ass'n.[238] Nancy Graves, the "personal representative" to Fred Graves' estate, appealed the trial court's non-final order vacating an amended final judgment of foreclosure and canceling judicial sale against Ciega Verde Condominium Association and its unit owners in this foreclosure and construction lien action.[239]

Decedent Fred Graves, as a general contractor, performed repair work to the condominium pursuant to a contract. The association later refused to pay Graves for his services and denied Graves access to the property.[240] Graves served both a claim of lien and a contractor's affidavit. Subsequently, Graves filed an amended complaint which sought to "foreclose the

232. *Id.* at 1279 (citing brokerage contract).
233. *Id.*
234. *Id.*
235. *Id.* at 1280.
236. *Whitehead*, 698 So. 2d at 1280.
237. *Id.*
238. 703 So. 2d 1109 (Fla. 2d Dist. Ct. App. 1997).
239. *Id.* at 1110.
240. *Id.*

mechanic's lien against the unit owners and . . . sought recovery of damages for breach of contract against Ciega Verde."[241] Graves sued unit owners as a defendant class with the association as class representative. The association, in its individual capacity and as representative of the class, answered the amended complaint.[242]

"[T]he contract portion of the [complaint] was set for binding arbitration"[243] where Graves was the prevailing party.[244] "Graves served . . . Ciega Verde [with] a motion to confirm the arbitration award and to set cause for trial on the foreclosure action against the unit owners."[245] The trial court entered final judgment in March 1996 and set judicial sale for May 1996.[246]

"[C]ounsel for the unit owners filed a motion to set aside the amended final judgment" claiming the court did not have jurisdiction over the unit owners.[247] Ultimately, the trial court, at hearing, granted the unit owners' motion to dismiss and dismissed the unit owners from the action because Graves failed to serve such unit owners within the 120 day period starting from the date of filing the complaint as per *Florida Rules of Civil Procedure*.[248]

The appellate court recognized that the trial court erred in vacating the amended final judgment of foreclosure.[249] The trial court had jurisdiction over the unit owners because they constituted a class with a common interest based on membership in the Ciega Verde Condominium Association.[250]

Ciega Verde's Declaration of Condominium stated that each unit owner was a member of the condominium association while he owned the unit.[251] When the association authorized work to be performed on the common grounds, it was understood that the unit owners consented to that authorization.[252] As such, Graves' lien attached to each condo unit and could be foreclosed.[253]

Each unit owner was not required to receive individual notice. It was the condominium's board of directors' fiduciary and statutory obligation to

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241. *Id.*
242. *Id.* at 1111.
243. *Graves*, 703 So. 2d at 1111.
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Graves*, 703 So. 2d at 1111; *see* FLA. R. CIV. P. 1.070(i).
249. *Graves*, 703 So. 2d at 1111; *see* FLA. R. CIV. P. 1.070(i).
250. *Graves*, 703 So. 2d at 1112; *see* FLA. R. CIV. P. 1.221.
251. *Graves*, 703 So. 2d at 1111–12.
252. *Id.* at 1112.
253. *Id.*

give unit owners notice of a lawsuit.[254] Graves' service upon the association, the class representative, was sufficient and if the court wanted to require notice to the individual members, it should have provided Graves adequate time to do so.[255]

Perlow v. Goldberg.[256] This court affirmed the order dismissing owner's claims because the facts show that the "directors cannot be held liable in their individual capacity."[257] Perlow sought personal judgments for breach of fiduciary duty against Goldberg and Leb, directors of the condominium association, for failure to properly administer insurance proceeds.[258]

Condominium association directors are immune from individual liability absent fraud, self-dealing, or criminal activity.[259] The court below relied on a fourth district case which furthered this rule.[260] This court agreed with that holding and stated the directors here were neither unjustly enriched, nor did they commit fraud or a crime.[261] At the most, the directors were negligent by failing to properly administer insurance proceeds from Hurricane Andrew.[262] This negligence is not enough to create personal liability for the condominium directors.[263]

The court also recognized that owner's reliance on *B & J Holding Group v. Weiss*[264] was unwarranted because the directors in that case deliberately engaged in self-dealing.[265] That was not the situation here.[266]

Ruffin v. Kingswood E. Condominium Ass'n.[267] "Kingswood E. Condominium Association, Inc., brought an arbitration proceeding under section 718.1255 [of the] *Florida Statutes,*[268] against unit owner Mary Ruffin

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254. *Id.*

255. *Id.*

256. 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997).

257. *Id.* at 149.

258. *Id.*

259. *Id. See* FLA. STAT. § 718.111(2) (1995); *see also* FLA. STAT. §§ 607, 617 (1995).

260. *Perlow*, 700 So. 2d at 150 (citing Munder v. Circle One Condominium, Inc., 596 So. 2d 144 (Fla. 4th Dist. Ct. App. 1992)).

261. *Id.*

262. *Id.*

263. *Id.*

264. 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1977).

265. *Perlow*, 700 So. 2d at 150 (citing B & J Holding Group v. Weiss, 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1997)).

266. *Id.*

267. 23 Fla. L. Weekly D1178 (4th Dist. Ct. App. May 13, 1998), *opinion withdrawn and superseded on reh'g by* No. 97-1683, 1998 WL 689766 (4th Dist. Ct. App. Oct. 7, 1998).

268. FLA. STAT. § 718.1255 (1997).

and her son, appellant Paul Ruffin."[269] The reason for the arbitration was that the association alleged that Mary Ruffin and the appellant were in violation of the condominium declarations.[270] "The Association [wanted] the Division of Florida Land Sales, Condominium and Mobile Homes of the Department of Business Regulation to issue an order requiring appellant as tenant to vacate the premises and restraining him from further entry."[271] Mr. Ruffin "inform[ed] the arbitrator that his mother had moved . . . therefore the matter was moot."[272] However, the association wanted future protection. So, the arbitrator issued an order that "Mr. Ruffin should remain away and off the condominium property."[273]

Mr. Ruffin filed a complaint for a "trial de novo" in circuit court and the Association moved for summary judgment on the grounds that the case was moot.[274] The circuit court entered the summary judgment and reserved jurisdiction to assess attorneys' fees.[275]

The appellate court, "*sua sponte*," considered the subject matter jurisdiction of the arbitrator to have heard this action.[276] It looked at section 718.1255(1) of the *Florida Statutes*[277] and found that the arbitrator had no subject matter jurisdiction, since the arbitrator may only hear disputes within its statutory authority and disputes that include disagreements involving eviction or other removal are not within the arbitrator's statutory authority.[278] Further, the appellant was not the owner of the unit and, therefore, section 718.1255 did not cover disputes with the appellant.[279]

Since the arbitrator lacked subject matter jurisdiction, the trial de novo was not moot. If the appellant had not challenged the matter, the arbitrator's order would have become final. Therefore, this court reversed the final judgment and directed the trial court to "enter an order vacating the arbitrator's final order."[280]

Legislative changes to section 718 include, but are not limited to, the following:

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269. *Ruffin*, 1998 WL 689766, at *1.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Ruffin*, 1998 WL 689766, at *1.
275. *Id.* at *1–2.
276. *Id.* at *1.
277. FLA .STAT. § 718.1255(1) (1997).
278. *Ruffin*, 1998 WL 689766, at *2.
279. *Id.* at *2; *see* Carlandia Corp. v. Obernauer, 695 So. 2d 408, 410 (Fla. 4th Dist. Ct. App. 1997).
280. *Ruffin*, 1998 WL 689766, at *2.

Section 718.111(11) of the *Florida Statutes* now includes subparagraph (d) which provides for the association to maintain adequate insurance or fidelity bonding for all persons who control or disburse funds for the association.[281]

Section 718.112(d)8 of the *Florida Statutes* provides that, unless the bylaws provide otherwise, any vacancy on the Board of Directors of the association prior to the expiration of a term may be filled by a majority vote of the remaining directors even though they may constitute less than a quorum or by the sole remaining director.[282] Alternatively, however, the board may hold an election to fill the vacancy.[283]

Section 718.503(2)(a) of the *Florida Statutes* has been amended to require that a unit owner who is not a developer shall include a copy of the financial information required by section 718.111 of the *Florida Statutes* in the disclosure information presented to a prospective purchaser.[284] Likewise, a prospectus or offering circular, per section 718.504 of the *Florida Statutes*, requires the same information to be included.[285]

V. CONSTRUCTION

City of Miami v. Tarafa Construction, Inc.[286] The contractor sued based on construction delays it alleged were attributable to the city. The case was reversed and remanded due to overly long delay in getting the trial completed and problems with the final judgment, but the court ruled that two claims had to be eliminated because they were not for work under the contract.[287] Since the defendant was the city, it was protected by the doctrine of "sovereign immunity."[288] While the city could be held liable for breaching the express or implied terms of a contract, it could not be held liable for expenses incurred before the contract was awarded or outside the scope of the construction work.[289] Thus, two of the claims cannot stand: 1) the claim for "value engineering damages,"[290] which was based on the cost of engineering work in preparing the bid; and 2) the claim for "claim

281. FLA. STAT. § 718.111(11)(d) (1997).
282. FLA. STAT. § 718.112(d)8 (Supp. 1998).
283. *Id.*
284. *Id.* § 718.111.
285. *Id.* § 718.504.
286. 696 So. 2d 1275 (Fla. 3d Dist. Ct. App. 1997).
287. *Id.* at 1277.
288. *Id.*
289. *Id.*
290. *Id.*

preparation damages,"[291] which the court characterized as pre-litigation costs.[292]

Temple Emanu-El v. Tremarco Industries, Inc.[293] The contract provided that the contractor would provide a new roof and that the price would include a three year "[g]uarantee against leaks" and a manufacturer's twelve year warranty.[294] Based on allegations that the roof was leaking, the owner filed suit against the roofing contractor, the manufacturer, and others involved with the roofing job. The manufacturer, relying on an arbitration clause in its warranty form, moved to require arbitration.[295] The owner did not resist. The roofing contractor also moved to require arbitration based upon the arbitration clause in the manufacturer's warranty.[296] Despite the owner's objections, the trial court ordered that claim to arbitration as well.[297] However, the fourth district reversed.[298]

The arbitration code puts the burden on the one claiming arbitration to prove an agreement to arbitrate.[299] The contract between the roofing contractor and the owner did not contain an arbitration clause.[300] The claim for arbitration was based on the argument that the arbitration clause in the manufacturer's warranty had been incorporated by reference into that contract.[301] In order for a term to be incorporated by reference, the incorporation document must contain an expression of the parties' intent to be bound by the incorporated term.[302] A mere reference to another document is not enough to effectuate an incorporation by reference.[303] Here, the fact that the contract required the roofing contractor to provide a manufacturer's warranty was simply not enough to incorporate the terms of that warranty into the roofing contract.[304]

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291. *Tarafa*, 696 So. 2d at 1277.
292. *Id.*
293. 705 So. 2d 983 (Fla. 4th Dist. Ct. App. 1998).
294. *Id.* at 983 (citing contract).
295. *Id.* at 984.
296. *Id.*
297. *Id.*
298. *Tremarco*, 705 So. 2d at 984.
299. FLA. STAT. § 682.03 (1997).
300. *Tremarco*, 705 So. 2d at 984.
301. *See id.*
302. *Id.*
303. *Id.*
304. *Id.*

VI. COOPERATIVES

Current legislative changes to section 719 include, but are not limited to, the following:

Section 719.103 of the *Florida Statutes* has added additional definitions including those for "buyers," "common areas," and "conspicuous type."[305] A "buyer" is one who purchases a cooperative and the words "purchaser" and "buyer" may be used interchangeably within the act.[306] "Common areas" now include, among other things, cooperative property which is not included within the units.[307] "Conspicuous type means type in capital letters no smaller than the largest type on the page on which it appears."[308] Also, there are additional definitions for "division," "limited common areas," "rental agreement," and "residential cooperative."[309]

Section 719.1035 of the *Florida Statutes* has been amended to require that, upon creating a cooperative, the developer or association shall file the recording information with the division within thirty working days on a form prescribed by the division.[310]

Section 719.104 of the *Florida Statutes* now has a new subpart (10) requiring the board to notify the division before taking any action to dissolve or merge the cooperative association.[311]

Section 719.502(1)(a) of the *Florida Statutes* has added a provision that a developer shall not close on any contract for sale or contract for a lease of more than five years until the developer prepares and files with the division, documents complying with both the requirements of chapter 719 and the rules promulgated by the division, and until the division notifies the developer that the filing is proper.[312] Further, the developer shall not close on any contract for sale or contract for lease period of more than five years until the developer prepares and delivers all documents to the prospective purchaser as required by *Florida Statutes* section 719.503(1)(b).[313]

Section 719.503(1)(b) of the *Florida Statutes* has an added provision requiring that the developer not close for fifteen days following the execution of the agreement and delivery of documents to the buyer as evidenced by a receipt for the documents signed by the buyer, unless the buyer is informed in a fifteen day voidability period and agrees to close prior

305. FLA. STAT. § 719.103 (Supp. 1998).
306. *Id.* § 719.103(4).
307. *Id.* § 719.103(8).
308. *Id.* § 719.103(11).
309. *Id.*
310. FLA. STAT. § 719.1035 (Supp. 1998).
311. *Id.* § 719.104(10).
312. *Id.* § 719.502(1)(a).
313. *Id.* § 719.503(1)(b).

to the expiration of fifteen days.[314] The developer must keep in its records a separate signed agreement as proof of the buyer's agreement to close prior to the expiration of the voidability period.[315]

VII. DEEDS

Mora v. Karr.[316] The court affirmed the trial court and denied the temporary injunction to the Moras regarding a violation of deed restrictions.[317] Karr wished to purchase a home and rebuild it to contain a three car garage and a twenty-five foot setback.[318] However, deed restrictions only allowed a two car garage and required a thirty-five foot setback.[319] Karr secured a waiver to those restrictions from the developer and from adjacent property owners prior to the purchase.[320]

After closing, Mr. Mora, an adjacent property owner and attorney, wrote Karr a letter that he would sue over the deed restrictions he waived. Karr continued with construction and Mora sued.[321] The trial court and the fourth district court both denied injunctive relief to Mora.[322] The most compelling evidence was the fact that Mora waived the deed restrictions prior to the construction and that Karr relied on that waiver in making the purchase.[323]

VIII. EASEMENTS

Citgo Petroleum Corp. v. Florida East Coast Railway Co.[324] The trial court entered "final judgment quieting title to certain property in favor of Florida East Coast Railway Company."[325] The appellate court reversed, finding that "Citgo was granted an express easement to construct and maintain a pipeline on the . . . property [and that] . . . Citgo's failure to

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314. *Id.*

315. FLA. STAT. § 719.503(1)(b) (Supp. 1998).

316. 697 So. 2d 887 (Fla. 4th Dist. Ct. App. 1997), *replacing original opinion*, 22 Fla. L. Weekly D781 (Fla. 4th Dist. Ct. App., Mar. 21, 1997).

317. *Id.* at 888.

318. *Id.*

319. *Id.*

320. *Id.*

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

322. *Id.*

323. *Id.*

324. 706 So. 2d 383 (Fla. 4th Dist. Ct. App. 1998).

325. *Id.* at 384.

record this easement [did] not render it ineffectual against [Florida East Coast ("FEC")], since [FEC] was on inquiry notice of its existence."[326]

The events giving rise to this dispute involved the expansion of the Ft. Lauderdale Airport and the resulting relocation of various utilities.[327] "Citgo had a licensing agreement with FEC under which Citgo had the 'right and privilege' of operating a pipeline under FEC's main track, across FEC's railroad right-of-way."[328] The right of way and Citgo's pipeline had to be relocated when the airport was expanded. Citgo "reached an agreement" with Florida's Department of Transportation ("Department") to "relocate the pipeline."[329] The agreement recognized "that Citgo owne[d] various property rights along the original pipeline, and provid[ed] for the transfer of those property rights to the [Department] in exchange for allowing Citgo to relocate and operate the pipeline on other property" acquired by the Department.[330]

Citgo informed FEC that the pipeline was to be relocated across the proposed relocation of FEC's right of way.[331] FEC sent Citgo the appropriate engineering specifications, as well as an application for a new licensing agreement. FEC remained adamant that, until it reached an agreement with Broward County to relocate its right of way, it could not consider granting Citgo a utility crossing permit.[332]

FEC and Broward County reached an agreement to relocate the railroad track.[333] That agreement provided that FEC would convey to Broward County its existing right of way in exchange for a replacement right of way.[334] The parcels of land comprising the new right of way were conveyed to FEC which promptly recorded the quitclaim deed. Citgo had no easements on record relating to this property.[335]

"[T]he new right-of-way property was to be conveyed to FEC 'free and clear of all encumbrances.'"[336] However, FEC was required "to grant easements, licenses, and permits to various utility companies . . . to allow storm sewers, fuel lines, and other appurtenances to cross the new right-of-way."[337] No mention was made of the relocated Citgo pipeline.

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326. *Id.*
327. *Id.*
328. *Id.*
329. *Citgo*, 706 So. 2d at 384.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Citgo*, 706 So. 2d at 384.
335. *Id.*
336. *Id.* (quoting the agreement).
337. *Id.*

FEC sent Citgo another application for a licensing agreement. As before, this agreement was never executed. After the railroad tracks and pipeline were fully completed, it was evident that FEC's railroad track was built between two of the pipeline's protruding vents. So, FEC brought suit to quiet title.[338]

Citgo argued that it had an express easement due to the earlier agreement with the department. After the proceedings were well underway, "Citgo recorded a Notice of Easement."[339] After the court "conclude[d] that FEC was not on inquiry notice of any 'potential unrecorded easement,' . . . that . . . Citgo was never granted an easement,"[340] and that Citgo's Notice of Easement was "null and void," Citgo appealed.[341]

Under de novo review, the appellate court was convinced that the 1983 agreement granted Citgo an express easement to operate and maintain the relocated pipeline.[342] "An easement is 'the right in one other than the owner of the land to use land for some particular purpose or purposes.'"[343] To determine whether the "[a]greement grant[ed] Citgo an easement, the applicable rule is that 'no particular form and language are necessary to create an easement; rather, any words clearly showing the intention of the parties to create a servitude on a sufficiently identifiable estate is sufficient.'"[344]

There was no provision in the 1983 agreement which affirmatively established that an easement was not intended. In fact, the court found the other provisions in the agreement manifested an intent by the department to grant Citgo an easement.[345]

The court also rejected "FEC's argument that Citgo's failure to record its easement render[ed] it ineffectual against FEC."[346] In Florida, the recording act subjects "FEC [to] Citgo's preexisting, unrecorded easement unless FEC was 'without notice' of it."[347] "If the circumstances known to FEC when it acquired the subject property were 'such as should reasonably suggest inquiry' into Citgo's property rights, then FEC is deemed to be on 'inquiry notice' of — and bound by — those encumbrances which would

338. *Id.* at 385.

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

340. *Id.*

341. *Id.*

342. *Id.*

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

344. *Citgo*, 706 So. 2d at 385 (quoting Hynes v. City of Lakeland, 451 So. 2d 505, 511 (Fla. 2d Dist. Ct. App. 1984)).

345. *Id.*

346. *Id.*

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

have been discovered upon a reasonable inquiry."[348] The district court concluded that Citgo's actual, open, and obvious possession by construction of a conspicuous pipeline placed FEC on inquiry notice of Citgo's easement.[349]

H & F Land, Inc. v. Panama City - Bay County Airport & Industrial District.[350] The issue before the court was whether the Marketable Record Title Act,[351] operated "to extinguish an otherwise valid claim of an easement by necessity, when such a claim has not been asserted within 30 years," as required by the Act.[352]

The appellate court recognized the general rule "that a landowner has a right to access his land."[353] However, it disagreed with H & F, the owner of a land-locked estate, that its claim deserves different treatment from any other claim of an interest in land which does not fall within an exception to the Act and which has not been timely asserted.[354]

The Marketable Record Title Act was "designed to simplify conveyances of real property, stabilize titles, and give certainty to land ownership."[355] A party only can blame himself if he fails to provide proper notice.[356] The legislature intended to afford a means to preserve old claims and interests and to give a reasonable time period to take steps to accomplish the purpose.[357]

Since the policies underlying the Marketable Record Title Act "conflict with the public policy that 'lands should not be rendered unfit for occupancy or cultivation,'" the appellate court certified the following question as one of great public importance:

> DOES THE MARKETABLE RECORD TITLE ACT, CHAPTER 712, FLORIDA STATUTES, OPERATE TO EXTINGUISH AN OTHERWISE VALID CLAIM OF A COMMON LAW WAY OF

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

349. *Citgo*, 706 So. 2d at 386.

350. 706 So. 2d 327 (Fla. 1st Dist. Ct. App. 1998).

351. FLA. STAT. § 712 (1997).

352. *H & F Land*, 706 So. 2d at 327.

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

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

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

356. *Id.*

357. *Id.*

NECESSITY WHEN SUCH CLAIM WAS NOT ASSERTED WITHIN 30 YEARS?[358]

Highland Construction, Inc. v. Paquette.[359] This court affirmed final judgment granting Paquette an implied easement over Highland's property.[360] Paquette sued Highland requesting an implied easement be granted over Vickers Street. Once Vickers Street was abandoned, ownership reverted to Highland.[361]

With regard to determining the existence of an implied easement, "Florida has adopted the 'beneficial or complete enjoyment rule.'"[362] This rule states that the "grantee receives the right to all streets in the plat beneficial to him."[363] If the grantee can show he will suffer injury differing in degree and kind from everyone else, "he is entitled to receive an implied easement."[364]

Paquette satisfied the beneficial enjoyment rule. Since he operates two automobile businesses on the property and Vickers Street was the only viable entrance to these establishments, the loss of this access would impair the business.[365] Therefore, the implied easement was granted.[366]

Sears, Roebuck & Co. v. Franchise Finance Corp. of America.[367] This court reversed a final summary judgment that declared a condition in a nonexclusive easement unenforceable and void.[368]

Sears owns real property where it operates a retail store, and Bradenton Mall Associates ("Developer") owns a retail shopping center adjacent to Sears' parcel.[369] Sears and Developer, having adjacent parcels and parking lots that were connected, "operated their respective parcels under a joint Operating Agreement. Southern Homes Park, Inc. (Southern), a corporate affiliate of the Developer, owned an 'outparcel' adjacent to the [others] but not . . . accessible except through the Sears . . . parking area."[370] In 1987, Southern sold its "outparcel" to Suncoast Rax, Inc. on the condition that Southern acquire an ingress and egress easement to the outparcel over a

358. *Id.*
359. 697 So. 2d 235 (Fla. 5th Dist Ct. App. 1997).
360. *Id.* at 236.
361. *Id.*
362. *Id.*
363. *Id.*
364. *Highland*, 697 So. 2d at 236.
365. *Id.* at 237.
366. *Id.*
367. 711 So. 2d 1189 (Fla. 2d Dist. Ct. App. 1998).
368. *Id.* at 1190.
369. *Id.*
370. *Id.*

portion of the Sears parking lot.[371] Suncoast, at the same time, was contracting to sell the "outparcel" and easement, if acquired, to the appellee, Franchise Finance Corporation of America ("F.F.C.A."). However, F.F.C.A. agreed to lease the property back to Suncoast. Developer and Sears agreed that Sears would grant the easement to Suncoast and that Developer in return would sweep both the developer parking area and the Sears entire parking area. The easement provided:

> The rights granted herein shall be perpetual, but shall expire in the event that:
>
> ....
>
> (iii) Developer, ... shall fail to sweep that portion of Grantor's parcel devoted to customer parking and which includes the Easement Parcel ("Parking Parcel") as shown in yellow on Exhibit C hereto. Grantor, its employees, agents or contractors shall upon written notice to both Developer and Grantee, have the right, at its cost and expense, to sweep the Parking Parcel. In the event that after notice Developer and/or Grantee fails to or refuses to cure, Grantor shall have the right to terminate the easements granted herein by filing a Notice of Termination of Easement in the Public Records of Manatee County, Florida, thirty (30) days, after written notice to both Grantee and Bradenton.[372]

In 1990, Suncoast went out of business and F.F.C.A. terminated the lease. In November, 1992, "Developer sent F.F.C.A. an invoice for ... the annual cost of 'sweeping' the Sears Parcel parking area."[373] Developer represented "that if this invoice was not paid, Developer would no longer 'sweep' the Sears Parcel parking area."[374] F.F.C.A. declined to pay the invoice and, fearing that Sears may want to terminate the easement, brought its declaratory action to have the sweeping condition declared void and unenforceable. The trial court declared the forfeiture provision unenforceable under *Florida Statutes* section 689.18[375] because section 689.18 provides that "reverter or forfeiture provisions ... in the conveyance of real estate or any interest therein in the state constitute unreasonable restraint on alienation and are contrary to the public policy of the state." [376]

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371. *Id.*
372. *Sears*, 711 So. 2d at 1190 (citing easement).
373. *Id.*
374. *Id.* at 1191.
375. FLA. STAT. § 689.18 (1987).
376. *Sears*, 711 So. 2d at 1191; *see* FLA. STAT. § 689.18 (1987).

The appellate court rejected this argument "[b]ecause a grant of easement is not a conveyance of a proprietary interest in real property."[377] An easement only grants the right to use property for some particular purpose, and does not convey title to land or dispossess the owner of the land subject to easement.[378] Therefore, the district court concluded "that a specified condition to the continuance of an easement agreed upon by the parties is not an encumbrance to the marketability of title to real estate" meant to be protected by section 689.18.[379] Easements that end upon the happening of a clearly defined condition have been recognized in the past.[380]

Furthermore, the district court found that the trial court erred in applying section 689.18 and that even if section 689.18 did apply, the forfeiture provision would not be void for twenty-one years after the granting of the easement, since 689.18 (3) and (4) provide that the provisions do not become void until twenty-one years after the conveyance has passed.[381]

Shiner v. Baita.[382] The appellant, Shiner wanted to end the real property rights reserved by the appellee, Baita, in a deed given by Baita to Shiner's predecessor in interest.[383] "Baita, the original grantor of the property, placed a reservation in the deed to Shiner's predecessor" that provided:[384]

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

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

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

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

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

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

382. 710 So. 2d 711 (Fla. 1st Dist. Ct. App. 1998).

383. *Id.* at 711.

384. *Id.*

> by the Grantors, and then in that event, this right of hook-up to septic tank shall cease and be of no further force and effect. [385]

Shiner elected to construct a septic tank on the property still held by Baita because she believed that she had the right to do so after aquiring the property. Shiner felt that this action would end the reserved right for Baita's septic tank hookup. Baita, who intended to develop a mobile home park, disputed Shiner's view. [386]

The lower court found that the restrictive covenant was ambiguous and that Shiner's septic tank would deprive Baita of using her property. Therefore, the lower court held that Shiner could not take any action regarding the septic tank that would deprive Baita from using and enjoying her property.[387]

The appellate court reversed the lower court's decision.[388] First, the court found that a restrictive covenant did not exist.[389] Rather, a reservation existed and that the deed created an easement, not a restrictive covenant.[390] Although an easement is often permanent, "an easement does not have to be permanent, [and] may end upon the happening of a condition."[391]

When there is a grant of easement, the intent is determined by a fair interpretation of the language.[392] When the language is unambiguous, the court must look at the plain meaning.[393] This court found that there was no ambiguity in the language of the deed and that it clearly shows that, if the grantees determine that the septic tank interferes with their use of the property, they may construct a septic tank on the property, and the hookup septic tank shall cease.[394] Therefore, because "the easement holder cannot expand the easement beyond what was contemplated at the time it was

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385. *Id.* at 711–12.

386. *Id.* at 712.

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

388. *Id.* at 713.

389. *Id.* at 712.

390. *Id.* (citing Homer v. Dadeland Shopping Ctr., Inc., 229 So. 2d 834, 836 (Fla. 1969)).

391. *Id.* (citing Datson v. Wolfe, 391 So. 2d 757, 759 (Fla. 5th Dist. Ct. App. 1980)).

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

393. *Id.* (citing Richardson v. Deerwood Club, Inc., 589 So. 2d 937, 939 (Fla. 1st Dist. Ct. App. 1991)).

394. *Id.*

granted,"[395] the appellate court held that the appellant is entitled to enforce the unambiguous provisions and reversed the lower court's order.[396]

IX. EMINENT DOMAIN

A. *Condemnation*

Basic Energy Corp. v. Department of Corrections.[397] The condemnation was initiated by the city which planned to give the land to the Department of Corrections ("Department") for the construction of a prison. The city utilized the quick taking procedure, took possession, and gave possession to the Department. While the Department was constructing the prison, the landowner appealed and won because the court held the stated municipal purpose for the taking was invalid.[398] Title reverted to the landowner, but a prison now stood on the land. The Department began its own eminent domain procedure to gain title to the prison it had built.[399] The issue on appeal was the appropriate time as of which to figure the compensation. The landowner asserted it should be when the Department acquired title under its condemnation procedure. The Department claimed compensation should be calculated as of the time when the Department took possession under the city's quick take.[400]

Section 73.041 of the *Florida Statutes* provided that when title had been acquired or perfected after appropriation, the compensation was to be determined as of the date of appropriation.[401] However, the statute did not define "appropriation" and there was no case law interpreting the term as used in this situation. The First District Court of Appeal utilized the plain meaning approach to determine that appropriation was not intended to be synonymous with the time of acquiring title.[402] Review of the statutory history supported the trial court's conclusion that "appropriation" meant the time when the condemning authority took possession.[403] Moreover, the court noted that this situation was similar to an inverse condemnation situation when calculating damages.[404] Consequently, the court affirmed the circuit

395. *Id.* (citing Walters v. McCall, 450 So. 2d 1139, 1142 (Fla. 1st Dist. Ct. App. 1984); Fields v. Nichols, 482 So. 2d 410, 414 (Fla. 5th Dist. Ct. App. 1985)).

396. *Id.* at 713.

397. 709 So. 2d 124 (Fla. 1st Dist. Ct. App. 1998).

398. *Id.* at 125.

399. *Id.*

400. *Id.*

401. FLA. STAT. § 73.031 (1993).

402. *Basic Energy*, 709 So. 2d at 126.

403. *Id.* at 127.

404. *Id.* at 128.

court's decision to calculate compensation as of the time when the Department first took possession.[405]

City National Bank. v. Dade County.[406] The landowner appealed a jury verdict denying it severance damages on the condemnation of a corner of its land for a road widening project.[407] The problem was that the land had not yet been developed and was, at the time of the condemnation, being used as an overflow parking lot for a nearby stadium. Years earlier, the landowner had a conceptual site plan prepared showing a retail strip shopping center with out-parcels. The county had rezoned the land from residential use to commercial use, consistent with the site plan.[408] However, the landowner never proceeded past that point. The landowner had never sought approval for the site plan and had not taken any further steps to implement the plan. At trial, the landowner sought to introduce the site plan into evidence to prove that the condemnation interfered with the plan by reducing the number of out-parcels from four to three or reduce the size of the out-parcels to smaller than normal size, reducing the business value of the mall.[409] The trial court excluded the conceptual site plan and the Third District Court of Appeal affirmed.[410]

The rule is that the amount of damages awarded to a property owner in an eminent domain case is determined by the uses to which the property is then being put or to those which it could reasonably be put.[411] "'*It is not proper to speculate on what could be done to the land or what might be done to it to make it more valuable and then solicit evidence on what it might be worth with such speculative improvements at some unannounced future date.*'"[412] The trial court correctly applied the rule.[413] The landowner could not have reasonably relied upon the approval of this site plan.[414] Whether this conceptual site plan would ever be approved or implemented was merely speculation.[415] It would not have been proper to base the award on such speculation.[416]

Moreover, the fact that the appraiser's report mentioned the conceptual site plan did not open the door to the plan's introduction into evidence. He

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405. *Id.* at 126–28.
406. 715 So. 2d 350 (Fla. 3d Dist. Ct. App. 1998).
407. *Id.* at 351.
408. *Id.*
409. *Id.*
410. *Id.* at 352.
411. *City Nat'l Bank*, 715 So. 2d at 352.
412. *Id.* (quoting Yoder v. Sarasota County, 81 So. 2d 219, 220–21 (Fla. 1955)).
413. *Id.*
414. *Id.*
415. *Id.*
416. *City Nat'l Bank*, 715 So. 2d at 353.

did not base his appraisal on the conceptual site plan.[417] He merely reported the facts that he had a meeting with the landowner and had analyzed the landowner's concerns which included how the condemnation would affect the plans which the landowner had for the future.[418]

Department of Transportation v. Rogers.[419] The Department condemned the entire property. At the time of the condemnation, the property was leased to the operator of a restaurant.[420] The jury fixed compensation at $705,000. One of the landowner's appraisers, a self-styled "business appraiser," based his opinion on a residual methodology.[421] This focused on the sales at the restaurant, and projections of future income, which were significantly above average for the region. The appraiser attributed that to the location.[422] The department appealed based on the admission of this testimony and on the theory that the evidence did not support the award. The district court agreed with the department on both points and reversed.[423]

Business damages are not part of the full compensation mandated by the *Florida Constitution*.[424] Business damages are provided by statute in the case of a partial taking.[425] Such statutes granting legislative largess are strictly construed in favor of the state. Since the entire property was taken here, the landowner was not entitled to business damages.[426] The district court concluded that the appraisal testimony based on projected sales was, in effect, a calculation of business damages.[427] In substance, it was testimony about the value of the business and reflected the degree to which location affected the business's value. The testimony was not about the value of the property itself, so it should not have been admitted.[428]

As to the final award, the court noted that five appraisers testified at trial.[429] The Department's appraisers valued the property at approximately $314,000. The landowner's appraisers valued the lot at $450,000 and a new building, to replace the thirty year old building taken, at $181,000. That total of $631,000 is far below the $705,000 the jury awarded.[430] "None of

417. *Id.*
418. *Id.*
419. 705 So. 2d 584 (Fla. 5th Dist. Ct. App. 1997).
420. *Id.* at 586.
421. *Id.*
422. *Id.* at 587.
423. *Id.* at 586.
424. *Rogers*, 705 So. 2d at 587.
425. FLA. STAT. § 73.071(3)(b) (1995).
426. *Rogers*, 705 So. 2d at 587–88.
427. *Id.* at 588.
428. *Id.*
429. *Id.*
430. *Id.* at 588–89.

these figures [alone or] in any combination support[ed] the amount awarded."[431]

Pol v. Pol.[432] As part of the property division in a divorce, the husband agreed to buy the wife's interest in a hotel they owned, but the agreement provided that the wife would receive fifty percent of the profits if the husband sold or transferred ownership within five years.[433] When the hotel was taken in a condemnation action, the wife sought a share of the condemnation proceeds. The trial court held that the husband was not a willing seller and, therefore, reasoned that no sale or transfer had occurred to trigger her right to participate in the profits.[434] The Third District Court of Appeal disagreed and reversed.[435]

Neither "sale" nor "transfer" was necessarily limited to a voluntary transaction. That either could be involuntary was evidenced by the familiar term, "forced sale."[436] The rule is that "a court cannot rewrite the clear and unambiguous terms of a voluntary contract."[437] Under the unambiguous terms of this contract the wife was entitled to share in this condemnation award.[438]

Taylor v. Department of Transportation.[439] The landowner's tract was bisected by a river. Part of his land was taken, so he sought severance damages. He proffered testimony by experts that his remaining land would be devalued by the roadway and bridge that the Department of Transportation was planning to build upstream because the design was flawed.[440] The general rule is that severance damages are allowed to attach to the remaining property due to use of or activity on the part of the land that has been taken.[441] However, his land was to be used only as a mitigation area. The roadway and bridge were to be built upstream on land that had been taken from others. Invoking the rule, the Department objected to the proffered testimony and the circuit court granted the department's motion in limine to deny severance damages.[442] The second district, however, reversed.[443]

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431. *Rogers*, 705 So. 2d at 589.
432. 705 So. 2d 51 (Fla. 3d Dist. Ct. App. 1997).
433. *Id.* at 52.
434. *Id.*
435. *Id.* at 53.
436. *Id.*
437. *Pol*, 705 So. 2d at 53.
438. *Id.*
439. 701 So. 2d 610 (Fla. 2d Dist. Ct. App. 1997).
440. *Id.* at 611.
441. *Id.*
442. *Id.*
443. *Id.* at 612.

The general rule is subject to an exception "where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put."[444] In this case, the land was being taken as part of one road and bridge project. Even though the roadway and bridge were not to be located on the land taken from him, the alleged negative effect of the project, according to the proffered testimony, would decrease the value of the parcels the landowner still owned.[445] Consequently, it was error to exclude that testimony and grant the motion in limine.[446] A new trial was ordered and the case remanded.[447]

Night Flight, Inc. v. Tampa-Hillsborough County Expressway Auth.[448] Night Flight operated a club on leased premises. Under the terms of the lease, Night Flight had the right to use an adjacent parking lot during certain hours every day. The Authority took the entire building in which the club was located.[449] Business damages are recoverable by statute in cases where there has been a partial taking.[450] Night Flight claimed this was a partial taking because it conducted activities like a theme party, a fund raising car wash, an Easter egg hunt, Fourth of July celebrations, a volleyball game, and a birthday party in the adjacent parking lot.[451] The trial judge granted summary judgment against Night Flight, but the district court reversed.[452]

Under the statute,[453] recoverable business damages are limited to reasonable damages to an established business located on the unappropriated land.[454] Night Flight would have to establish that the activities in the parking lot were authorized by the lease. The most that Night Flight could recover would be lost profits from the activities in the parking lot. Moreover, it would have to prove that its activities in the parking lot were an established and continuing business for a period of at least five years before the taking. However, the record did not preclude recovery in front of a jury, so summary judgment was inappropriate.[455]

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444. *Taylor*, 701 So. 2d at 611 (quoting Lee County v. Exchange Nat'l Bank of Tampa, 417 So. 2d 268, 269 (Fla. 2d Dist. Ct. App. 1982)).

445. *Id.*

446. *Id.* at 612.

447. *Id.*

448. 702 So. 2d 538 (Fla. 2d Dist. Ct. App. 1997).

449. *Id.* at 538.

450. *Id.* at 539. *See* FLA. STAT. § 73.017(3)(b) (1991).

451. *Night Flight*, 702 So. 2d at 539.

452. *Id.* at 540.

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

454. *Id.*

455. *Night Flight*, 702 So. 2d at 540.

B. *Inverse Condemnation*

Associates of Meadow Lake, Inc. v. City of Edgewater.[456] When the city built a new park, it lacked a properly functioning storm water management system. Until the problem was corrected, flooding occurred in a residential subdivision. The developer brought this suit for inverse condemnation based on a temporary taking.[457] The trial court granted summary judgment on the theory that Florida does not provide compensation for temporary takings.[458] However, the Fifth District Court of Appeal disagreed and vacated the order below.[459] The court concluded that since the United States Supreme Court decided *First Evangelical Lutheran Church of Glendale v. County of Los Angeles,*[460] a cause of action for a temporary regulatory taking has been recognized under the United States Constitution.[461] Following suit, the Supreme Court of Florida held that the improper seizure of a truck for a period of two years was compensable as a temporary taking under the *Florida Constitution.*[462] Consequently, "[i]f substantial periodic flooding occurred and was expected to recur and such flooding denied Associates *any* reasonable use of its property because Edgewater defectively constructed its project, a cause of action for inverse condemnation does lie."[463]

Coastal Petroleum v. Chiles.[464] In 1941, the state signed an oil exploration contract and option to lease. Coastal Petroleum succeeded to the rights of the optionee/lessee in 1947. A dispute arose concerning those rights and the parties reached a settlement in 1976. One part of the settlement was that Coastal would retain a residual royalty for all gas and oil produced from a certain area until the year 2016. However, in 1990, the Governor and Cabinet, sitting as the Board of Trustees of the Internal Development Trust Fund, adopted a policy prohibiting drilling and oil and gas production in the sovereign waters of the state. Likewise, the Florida Legislature passed a statute prohibiting oil and gas leases on Florida's west coast north of latitude twenty-six degrees. Coastal's residual royalty area

456. 706 So. 2d 50 (Fla. 5th Dist. Ct. App. 1998).

457. *Id.* at 50.

458. Hillsborough County v. Gutierrex, 433 So. 2d 1337 (Fla. 2d Dist. Ct. App. 1983).

459. *Edgewater,* 706 So. 2d at 52.

460. 482 U.S. 304 (1987).

461. *Edgewater,* 706 So. 2d at 52.

462. *In re* Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So. 2d 261 (Fla. 1990).

463. *Edgewater,* 706 So. 2d at 52 (citations omitted).

464. 701 So. 2d 619 (Fla. 1st Dist. Ct. App. 1997).

land was in the area covered by the statute.[465] Since that had the effect of guaranteeing that there would be no oil and gas production from which Coastal could receive royalties, Coastal sued on the theory of inverse condemnation.[466]

After trial without a jury, the circuit court denied recovery and the first district affirmed.[467] Not every interest obtained from the state rises to the level of a protectable property interest under eminent domain law.[468] The petitioner here had a right to share in the royalties produced under nonexistent oil and gas leases. Nothing in the settlement agreement explicitly obligated the state to enter into such leases. Any implied covenant of fair dealing which might have been found in a similar agreement between private parties would have to be balanced by the state's obligations under the public trust doctrine to act only in the public interest and the state's obligation to exercise police powers for the public good.[469] The state's conduct here was to protect the public interest rather than to defeat Coastal's rights to royalties. Nor was there any evidence that the land involved had any potential to produce any oil and gas before the agreement would expire.[470] Under the circumstances, Coastal's rights were simply too speculative to require compensation under inverse condemnation doctrine.[471]

Gardens Country Club, Inc. v. Palm Beach County.[472] When plaintiff bought the land, the county was in the process of actively considering a new comprehensive land use plan. Under the old plan, use was limited to one dwelling per 2.5 acres or one dwelling per two acres in a planned unit development. Under the proposed plan, the area was to be down-zoned to one dwelling per twenty acres. Plaintiff formally applied for certification as a Planned Unit Development ("PUD") under the old plan, but the county commission had directed its staff not to certify any applications for certification that did not comply with the plan then under consideration.[473] Plaintiff sued over this denial and eventually won in the district court because the old plan, not yet having been replaced by the enactment of the new one, was still in effect.[474]

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465. *Id.* at 622–23.
466. *Id.* at 623.
467. *Id.*
468. *Id.* at 625.
469. *Coastal Petroleum*, 701 So. 2d at 624.
470. *Id.* at 625.
471. *Id.*
472. 712 So. 2d 398 (Fla. 4th Dist. Ct. App. 1998).
473. *Id.* at 400.
474. Gardens Country Club, Inc. v. Palm Beach County, 590 So. 2d 488 (Fla. 4th Dist. Ct. App. 1991) (referred to as "Gardens I" by the court to distinguish it from this appeal which the court labled "Gardens II").

Before the case could be heard on remand, the plaintiff succeeded in having the land annexed by the City of Palm Beach Gardens. The city approved the plaintiff's development plan which the county had refused to consider. Plaintiff then filed a supplemental complaint against the county seeking damages for a temporary taking and violation of the plaintiff's civil rights.[475]

The district court found that the takings claim was ripe for review even though plaintiff had never attempted to get its plan approved under the new comprehensive plan.[476] The ripeness doctrine has a futility exception and the court concluded this case fit squarely within it.[477] Any attempt to get approval of one residential unit per two acres under a plan calling for one residential unit per twenty acres would have been futile.[478] However, there was competent substantial evidence to support the trial court's findings that under the new plan the land still had a significant value at $3000 per acre.[479] While this was less than the $8000 per acre that it would have had under the old plan, the plaintiff had not established that it constituted a taking in light of a reasonable investment backed expectation.[480]

The district court also rejected the civil rights claim under Title 42 section 1983 of the *United States Code*.[481] Such a claim must satisfy a two-prong test: 1) there must be a deprivation of a constitutionally protected interest; and 2) the deprivation must be the result of arbitrary and unreasonable government action.[482] The right to have its application for certification of its PUD which complied with the existing comprehensive plan was a property right subject to due process protection. However, the county's act was not arbitrary and unreasonable under the circumstances.[483] The county was actively considering the new comprehensive plan and it was not unreasonable to avoid approving plans that would be inconsistent with the new plan, even though that proved to be prohibited by the law.[484]

Intracoastal North Condominium Ass'n, Inc. v. Palm Beach County.[485] The condominium association owned land fronting the Intracoastal Waterway.[486] At this location, the association operated and owned wooden

475. *Gardens*, 712 So. 2d at 400–01.
476. *Id.* at 401.
477. *Id.*
478. *Id.*
479. *Id.*
480. *Gardens*, 712 So. 2d at 402.
481. *Id.* at 403.
482. *Id.* at 403 (citing 42 U.S.C. § 1983 (1997)).
483. *Gardens*, 712 So. 2d at 403.
484. *Id.* at 403–04.
485. 698 So. 2d 384 (Fla. 4th Dist. Ct. App. 1997).
486. *Intracoastal*, 698 So. 2d at 384.

docks that were used by recreational boaters.[487] Directly to the north was a bridge over the river.[488] When the new bridge was built, the channel was widened to make navigation safer on the intracoastal.[489] However, the channel widening increased the tidal currents along the associations's frontage except during the periods when the tide changed.[490] These slack periods occurred four times a day and lasted for one-half hour.[491] Only during the slack periods could a recreational boater safely dock or moor at the association's wooden docks. The association claimed that this diminution in its ability to use its docks was a taking for which compensation must be paid. The trial court, however, disagreed and the district court affirmed.[492]

The district court found itself faced with a case of first impression.[493] It concluded that an increase in the speed at which water flowed past riparian land did not constitute a physical invasion or an appropriation of property rights because a riparian landowner's rights to use the water are inherently servient to the public's right to navigation and commerce on the water.[494] The court noted that this was not a case in which the landowner could claim that the governmental action had rendered the land useless, nor was it a case in which the riparian landowner's access to the water was denied or even substantially diminished.[495] Consequently, the inverse condemnation action failed.[496]

Lee County v. Kiesel.[497] The landowner bought land on the riverbank and built an expensive home. Later, the county built a bridge that extended at an angle from the adjacent lot across the river so as to obstruct the landowner's view. The bridge was not on any of the landowner's property, and none of the landowner's property was condemned for the bridge construction, but the landowner presented expert testimony that the location of the bridge caused a substantial drop in the value of the property. The trial court granted final judgment to the landowner on the issue of inverse condemnation and the county appealed.[498]

The district court rejected the county's claim that the appropriate test was the one used for regulatory takings, i.e., whether "the bridge

487. *Id.*
488. *Id.*
489. *Id.*
490. *Id.*
491. *Intracoastal*, 698 So. 2d at 384.
492. *Id.*
493. *Id.* at 385.
494. *Id.*
495. *Id.*
496. *Intracoastal*, 698 So. 2d at 386.
497. 705 So. 2d 1013 (Fla. 2d Dist. Ct. App. 1998).
498. *Id.* at 1014.

construction substantially ousted them from or deprived them of substantially all beneficial use of their property."[499] This was not a regulatory takings case. The owner of shore land along navigable water has "common law riparian rights."[500] Florida has long recognized that one of those riparian rights "is the right to an unobstructed view over the water to the channel."[501] Because navigable waters have irregular paths, no geometric formula governs precisely when activity interferes with that right. The question, to be decided on a case by case basis, is whether the activity, in this case the building of the bridge, "substantially and materially obstruct[s] the land owner's view to the channel."[502] The evidence included testimony by one expert witness that "eighty per cent [sic] of [the] view to the channel was obstructed by [this] bridge."[503] That satisfied the test. Consequently, the district court affirmed the holding that a taking had occurred.[504]

VLX Properties, Inc. v. Southern States Utilities, Inc.[505] Of particular interest in this case was the fact that the mortgagee had made an inverse condemnation claim against the utility that allegedly misused an easement and misused a commonly owned pond. The circuit court held the mortgagee did not have standing, and the mortgagee appealed.[506] The district court affirmed because in Florida a mortgagee has only a lien on the property and, therefore, is not the landowner.[507] Under the *Florida Constitution*, compensation is due to only the owner when private property is taken for public use.[508]

This analysis understates the matter. Under the circumstances, this mortgagee was not deprived of any property rights. However, it is conceivable that a mortgagee might be deprived of its security by governmental action so as to have standing to bring an inverse condemnation suit, even though that did not occur in this case.

X. ENVIRONMENTAL LAW

Jacksonville v. American Environmental Services, Inc.[509] The court addressed the lower court "judge's declaratory statement concerning the

499. *Id.* at 1015.
500. *Id.*
501. *Id.*
502. *Kiesel*, 705 So. 2d at 1016.
503. *Id.*
504. *Id.*
505. 701 So. 2d 391 (Fla. 5th Dist. Ct. App. 1997).
506. *Id.* at 393.
507. *Id.* at 395.
508. *Id.* (citing FLA CONST. art. X, § 6).
509. 699 So. 2d 255 (Fla. 1st Dist. Ct. App. 1997).

applicability and validity of the local certificate of need application ordinances."[510] This court affirmed the lower court and held American Environmental Services "could not properly be required to obtain a local certificate of need from the City of Jacksonville."[511]

"Jacksonville's CON [Certificate of Need] ordinances, as applied to [American Environmental Services Inc.'s] proposed hazardous waste transfer station . . . conflict[ed] with chapter 403 of the Florida Statutes."[512] "The Jacksonville ordinances require a determination of local need, and impose a condition that the waste only be of a type generated in Duval County."[513]

In comparison, chapter 403 of the *Florida Statutes* documents "a statewide need for hazardous waste facilities . . . and contemplate[s] *regional* . . . facilities for the transfer, storage and treatment of hazardous waste."[514] The City of Jacksonville cannot prevent the facility by determining lack of local need, even though statutes refer to local assessments of hazardous waste management. Local assessments have the purpose of compiling information for an assessment of need in the state.[515]

Local governments cannot enact an ordinance pertaining to the subject of hazardous waste regulation that is more stringent than chapter 403 rules.[516] As per chapter 403, local governments can control the zoning of such hazardous waste and "impose necessary conditions to protect the health, safety, and welfare of their citizens . . . but may not impose an additional obligation to satisfy a test for local need."[517]

Secret Oaks Owner's Ass'n v. Department of Environmental Protection.[518] "[F]inal order of the . . . Department of Environmental Protection . . . den[ied] the Association the right to apply for a permit to construct a dock on sovereignty land."[519] The Fifth District Court of Appeal concluded that the association had a "sufficient title interest" in the uplands for the purpose of seeking permission to construct a dock and thus, the court reversed the final order.[520]

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510. *Id.* at 256.

511. *Id.*

512. *Id.*

513. *Id.*

514. *American Envtl.*, 699 So. 2d at 256; *see* FLA. STAT. § 403.7225(8) (1995); FLA. STAT. § 403.7225(7) (1995); FLA. STAT. §. 403.723 (1995).

515. *American Envtl.*, 699 So. 2d at 256; *see also* FLA. STAT. §. 403.7225 (1995).

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

517. *American Envtl.*, 699 So. 2d at 257 (citing Escambia County v. Trans Pac., 584 So. 2d 603, 605 (Fla. 1st Dist. Ct. App. 1991)).

518. 704 So. 2d 702 (Fla. 5th Dist. Ct. App. 1998).

519. *Id.* at 703.

520. *Id.* (citing FLA. ADMIN. CODE ANN. r. 18-21.004(3)(b) (1996)).

This was the third appeal involving the Association and the Parlatos.[521] This discussion pertains solely to the last appeal. The association through Environmental Services, Inc. filed an application with the Department of Environmental Protection ("DEP") for the permits needed to construct the dock.[522] This was the issue of the prior appeal. The application sought a dredge fill permit and permission from the State, as owner of the submerged lands, to construct such dock. Almost a year later, the DEP denied the application and stated that the holder of an easement does not have sufficient title interest to make an application for activities pertaining to submerged lands. [523]

In return, Secret Oaks requested a formal hearing. "[T]he hearing officer concluded that there were no material issues of fact and ordered the case back to the agency for an informal hearing."[524] At the informal hearing, the Director stated the issue as "whether the Association, as the holder of an easement, is among the class of persons who may file an application to conduct activities on state-owned sovereign submerged lands."[525] The Director issued a lengthy order regarding such issue. The DEP framed the issue as follows:

> [W]hether the Association, as the holder of recorded contractual rights to construct, maintain and use all docks on lot 10, and, concomitantly, to limit the rights of any owner or lessee of lot 10, is precluded from applying for a permit to construct a dock because the rule requirement of "sufficient title interest in uplands for the intended purpose" means the appellant must have a possessory interest in the upland property.[526]

In this case, the Owners' Agreement and the recorded easement on lot ten provided that lot owners in the Secret Oaks Subdivision were granted pedestrian access to the St. John's River and to any dock that is situated or may later be situated thereon.[527] The association was obligated to improve, repair, or maintain the easement.[528]

The DEP relies on the definition of "title interest" as set forth "in *Black's Law Dictionary*: Title is defined as, 'the means whereby the owner of lands has the just possession of his property. The union of all the

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521. *Id.*
522. *Id.* at 704.
523. *Secret Oaks*, 704 So. 2d at 704.
524. *Id.* at 705.
525. *Id.*
526. *Id.* at 706.
527. *Id.*
528. *Secret Oaks*, 704 So. 2d at 706.

elements which constitute ownership. Full independent and fee ownership. The right to or ownership in land.'"[529] Just because title can be the means to receive right of possession, that does not dictate that all possessory interests are title interests.[530] This case clearly shows "that the Association has recorded contractual rights in lot 10 sufficient to grant it the right to build the dock."[531] If the language "sufficient title interest in the uplands" meant only "right of possession," the agency would have said so.[532]

In addition, the DEP "offers no reason why a possessory interest is the only possible 'title interest' . . . [or] why a 'possessory' interest would be the minimum 'sufficient title interest' for dock-building permit application purposes."[533] This court viewed the "[A]gency's interpretation [as] illogical and unreasonable."[534] To interpret "title interest" as meaning "right of possession" creates irrational distinctions.[535]

XI. HOMEOWNERS' ASSOCIATIONS

Legislative changes to chapter 617 of the *Florida Statutes* include, but are not limited to, the following:

Section 617.303 of the *Florida Statutes* has a new subsection (8).[536] This provides that "[a]ll association funds held by a developer shall be maintained separately in the association's name."[537] There shall be no comingling of reserve and operating funds prior to turnover.[538] However, "the association may jointly invest reserve funds; [even though the] invested funds must be accounted for separately."[539]

Section 617.307 of the *Florida Statutes* has a new subsection (3).[540] This subsection is designed to provide for transition of homeowners' association control in a community.[541] Under this subsection, such shall occur when "[m]embers other than the developer are entitled to elect at least

529. *Id.* at 707 (quoting BLACK'S LAW DICTIONARY 1331 (5th ed. 1979)).
530. *Id.*
531. *Id.*
532. *Id.*
533. *Secret Oaks*, 704 So. 2d at 707.
534. *Id.* at 708.
535. *Id.* at 707.
536. Act of May 27, 1998, ch. 98-261, §1, 1998 Fla. Laws 2277, 2278 (to be codified at FLA. STAT. § 617.303(8)).
537. *Id.*
538. *Id.*
539. *Id.*
540. Act of May 27, 1998, ch. 98-261, §2, 1998 Fla. Laws 2278, 2278 (to be codified at FLA. STAT. § 617.307(3)).
541. *Id.*

a majority of the board of directors of the homeowners' association."[542] "The developer shall, at the developer's expense, within no more than 90 days deliver the [prescribed] documents to the board."[543]

Section 617.3075 of the *Florida Statutes* has been enacted to create a list of prohibitive clauses to be found in homeowners' association documents.[544] Subsection (1) and its subparts prohibit provisions to the effect that the developer has the unilateral ability and right to make changes in the homeowners' association documents after the transition of the homeowners' association control in a community to the nondeveloper members; that the association is restricted from filing a lawsuit against the developer; and that the developer is entitled to cast votes in amount that exceeds one vote per residential lot after the transition to the association.[545] Subparagraph (2) declares the prohibited position stated above as unenforceable as a matter of public policy where those clauses were created on or after the effective date of that section, October 1, 1998.[546]

XII. INSURANCE

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

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

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542. *Id.*

543. Act of May 27, 1998, ch. 98-261, §2, 1998 Fla. Laws 2278, 2278 (to be codified at FLA. STAT. § 617.307(3)).

544. FLA. STAT. § 617.3075 (1997).

545. *Id.* § 617.3075(1).

546. *Id.* § 617.3075(2).

547. 700 So. 2d 51 (Fla. 5th Dist. Ct. App. 1997).

548. *Id.* at 52.

549. *Id.*

550. *Id.*

him.[551] So, the examination was again rescheduled and, once again, Fassi failed to appear or respond.[552] Three months later, Fassi wished to have the examination conducted but American responded that it was too late. The trial court granted summary judgment after Fassi filed suit on the policy.[553]

The appellate court agreed with American's contentions.[554] Fassi was given one last chance to explain the refusal to cooperate, and failure to respond would lead to denial of the claim.[555] Since Fassi did not explain, no further notice was required on American Fire's behalf. The final letter to Fassi was only an opportunity to explain, not a chance to participate. The court concluded that five opportunities to participate were enough.[556]

XIII. LANDLORD AND TENANT

Bell v. Kornblatt.[557] The circuit court, sitting as an appellate court, had affirmed the county court's final judgment of eviction based upon failure to pay the rent.[558] The tenant sought certiorari review in the Fourth District Court of Appeal on the theory that the county court lacked subject matter jurisdiction because the three-day notice the tenant received did not comply with the statute.[559] A number of county and circuit court decisions supported that argument,[560] but the district court rejected it concluding that compliance with the statute was merely a condition precedent to eviction.[561] The court reasoned that under earlier versions of the statute, the tenant could waive its right to a three-day notice, and such ability to waive would be inconsistent

551. *Id.*
552. *Fassi*, 700 So. 2d at 52.
553. *Id.* at 53.
554. *Id.*
555. *Id.*
556. *Id.*
557. 705 So. 2d 113 (Fla. 4th Dist. Ct. App. 1998).
558. *Id.* at 113–14.
559. *Id.* (citing FLA. STAT. § 83.56(3) (1995)).
560. *Id.* (citing Cook v. Arrowhead Mobile Home Community, 50 Fla. Supp. 2d 26 (3d Cir. Ct. 1991); Johnson v. Kallioinen, 16 Fla. Supp. 2d 86 (15th Cir. Ct. 1986); Archer v. Jackson, 2 Fla. L. Weekly Supp. 225 (Broward Cty. Ct. 1994); Shapiro v. Puche, 1 Fla. L. Weekly Supp. 409 (Broward Cty. Ct. 1993); Pearson v. Sims, 1 Fla. L. Weekly Supp. 408 (Broward Cty. Ct. 1993); Pappas v. Kartub, 2 Fla. L. Weekly Supp. 59 (Broward Cty. Ct. 1993); Broward Gardens Assocs., Ltd. v. Walker, 1 Fla. L. Weekly Supp. 155 (Broward Cty. Ct. 1992); Marcrum Management Co. v. Phillips, 40 Fla. Supp. 2d 198 (Broward Cty. Ct. 1990); Garcia v. Ruiz, 50 Fla. Supp. 2d 176 (Dade Cty. Ct. 1991); Labrada v. Barrios, 44 Fla. Supp. 2d 140 (Dade Cty. Ct. 1990); Metropolitan Dade County v. Dansey, 43 Fla. Supp. 2d 169 (Dade Cty. Ct. 1990); and Kosta v. Bernstein, 4 Fla. L. Weekly Supp. 480 (Sarasota Cty. Ct. 1996)).
561. *Bell*, 705 So. 2d at 114.

with the court being deprived of subject matter jurisdiction.[562] As this appears to be the only district court decision in the state, it is binding throughout the state and has the effect, at least for the time being, of overruling all inconsistent circuit and county court decisions.

Charlemagne v. Francis.[563] Injured by a fall allegedly caused by a defective carpet, the roommate of the tenant sued the landlord.[564] The tenant testified that she had repeatedly notified the landlord about the problems with the carpet. However, the apartment manager testified that he had not been notified. Moreover, he testified that he never saw any problems with the carpet.[565] The person who cleaned the carpet before the tenancy began also testified that the carpet had no defects.[566] The landlord, thereafter, conjectured that any defects in the carpet, if they existed at all, might have been caused by the tenant's furniture movers. Over the tenant's objection, the landlord got a jury instruction that, *inter alia*, "the landlord [is] not responsible to the tenant . . . for [defects] created or caused by . . . person on the premises with the tenant's consent."[567] The jury returned a verdict for the landlord and the tenant appealed.[568]

The fourth district reversed, finding the instruction improper on two grounds.[569] First, the instruction about the landlord's responsibility to the tenant under section 83.51 of the *Florida Statutes* relates to the statutory warranty of the premises by the landlord to the tenant.[570] It has no applicability to an action for common law negligence.[571] The only defense would be comparative negligence of the defendant or the superseding negligence of others.[572] Second, there was no testimony that the defect might have been caused by third parties such as furniture movers.[573]

Comptech International, Inc. v. Milam Commerce Park, Ltd.[574] This involved a commercial lease. Pursuant to an agreement to lease additional space, the parties agreed that the landlord would build offices in part of the

562. *Id.*
563. 700 So. 2d 157 (Fla. 4th Dist. Ct. App. 1997).
564. *Id.* at 158.
565. *Id.* at 158–59.
566. *Id.* at 159.
567. *Id.* at 158.
568. *Charlemagne*, 700 So. 2d at 158.
569. *Id.* at 159.
570. *Id.* at 160.
571. *Id.*
572. *Id.*
573. *Charlemagne*, 700 So. 2d at 160.
574. 711 So. 2d 1255 (Fla. 3d Dist. Ct. App. 1998), *replacing original opinion*, 22 Fla. L. Weekly D2192 (Fla. 3d Dist. Ct. App., Sep. 17, 1997).

original space.[575] The tenant, claiming its office space and computers were damaged by the unworkmanlike and untimely construction of the landlord's office space, brought suit against the landlord based on the following theories: 1) negligent construction; 2) violation of the building code; 3) rent had been illegally collected; and 4) negligence in the selection of contractors. The first three were dismissed with prejudice, and the court granted summary judgment for the landlord on the last.[576] The tenant brought this appeal, which turned on the question of whether the tenant's recovery on the tort theories was barred by the economic loss rule.[577]

The economic loss rule draws the line between recovery in tort and in contract. It provides that tort recovery is prohibited "when a product damages itself, causing economic injury, but does not cause personal injury or damage to any property other than itself."[578] Thus, if the defective product damages other property, the economic loss rule does not bar recovery. However, the first question here was whether the tenant's office space and computers were "'other' property." The majority, in an extensive opinion written by Judge Gersten, thought not.[579] Judge Cope, in an equally extensive dissent, reached the contrary conclusion.[580] It is a close call. Eventually it will have to be resolved by the Supreme Court of Florida, but until that time, tenants would be well advised to provide by contract for protection from this type of harm.

The majority and the dissent also disagreed on the indemnity clause.[581] It provided that the tenant would indemnify the landlord for all claims of every kind arising from the use or occupancy of the premises. The majority found this language supported its conclusion that the tenant should be limited to contract damages because the parties negotiated the allocation of risk and agreed to place it on the tenant.[582] In contrast, the dissent focused on the omission of specific language of an intent to indemnify the landlord against its own negligence.[583] Such language would be necessary to overcome the distaste for agreements that protect a party from its own wrongful conduct.[584] Thus, it should not protect this landlord.[585]

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575. *Id.* at 1256–57.

576. *Id.* at 1257.

577. *Id.*

578. Casa Clara Condominium Ass'n. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1246 (Fla. 1993).

579. *Comptech Int'l*, 711 So. 2d at 1256–63.

580. *Id.* at 1263–68 (Cope, J., dissenting).

581. *Id.* at 1261, 1265.

582. *Id.* at 1261.

583. *Id.* at 1265. (Cope, J., dissenting).

584. *Comptech Int'l*, 711 So. 2d at 1265.

585. *Id.*

There was also disagreement as to whether the economic loss rule bared recovery for the building code violations.[586] Section 553.84 of the *Florida Statutes* provides: "*Notwithstanding any other remedies available*, any person or party . . . damaged as a result of a violation [of the Florida Building Codes Act] has a cause of action [in any court of competent jurisdiction] against the [person or] party who committed the violation."[587]

The dissent interpreted the phrase, "[n]otwithstanding any other remedies" available as creating an exception to the economic loss rule because the rule turns on the available of the contract remedy.[588] The majority, however, pointed out that the economic loss rule has been applied to bar statutory tort actions in the same way that it bars common law tort actions.[589] Unfortunately, the statutory phrase is capable of both interpretations, and only a trip to the supreme court or legislative clarification will settle the question.

Markell v. Mi Casa, Ltd.[590] The tenant sued after being injured when she tripped on the rubber weather stripping on the threshold of her apartment's front door.[591] Unfortunately, the building had been sold only two weeks before the accident.[592] In response to the present and former landlords' motions for summary judgment, she produced the affidavit of an expert in risk analysis. He stated that: 1) the weather stripping was improperly designed, installed and maintained; 2) it constituted a "hidden trap" to someone using that doorway; 3) it would not necessarily have been visible to a person entering or leaving the apartment; 4) it would have been easily noticed by a "*minimally experienced maintenance or repair individual* during the normal course of inspection at any time after the initial installation;" and 5) the weather stripping area was not regularly inspected.[593] The trial court granted summary judgment against the tenant.[594] She appealed, and the Fourth District Court of Appeal reversed.[595]

Two rules were applicable regarding the landlord's duty in the absence of a tenant waiver. First, "'the owner of a residential dwelling unit, who leases it to a tenant for residential purposes, has a duty to reasonably inspect the premises before allowing the tenant to take possession, and to make therepairs necessary to transfer a reasonably safe dwelling unit to the

586. *Id.* at 1257, 66–68.
587. *Id.* at 1266 (quoting FLA. STAT. § 553.84 (1989)).
588. *Id.*
589. *Comptech Int'l*, 711 So. 2d at 1258.
590. 711 So. 2d 583 (Fla. 4th Dist. Ct. App. 1998).
591. *Id.* at 584.
592. *Id.*
593. *Id.* at 585.
594. *Id.* at 584.
595. *Markell*, 711 So. 2d at 586.

tenant.'"[596] Secondly, once notified of a dangerous defect, the landlord has a continuing duty to exercise reasonable care to make repairs.[597] The expert's affidavit left questions of fact as to how these rules should apply to this case. Was the property in an unreasonably dangerous condition? Had it been delivered that way, or had it become dangerous after delivery? Was the prior or new landlord on constructive notice because it should have known? Was the tenant also negligent? If so, how would the parties' negligence be assessed for comparative negligence analysis purposes? In light of the unanswered questions, summary judgment should not have been granted.[598]

Chief Judge Stone, however, dissented.[599] He saw no evidence that the landlords had notice of the dangerous condition or that they might have been on constructive notice.[600] Without notice, they could not be held liable under the above rules.[601]

Morris Investment Partnership v. Figueroa.[602] The tenant leased space for an automobile repair shop. Unfortunately, the space did not have enough off-street parking to satisfy the zoning ordinance, so the tenant could not get an occupational license. That did not stop the tenant from opening for business while the landlord tried to solve the zoning problem. After the landlord's efforts failed, the tenant vacated the premises. The landlord sued for unpaid rent from the period tenant was in possession, accelerated rent, and compensation for the expenses incurred in the zoning dispute. The trial court, following a nonjury trial, granted judgment for the tenant on all counts and declared the lease to be null and void.[603] The district court reversed.[604]

The district court reasoned that declaring the lease to be null and void was inappropriate because the tenant had never sought rescission.[605] Furthermore, tenant's remaining in possession and opening for business would have been a bar to rescission anyway, and remaining in possession would have prevented tenant from raising constructive eviction as a defense to the rent suit.[606] Therefore, the landlord was entitled to rent for the period when the tenant was in possession of the premises.[607] But why only for the time tenant was in possession?

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596. *Id.* at 585 (quoting Mansur v. Eubanks, 401 So. 2d 1328, 1329–30 (Fla. 1981)).
597. *Id.*
598. *Id.* at 586.
599. *Id.* (Stone, J., dissenting).
600. *Markell*, 711 So. 2d at 586.
601. *Id.*
602. 698 So. 2d 288 (Fla. 3d Dist. Ct. App. 1997).
603. *Id.* at 290.
604. *Id.*
605. *Id.*
606. *Id.*
607. *Figueroa*, 698 So. 2d at 290–91.

Taking the court's reasoning to its logical conclusion, the landlord should have recovered the accelerated rent. The lease had a rent acceleration clause. The lease had not been rescinded. The tenant vacated while the lease was still in effect, so the landlord could exercise the acceleration clause. When the tenant later vacated, it was too late because the accelerated rent was already due; so the tenant could not raise constructive eviction as a defense to a suit for accelerated rent. However, the court failed to explain why the landlord did not win on this point as well.

Allowing rent only until the tenant vacated is consistent with an application of the construction eviction defense, i.e., the landlord was entitled to rent only until the tenant was evicted, constructively, by the landlord and not thereafter.[608] However, that is inconsistent with what the court said. Perhaps the court was basing its conclusion on failure of consideration or on the doctrine of commercial frustration. Perhaps the court was basing its opinion on an application of the doctrine of mitigation of damages. Perhaps the court was granting the landlord compensation for the use and occupancy of the land, a form of restitution damages, but that would only make sense if the court granted rescission or found the lease to be void *ab initio*. Perhaps . . .

Rodriguez v. Brutus.[609] On the lot in question were a house and a shed.[610] The tenants had an oral lease for the house that specifically excluded the shed. The tenants were specifically warned that the shed contained a working power saw and that they were not to enter. In turn, the tenants specifically warned their daughter that she was forbidden from entering the shed. There was no problem until the daughter took a wood shop class. Although she had been warned about the dangers of this type of saw by her teacher, she decided to try out the saw in the shed. As there was no door, she had no trouble entering. The experiment went badly, and she lost part of her thumb.[611] The jury held the landlord eighty percent negligent and it entered a final judgment of $300,000 for the tenants.[612] On appeal, the Third District Court of Appeal reversed.[613]

The critical point was that the shed was not part of the leased premises.[614] Consequently, the daughter was in the shed as either an uninvited licensee or as a trespasser. If she was an uninvited licensee, the landlord's duty to her was to refrain from wanton negligence or willful

608. *Id.* at 290.
609. 702 So. 2d 1302 (Fla. 3d Dist. Ct. App. 1997).
610. *Id.* at 1303.
611. *Id.*
612. *Id.*
613. *Id.*
614. *Rodriguez*, 702 So. 2d at 1303.

misconduct.[615] If she were a trespasser, the landlords' only duty to her was to refrain from committing willful or wanton injury so long as the attractive nuisance doctrine does not apply.[616] Unfortunately, the court failed to reveal why the saw was not an attractive nuisance. However, the daughter had been warned of the danger and admittedly was well aware of it, so the landlord had not breached this duty to her. Consequently, they could not be held liable.[617]

Schroeder v. Johnson.[618] The lease provided the tenant with the right "to extend this lease for successive five (5) year periods," but the lease was silent on how many renewals would be allowed.[619] The trial judge, after hearing parol evidence, interpreted this to mean that the tenant had the right to renew as long as she wished.[620] The district court reversed.[621] It acknowledged that the use of the plural word "periods" indicated more than one renewal, but that was tempered by the policy against perpetual leases.[622] The traditional rule is that a court should not find a lease to be perpetual in the absence of unambiguous language indicating that intent, and that language was missing from this lease. Therefore, the district court concluded that the lease gave the tenant the fewest possible number of plural renewals; i.e., two renewals.[623]

Judge W. Sharp strongly dissented.[624] In this case, the lease provision was not clear.[625] The trial judge heard the parol evidence, and evidence in the record supported his conclusions as to the parties' intent.[626] The policy against perpetual renewals is an ancient one that has produced strained constructions. It has outlived its original purpose and should not be used to trump the intent of the parties, particularly because interpreting the lease to provide a human tenant with the right to renew during her life would be far less than perpetual.

Serchay v. NTS Fort Lauderdale Office Joint Venture.[627] The office space was leased to Lane, P.A. and Serchay, P.A. Lane, P.A. was the law firm of Paul Lane. Serchay, P.A. was the accounting firm of Alan Serchay.

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615. *Id.*
616. *Id.* at 1304.
617. *Id.* at 1303–04.
618. 696 So. 2d 498 (Fla. 5th Dist. Ct. App. 1997).
619. *Id.*
620. *Id.* at 499.
621. *Id.*
622. *Id.* at 500.
623. *Schroeder*, 696 So. 2d at 499.
624. *Id.* at 500–03 (Sharp, J., dissenting).
625. *Id.* at 503.
626. *Id.*
627. 707 So. 2d 958 (Fla. 4th Dist. Ct. App. 1998).

Lane, P.A. subleased space to Coven, P.A. Both corporate entities were dissolved for failure to file annual reports. Later, Coven and Lane formed a new firm, Coven & Lane, P.A., and Alan Serchay formed a new accounting firm, A. Serchay Accounting Services, P.A.[628]

After the tenants vacated the premises and stopped paying rent, the landlord brought this action for unpaid rent. The tenants reinstated the defunct corporations to defend on the theory of constructive eviction. Following trial, the jury rendered a verdict in favor of the landlord against the defendants, including Coven & Lane, P.A. and A. Serchay Accounting Services, P.A.[629] The district court affirmed the judgment against A. Serchay Accounting Services, P.A., but reversed the decision against Coven & Lane.[630]

Since these corporations were not parties to the written lease, they could be held liable for the unpaid rent only if they were successor entities or if they had *de facto* merged with the tenant entities.[631] A successor entity "'is merely a continuation or reincarnation of the earlier entity under a different name'" or in a different form.[632] The key element is "'common identity of officers, directors and stockholders'" between the original and successor entity.[633] Similarly, to find a *de facto* merger requires "'continuity of the selling corporation evidenced by the same management, personnel, assets . . . physical location . . . stockholders, accomplished by paying for the acquired corporation with shares of stock; a dissolution of the selling corporation; and assumption of the liabilities.'"[634]

As to the accounting firm, there appeared to be no question that the essentials of the earlier and later firms were the same. However, there was insufficient evidence that the new law firm, consisting of two lawyers, was a successor to the earlier solo practice of one partner, or that there was a *de facto* merger of the earlier solo practice into the new partnership. Although there was evidence that the new firm used the space of the earlier solo practice and some of the equipment and personnel, it was not enough in that the new firm had a new officer and shareholder, Coven, and there was no evidence that it had acquired the assets and liabilities of the solo practice.[635]

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628. *Id.* at 959.

629. *Id.* at 959.

630. *Id.* at 960.

631. *Id.*

632. *Serchay*, 707 So. 2d at 960 (quoting Munim v. Azar, 648 So. 2d 145, 154 (Fla. 4th Dist. Ct. App. 1994)).

633. *Id.* (quoting Munim v. Azar, 648 So. 2d 145, 154 (Fla. 4th Dist. Ct. App. 1994)).

634. *Id.* (quoting Munim v. Azar, 648 So. 2d 145, 153–54 (Fla. 4th Dist. Ct. App. 1994)).

635. *Id.*

Siegel v. Deerwood Place Corp.[636] The tenants brought suit for injuries one suffered from a fall down the stairs. They produced the affidavit of an expert that construction staples were found in the area where the victim allegedly tripped on the stairway carpeting. They claimed that such staples led to the inference that the carpet was improperly installed or repaired and that there was a presumption that the landlord knew of the defect. The trial court, however, granted summary judgment to the landlord, and the Third District Court of Appeal affirmed.[637]

The rule is that, absent a waiver, the landlord has a "'continuing duty to exercise reasonable care to repair dangerous defective conditions'" of which he has notice.[638] The mere existence of the construction staples alone was not enough to establish that the landlord was on notice of the defect or had attempted to conceal it. There was no evidence to establish when the staples were installed, who installed them, or how long they were installed before the accident. Consequently, the district court affirmed the trial court's granting of summary judgment.[639]

XIV. LIENS

Morse Diesel International v. 2000 Island Boulevard, Inc.[640] The Third District Court of Appeal reversed a peremptory writ of mandamus authorizing release of a cash bond in favor of 2000 Williams Island ("Williams"), owner and developer of a 280 unit highrise condominium project.[641] The court remanded with directions that Williams redeposit disbursed proceeds from the cash bond pending further orders.[642]

Morse Diesel sued Williams Island "for money due under a construction contract."[643] The parties entered into an agreement that provided Morse Diesel with a lien on a pool of twenty condo units to secure the claim. Morse agreed to release its lien rights as to the other units.[644] "Williams . . . posted a bond on a prorated basis as to five of the units."[645] Morse asserted additional claims when another dispute arose between the parties. Williams later "filed an emergency motion for the clerk to transfer

636. 701 So. 2d 1190 (Fla. 3d Dist. Ct. App. 1997).
637. *Id.* at 1191.
638. *Id.* (quoting Mansur v. Eubanks, 401 So. 2d 1328, 1330 (Fla. 1981)).
639. *Id.* at 1192.
640. 698 So. 2d 309 (Fla. 3d Dist. Ct. App. 1997).
641. *Id.* at 310.
642. *Id.* at 313.
643. *Id.* at 310.
644. *Id.* at 311.
645. *Morse Diesel*, 698 So. 2d at 311.

all of the [existing] liens to its cash bond and to reduce Morse Diesel's amended claim of lien . . . when certain subcontractors were paid."[646]

The trial court allowed the lien transfer to a cash bond but denied Williams' request for reduction of the bond.[647] Since Williams failed to receive the bond reduction, it filed for a writ of mandamus directing the clerk to disburse the cash bond as per section 713.24(4) of the *Florida Statutes*.[648] The lower court directed the clerk to release the cash bond.[649] On appeal, the court concluded the following:

> the lower court abused its discretion in granting the writ of mandamus where (1) the record did not disclose Williams Island's clear legal right to the same in that a genuine dispute existed as to whether Morse Diesel's claim of lien had expired by operation of law; (2) Williams Island had another adequate legal remedy to procure the release of these funds; and (3) Morse Diesel was an interested party to the mandamus proceeding who had not been brought before the court.[650]

To receive a writ of mandamus, "petitioner must demonstrate a clear legalright to the performance of a ministerial duty by the respondent and that no other adequate remedy exists."[651] The court found that "Williams Island did not establish a clear legal right to [a] mandamus where the clerk's answer . . . and defenses created a genuine issue of fact about whether Morse['s] . . . claim of lien had expired and/or been satisfied."[652] Moreover, "Williams did not allege in its complaint that it had no adequate remedy at law."[653] Just because Williams was unsuccessful in getting the bond reduced did not signify such remedies were inadequate.[654]

The court also held that the writ should not have been entered when "Morse Diesel was an interested party . . . but was given no notice and opportunity to be heard on the issues."[655] In addition, it was an abuse of discretion to grant the writ to release the cash bond when the funds were in

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646. *Id.*
647. *Id.*
648. *Id.* (citing FLA. STAT. § 713.24(4) (1997)).
649. *Id.* at 312.
650. *Morse Diesel*, 698 So. 2d at 312.
651. *Id. See also* Pino v. District Court of Appeal, 604 So. 2d 1232, 1233 (Fla. 1992).
652. *Morse Diesel*, 698 So. 2d at 312.
653. *Id.*
654. *Id.*
655. *Id.*

dispute between the parties in another pending action.[656] The lower court should have required Williams Island to redeposit disbursed proceeds of the cash bond.[657]

Robinson v. Sterling Door & Window Co.[658] The issue before the court was "whether the trial court erred when applying section 55.10(1) Florida Statutes, to Appellee [Sterling's] judgment lien on Appellant [Robinson's] realty."[659]

The trial court determined that Sterling Door had a valid lien on Robinson's property.[660] Robinson claimed the lien was defective because Sterling's address was lacking as required per section 55.10(1) of the *Florida Statutes*.[661] The trial court held the statute was satisfied since the names of the attorneys involved were included in the judgment lien.[662]

Section 55.10 of the *Florida Statutes* specifically recognized: "'[a] judgment, order, or decree does not become a lien on real estate unless the address of the person who has a lien as a result of such judgment . . . is contained in the judgment.'"[663] Since courts must give effect to statutory language, the appellee's address must be on the judgment lien.[664] Without the address, there was no lien on Robinson's real estate.

Wolf v. Spariosu.[665] This court reversed final summary judgment of foreclosure which declared the Wolf Group's lien to be superior to the interests of all appellees except Maysonet Landscape Company's claim of lien.[666] The court agreed with Wolf Group that its mortgage gained priority over Maysonet through the doctrine of equitable subrogation or conventional subrogation.[667]

Maysonet and Spariosu entered into a contract for landscaping materials and services for the property.[668] Maysonet filed and duly recorded a claim of lien. At that time, two existing mortgages were recorded on the property.[669] A few months later, Spariosu executed a note and mortgage to City First

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656. *Id.*at 313.
657. *Morse Diesel*, 698 So. 2d at 313.
658. 698 So. 2d 570 (Fla. 1st Dist. Ct. App. 1997).
659. *Id.* at 571.
660. *Id.*
661. *Id. See also* FLA. STAT. § 55.10 (1997).
662. *Id.*
663. *Robinson*, 698 So. 2d at 571 (emphasis omitted) (quoting FLA. STAT. § 55.10 (1997)).
664. *Id.*
665. 706 So. 2d 881 (Fla. 3d Dist. Ct. App. 1998).
666. *Id.* at 882.
667. *Id.*
668. *Id.* at 882.
669. *Id.*

Mortgage Corp. Two prerequisites existed for the loan to Spariosu. First, the proceeds from City First's loan "were to be used . . . for the purpose of satisfying the two previously recorded mortgages."[670] Second, "City First's mortgage would be substituted in the place of [the] two prior mortgages."[671] City's mortgage was later assigned to the Wolf Group.

"Maysonet sued the borrowers . . . and recorded its notice of lis pendens."[672] When the borrowers defaulted on City's loan, Wolf Group sought to foreclose the mortgage, and Maysonet was later named as a defendant in the complaint. "The lower court . . . entered a final judgment of mortgage foreclosure finding the Wolf Group's interest . . . superior to the interests of all defendants except Maysonet."[673] Subrogation is defined as:

> "substitution of one person to the position of another with reference to a legal claim or right . . . . Th[is] doctrine is generally invoked when one person has satisfied the obligations of another and equity compels that the person discharging the debt stand in the shoes of the person whose claim has been discharged, thereby succeeding to the rights and priorities of the original creditor."[674]

This court found that "under the doctrine of conventional subrogation, the Wolf Group's lien should have been . . . superior to Maysonet's lien."[675] Evidence showed that "the borrowers had an agreement with . . . City First for City First's mortgage to be substituted in the place of the two prior . . . satisfied mortgages."[676] "Conventional subrogation" is defined by the following:

> "'[It] arises by virtue of an agreement, express or implied, that a third person or one having no previous interest in the matter involved shall, upon discharging an obligation or paying a debt, be substituted in the place of the creditor with respect to such rights, remedies, or securities as [the creditor] may have against the debtor.'"[677]

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

671. *Id.*

672. *Id.*

673. *Id.* at 883.

674. *Id.* (citation omitted) (quoting Eastern Nat'l Bank v. Glendale Fed. Savs. & Loan Ass'n, 508 So. 2d 1323, 1324 (Fla. 3d Dist. Ct. App. 1987)).

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

676. *Id.* at 884.

677. *Id.* at 883 (quoting Forman v. First Nat'l Bank, 79 So. 742 (1918) (quoting Kent v. Bailey, 164 N.W. 852, 853 (Iowa 1917))).

The court concluded that the Wolf Group's lien was entitled to priority over Maysonet's lien under the doctrine of conventional subrogation.[678]

Zalay v. Ace Cabinets of Clearwater, Inc.[679] The court affirmed final judgment in a construction lien action filed by subcontractors and materialmen.[680] Evidence supported the trial court's decision that all but one of the claims were valid and timely and created liens against the property.[681]

In 1992, Zalay contracted with Charles Walker Corporation to build a home for $360,000. Eventually, Zalay had to make only one final payment in the amount of $45,267.07. Although most of the work was completed on the home, "[s]everal of the subcontractors and materialmen remained unpaid."[682] Three lienors recorded claims totaling about $31,000 and "Artistic Surfaces . . . presented an untimely claim for $2,600."[683]

The issue before the court was "whether the language of section 713.06 [of the *Florida Statutes*] permits the attorneys' fees and costs ultimately awarded under section 713.29 to become a lien against the property."[684] The court concluded "that the limitation in section 713.06(3)(h) is intended to define the extent of the lien for the lienor's materials or services prior to litigation, and is not intended to preclude a lien for costs and attorneys' fees in a lien foreclosure action."[685] The court found it important to examine section 713.06(1).[686] This statute provides:

> A materialman or laborer, either of whom is not in privity with the owner, or a subcontractor . . . who complies with the provisions of this part and is subject to the limitations thereof, has a lien on the real property improved for any money that is owed to him for labor.[687]

There is nothing in this statute that expressly provides a lien for attorneys' fees and costs.[688]

Construction lien statutes should not be liberally construed in favor of any person.[689] "[A]ttorneys' fees awarded under section 713.29 are not an

678. *Id.* at 884.
679. 700 So. 2d 15 (Fla. 2d Dist. Ct. App. 1997).
680. *Id.* at 16.
681. *Id.*
682. *Id.*
683. *Id.* at 17.
684. *Zalay*, 700 So. 2d at 17.
685. *Id.*
686. *Id.*
687. *Id.* (quoting FLA. STAT. § 713.06(1) (1993)).
688. *Id.*
689. *Zalay*, 700 So. 2d at 17.

element of damages, but are 'taxed as part of . . . costs.'"[690] The court saw "no reason why the costs involved in a construction lien action should not be included within the lien."[691]

Legislative changes to Chapter255 of the *Florida Statutes* include, but are not limited to, the following:

With respect to public lands and property, section 255.05(2)(a) now provides that where a claimant is no longer furnishing labor on a project, "a contractor, or [its] agent or attorney may elect to shorten the prescribed time . . . within which an action to enforce any claim against a payment bond" may be made.[692] This may be done by filing a "NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND."[693] The form and procedure for such are set out in the above referenced statute.[694]

Legislative changes to Chapter 713 of the *Florida Statutes* include, but are not limited to, the following:

Section 713.01(12) is amended to include in the definition of "[i]mprove" a provision for solid waste collection or disposal on the site of the improvement.[695] Likewise, the definitions for "[i]mprovement", "[s]ubcontractor," and "[s]ub-subcontractor" have been amended to reflect the same.[696]

Section 713.23(1)(e) has been amended to provide a shortening of time for a contractor to claim against a payment bond.[697] This statute provides for a form for filing a "NOTICE OF CONTEST OF CLAIM AGAINST PAYMENT BOND."[698] Comparatively, section 713.235(1) provides for a form for a "[w]aiver of right . . . against the payment bond."[699]

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690. *Id.* at 18 (quoting Ceco Corp. v. Goldberg, 219 So. 2d 475 (Fla. 3d Dist. Ct. App. 1969)).

691. *Id.*

692. Act of May 22, 1998, ch. 98-135, § 1, 1998 Fla. Laws 913, 914 (to be codified at FLA. STAT. § 255.05(2)(a)1).

693. *Id.*

694. *Id.*

695. Act of May 22, 1998, ch. 98-135, § 2, 1998 Fla. Laws 917, 917 (amending FLA. STAT. § 713.01(12)).

696. Act of May 22, 1998, ch. 98-135, § 2, 1998 Fla. Laws 917, 917 (amending FLA. STAT. § 713.01(13), (26), (27)).

697. Act of May 22, 1998, ch. 98-135, § 6, 1998 Fla. Laws 920, 921 (amending FLA. STAT. § 713.23(1)(e)).

698. *Id.*

699. Act of May 22, 1998, ch. 98-135, § 7, 1998 Fla. Laws 921, 921 (to be codified at FLA. STAT. § 713.235).

XV. MORTGAGES

Alafaya Square Ass'n. v Great Western Bank.[700] The court granted appellee's motion for rehearing of the opinion dated February 7, 1997.[701] This opinion was entered in place of the previous one.[702] The court reversed the trial court's order appointing a receiver because "there was no showing that Alafaya wasted or impaired the . . . real property."[703] Alafaya owned a shopping center "encumbered by a mortgage in favor of the appellee, WHC-One."[704] If there was a default on the mortgage, Alafaya agreed to have a receiver appointed. After the loan matured, Alafaya did in fact default on payment, and WHC-One ("WHC") sued to foreclose and requested the appointment of a receiver.[705]

The trial court granted WHC's motion to sequester the rents received from the shopping center's tenants.[706] All rent collected was placed in escrow, and Alafaya could not expend funds from the account without the court's approval. Alafaya requested use of escrow funds from WHC to do repairs, but after Alafaya received no response, it requested permission from the trial court to expend the funds.[707] Alafaya later requested WHC's consent to withdraw escrow funds for payment of real estate taxes.[708] WHC again failed to answer. In response to Alafaya's request for funds to repair, "WHC filed a motion for appointment of receiver alleging an 'apparent waste to the property.'"[709]

The trial court granted WHC's motion for the appointment of a receiver, and Alafaya appealed arguing that evidence failed to show Alafaya wasted or impaired the property.[710] "The appointment of a receiver in a foreclosure action is not a matter of right . . . it is an extraordinary remedy."[711] The receiver's role "is to preserve the value of the secured property."[712] The trial court can appoint a receiver, but it can only do so if

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700. 700 So. 2d 38 (Fla. 5th Dist. Ct. App. 1997).
701. *Id.* at 39.
702. *Id.*
703. *Id.*
704. *Id.*
705. *Alafaya Square,* 700 So. 2d at 39.
706. *Id.*
707. *Id.*
708. *Id.*
709. *Id.*
710. *Alafaya Square,* 700 So. 2d at 40.
711. *Id.* (citing Barnett Bank of Alachua County v. Steinberg, 632 So. 2d 233, 234 (Fla. 1st Dist, Ct. App. 1994)).
712. *Id.* (citing Barnett Bank of Alachua County v. Steinberg, 632 So. 2d 233, 235 (Fla. 1st Dist. Ct. App. 1994).

evidence suggests the secured property was being wasted or subject to serious risk of loss.[713]

The appellate court agreed that "the evidence . . . [did] not constitute waste or impairment."[714] The only waste could be "the disrepair to the parking lot and the exterior paint."[715] Alafaya took timely action to get WHC to release the funds. As such, there could be no waste since the failure to repair was due to WHC's refusal to release the funds.[716] The court reversed because the facts did not justify the remedy of receivership.[717]

Beach v. Ocwen Federal Bank.[718] In 1986, the appellants, the Beaches, "refinanced their Florida house in 1986 with a loan from Great Western Bank."[719] In 1991, the appellants stopped making their mortgage payment, and in 1992 Great Western began this foreclosure proceeding.[720] The appellants "acknowledged their default but raised affirmative defenses, alleging . . . that the bank's failure to make disclosures required by the Truth in Lending Act gave them the right under 15 U.S.C. § 1635 to rescind the mortgage agreement."[721] The appellee, Ocwen, argued that the right to rescind expired since Section 1635(f) of the *United States Code* provides that the right of rescission shall expire three years after the closing of the loan.[722] However, the appellants argued the three years provision only pertains to the actual affirmative right of rescission and that there is no statute of limitations or expiration of permitting rescission by a recoupment defense.[723] The trial court, the Fourth District Court of Appeal, and the Supreme Court of Florida rejected that defense, holding that the right to rescind expired in three years under the plain language of section 1635(f).[724] The United States Supreme Court affirmed the decision made by all of the courts below.[725]

The purpose of the Act is "'to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various

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

714. *Id.*

715. *Alafaya Square*, 700 So. 2d at 40.

716. *Id.*

717. *Id.* at 41.

718. 118 S. Ct. 1408 (1998).

719. *Id.* at 1408.

720. *Id.*

721. *Id.*

722. *Id.*

723. *Ocwen*, 118 S. Ct. at 1409.

724. Beach v. Great W. Bank, 692 So. 2d 146 (Fla. 1997); Beach v. Great W. Bank, 670 So. 2d 986 (Fla. 4th Dist. Ct. App. 1996); *see* 15 U.S.C. § 1635(f) (1994).

725. *Ocwen*, 118 S. Ct. at 1411.

credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.'"[726] The Act gives the borrower a right to rescind without being liable for any finance or other charge; however, this right expires three years "'after the date of consummation of the transaction or upon the sale of the property, whichever occurs first.'"[727] The Supreme Court held that the Act does not give the borrower a right of rescission as an affirmative defense after this three-year period.[728]

The Court stated the question to decide was "whether [section] 1635(f) is a statute of limitation, that is, 'whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim' or 'merely to bar the remedy for its enforcement.'"[729] The Court held that "the answer is apparent from the plain language of [section] 1635(f)."[730] The Court stated that section 1635(f) states nothing about the time period in bringing an action, but instead speaks only to when the right of rescission terminates; therefore, the Supreme Court held the right was meant to be limited,[731] and it affirmed the judgment of the Supreme Court of Florida.[732]

Blatchley v. Boatman's National Mortgage, Inc.[733] The appellate court affirmed an order denying Blatchley's motion to vacate the foreclosure sale of his home.[734] The summary final judgment in foreclosure stated the sale date was January 9, 1997.[735] Boatman's moved for an order changing the sale date to January 7, because the ninth was a "scrivener's error" and because the published notice of foreclosure sale contained the correct date of January 7, 1997.[736] The court granted the date change.[737]

However, Blatchley failed to get notice of the new sale date until a day after the actual sale took place.[738] In addition, Blatchley only got Boatman's motion to change the date on January 10, 1997.[739] Blatchley sought to

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726. *Id.* at 1409–10 (quoting 15 U.S.C. § 1601(a) (1994)); *see* Mourning v. Family Publications Serv., 411 U.S. 356, 363–68 (1973).

727. *Beach*, 118 S. Ct. at 1410 (quoting 15 U.S.C. § 1635(f) (1994)).

728. *Id.*

729. *Id.* at 1412 (quoting Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U.S. 356, 358–59 & n.4 (1943)).

730. *Id.* at 1412. *See* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993).

731. *Beach*, 118 S. Ct. at 1412.

732. *Id.* at 1413.

733. 706 So. 2d 317 (Fla. 5th Dist. Ct. App. 1997).

734. *Id.* at 317.

735. *Id.*

736. *Id.*

737. *Id.*

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

739. *Id.*

vacate the sale, since he never got proper notice of the correct sale date. As such, he could not exercise his right of redemption or reinstatement and could not participate in the sale or protect his property interest.[740] "The trial court denied the motion to vacate the sale," but gave Blatchley fifteen days from the order date to pay the judgment amount.[741] Instead of taking advantage of the increased redemption period that was offered, Blatchley filed a notice of appeal.[742]

Section 45.031 of the *Florida Statutes* requires that a "final judgment of foreclosure specify a day for the sale and that the notice of the sale be published for two weeks, the second of which publication 'shall be at least 5 days before the sale.'"[743] This statute was not satisfied. However, even though Blatchley did not receive proper notice, the court remedied the error by extending the redemption period.[744] "Foreclosure suits are governed by equitable principles."[745] The trial court "did equity" by extending the redemption period.[746] "[N]othing [would] be accomplished by reversing for a new judgment and sale date."[747]

Clearman v. Dalton.[748] Clearman recovered a judgment for $150,000 against Dalton. Dalton filed for bankruptcy and revealed two secured mortgages against his homestead. The first was in favor of his son in the amount of $15,000, and the second was in favor of Monticello Bank for $50,000.[749] The mortgage in favor of the son was never recorded, and the bank's mortgage was recorded but not delivered.[750] "The trustee... obtained an order from the Bankruptcy Court avoiding the mortgages, thus preserving the avoided obligations 'for the benefit of the estate.'"[751] The trustee assigned the mortgages to the Clearmans who recorded the assignment and judgments avoiding the mortgages and preserving the avoided obligations.[752]

The trial court denied the foreclosure petition filed by Clearman.[753] The appellate court agreed with the trial court that section 544 of chapter11 of

740. *Id.* at 318.
741. *Id.* at 317–18.
742. *Id.* at 318.
743. *Blatchley*, 706 So. 2d at 318 (quoting FLA. STAT. 45.031 (1997)).
744. *Id.*
745. *Id.* (citing FLA. STAT. § 702.01 (1995)).
746. *Id.*
747. *Id.*
748. 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998).
749. *Id.* at 325.
750. *Id.*
751. *Id.*
752. *Id.*
753. *Clearman*, 708 So. 2d at 325.

the *United States Code* did "not place the Trustee (or the Trustee's assignees) in the place of the former mortgagees with the power to foreclose."[754] The court believed the bankruptcy estate had an assignable interest in the mortgage subject to Dalton's homestead claim.[755]

The assignees could assert their interest and require Dalton to establish "fact of homestead."[756] Filing of judgments entered by the Bankruptcy Court did not constitute slander of title.[757] When the Daltons "filed their bankruptcy petition and submitted their property, subject to provable exemptions," they could not complain "if the assignee of the estate's interest requires that they prove entitlement to the homestead exemption."[758]

Crane v. Barnett Bank.[759] The court affirmed an amended final judgment as to the terms of rescission of the mortgage agreement, except as to the effective date the rate of interest charged to the borrower should run.[760] The court reversed the denial of the borrower's motion for partial summary judgment on liability and vacated the provision for foreclosure of the subject mortgage if the borrower failed to satisfy the conditions for rescission within 45 days.[761]

"The bank sued for foreclosure when a construction loan matured and the borrower's wife refused to sign a modification of [their] mortgage agreement."[762] The borrower "had not defaulted under the construction loan phase of the agreement" since the borrower's payments had been refused, thus "preventing [such] borrower from performing under the agreement."[763] The borrower's bank had no written agreement that required the wife's signature on the mortgage.[764] In addition, the bank's allegations of liability against the borrower did not include the wife's refusal to sign a mortgage modification.[765]

On appeal, borrower claimed the trial judge erred in denying his motion for summary judgment because the borrower had offered to make payments but was refused.[766] "The trial court should have granted the borrower's

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754. *Id.*
755. *Id.*
756. *Id.*
757. *Id.*
758. *Clearman*, 708 So. 2d at 325.
759. 698 So. 2d 902 (Fla. 4th Dist. Ct. App. 1997).
760. *Id.* at 905.
761. *Id.* at 905–06.
762. *Id.* at 903.
763. *Id.*
764. *Crane*, 698 So. 2d at 903.
765. *Id.*
766. *Id.* at 904.

motion for partial summary judgment."[767] "[T]he bank's complaint . . . did not include allegations that the borrower defaulted by failing to have his wife sign the mortgage modification."[768] "[T]he sole basis for default was the borrower's failure to pay the mortgage."[769] As such, no material issue of fact on the question of liability for foreclosure existed.

The second issue on appeal was "whether the trial court's order allowing rescission 'ab initio' of the parties' mortgage agreement properly restored each party to status quo."[770] "[T]he trial court erred in assessing two different rates of interest as a condition for rescission of the parties' agreement 'ab initio.'"[771]

> [Since] there was only one integrated mortgage agreement . . . and its nullification is "ab initio," the borrower should not be penalized with a higher rate of interest if it was the bank's own refusal to accept payments that led to recission, simply because the mortgage agreement provided for two phases of the loan.[772]

The appellate court found no error in the imposition of a "costs of funds" rate of interest and payment required by the borrower as a cost of rescission.[773] It had "no record establishing the basis for foreclosure within 45 days if the borrower fails to make rescission as required in the amended final judgment."[774]

Since the trial court "erred in denying the borrower's motion for partial summary judgment on the bank's action for foreclosure," the bank had "no basis for foreclosure under the mortgage agreement of the parties even if the borrower [could not] restore the bank to status quo in 45 days."[775] "'[F]oreclosure on an accelerated basis may be denied where . . . payment was not made due to . . . excusable neglect, coupled with some conduct of the mortgagee which in a measure contributed to the failure to pay when due.'"[776] Acceleration of the balance and foreclosure of the mortgage agreement was declared premature on this record.[777]

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767. *Id.*
768. *Id.*
769. *Crane*, 698 So. 2d at 904.
770. *Id.*
771. *Id.*
772. *Id.* at 904.
773. *Id.* at 904–05.
774. *Crane*, 698 So. 2d at 904.
775. *Id.* at 905.
776. *Id.* (quoting Campbell v. Werner, 232 So. 2d 252, 256–57 (Fla. 3d Dist. Ct. App. 1970) (citing Lunn Woods v. Lowery, 577 So. 2d 705 (Fla. 2d Dist. Ct. App. 1991))).
777. *Id.*

Culpepper v. Inland Mortgage Corp.[778] The issue on appeal was "whether a mortgage lender's payment of a 'yield spread premium' to a mortgage broker violates the antikickback provision of the Real Estate Settlement Procedures Act" ("RESPA").[779]

Inland gave Culpepper a federally insured home mortgage loan[780] However, rather than dealing direct with Inland, Culpepper dealt only with the mortgage broker, Premiere Mortgage Company.[781] "On December 7, 1995, Premiere received a rate sheet from Inland and informed the Culpeppers that a 30-year loan was available at a 7.5% interest rate."[782] Culpepper accepted the rate. However, Culpepper did not know that the rate "was higher than Inland's par rate on [the] 30-year loans and carried a yield spread premium of 1.675% of the loan amount."[783] Also, Culpepper did not know that, as a result of the spread, Inland would be paying Premiere the premium for the higher rate, even though Culpepper paid Premiere a loan origination fee for its assisting them in obtaining and closing their loan. Once having discovered this, Culpepper challenged "the legitimacy of Inland's yield spread premium payment under RESPA."[784]

Noting that no federal circuit court has addressed this issue and the federal district courts that have addressed it are divided, the Eleventh Circuit Court of Appeals presented its own analysis.[785] In so doing, it determined that the yield spread premium under these facts was a nonexempt referral fee violating RESPA section 2607(a).[786]

The court's analysis began with the statutory prohibitions and exemptions.[787] Chapter 12, section 2607(a) of the *United States Code* prohibits kickbacks and referral fees pursuant to an agreement regarding federally related mortgages.[788] Section 2607(c) exempts from that prohibition payment for goods or services actually performed.[789]

The first question was whether the payment to Premiere was a referral fee. The court noted that it would constitute such if "(1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement

778. 132 F.3d 692 (11th Cir. 1998).
779. *Id.* at 694 (citation omitted); *see also* 12 U.S.C. § 2601 (1994).
780. *Culpepper*, 132 F.3d at 694.
781. *Id.*
782. *Id.*
783. *Id.*
784. *Id.*
785. *Culpepper*, 132 F.3d at 695; *see* 12 U.S.C. § 2607(a) (1994).
786. *Culpepper*, 132 F.3d at 696.
787. *Id.*
788. 12 U.S.C. § 2607(a) (1994)
789. *Culpepper*, 132 F.3d at 696 (citing 12 U.S.C. § 2607(c) (1994)).

business and (3) a referral actually occurs."[790] Here, Inland gave Premiere value by paying the spread premium. The payment was pursuant to an agreement to refer settlement business because the premium was to be paid for Premiere's registering loans with Inland which funded the loans. There was an actual referral when Premiere registered the loan with Inland.[791]

The next question was whether section 2607(c) exempted the transaction as a payment for goods or services. As to whether there was a payment for goods, the appellate court noted this was not satisfied since Inland funded the loan from the beginning.[792] It was not one owned by Premiere and subsequently sold to Inland, as might be done with loans sold in the permitted secondary mortgage market sales. The court noted that even if Premiere were selling to Inland its right to direct the loan's disposition to a number of wholesale lenders, such would not be an exempt sale of goods, because paying a referral fee for "directing" the business violates RESPA.[793] Therefore, the premium did not fit the sale of goods exemption.[794]

As to whether the premium was paid for Premiere's services, the appellate court first looked at the services Premiere provided Culpepper, obtaining and closing the loan.[795] It found that the facts clearly showed Culpepper had already paid Premiere for these services.[796] It also identified logically that the premium for Premiere's generating a higher loan rate was not a service to Culpepper.[797] So, the premium could not be for a service to Culpepper.[798]

Next, the court examined whether the premium was for a service to Inland.[799] However, there was no additional service to Inland. The premium was based solely on the higher interest rate.[800] Because Premiere provided no additional service to Inland over what it would have provided with a loan of a lower rate, the payment did not fit the sale of services exemption.[801] Having found the transaction violated RESPA's prohibitions, the court reversed and remanded to the district court noting that the market value test utilized by the trial court was inappropriate, since that test applies only to

790. *Id.* at 695–96.
791. *Id.* at 696.
792. *Id.*
793. *Id.*
794. *Culpepper*, 132 F.3d at 697.
795. *Id.* at 696–97.
796. *Id.* at 696.
797. *Id.* at 697.
798. *Id.*
799. *Culpepper*, 132 F.3d at 697.
800. *Id.*
801. *Id.*

facially permissible transactions, and it directed the trial court to consider *ab initio* Culpepper's motion for class certification.[802]

Dove v. McCormick[803] This court affirmed the trial court's order granting final summary judgment in favor of McCormick.[804] Dove executed a mortgage in favor of The First, F.A. that encumbered Orange County real property.[805] The transaction was subject to Truth in Lending Act requirements. Later on, The First was declared "troubled," and the Resolution Trust Corporation ("RTC") was appointed receiver to liquidate The First's assets.[806] "RTC assigned Dove's mortgage to Blazer Financial Services," which later assigned the mortgage to John McCormick.[807] Since Dove failed to make monthly payments, McCormick sued to foreclose.[808]

"The trial court entered final summary judgment [in McCormick's favor], concluding that Dove's [posed] defenses pertaining to rescission and recoupment were barred by the statute of limitations."[809] "Dove sought to assert her statutory right to rescission based upon alleged violations of [Truth in Lending Act] and Regulation Z."[810] Dove also argued for recoupment under section 1640(e).[811] The appellate court affirmed the trial court's ruling in denying Dove's claim of recission because "'under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f).'"[812]

Section 1635(f) provides "when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right."[813] Dove may not seek the remedy of recission under the guise of an affirmative defense of recoupment as a means of getting around the three year statute of limitations.[814]

Floyd v. Federal National Mortgage Ass'n.[815] Floyd "appeal[ed] a post-judgment final order denying [the] 'Motion to Vacate Final Judgment

802. *Id.* at 697.
803. 698 So. 2d 585 (Fla. 5th Dist. Ct. App. 1997).
804. *Id.* at 586.
805. *Id.*
806. *Id.*
807. *Id.*
808. *Dove*, 698 So. 2d at 586.
809. *Id.*
810. *Id.* at 587.
811. *Id.*
812. *Id.* at 588 (quoting Beach v. Great W. Bank, 692 So. 2d 146, 153 (Fla. 1997)).
813. *Dove*, 698 So. 2d at 588.; *see Beach*, 692 So. 2d at 152 (quoting Bowery v. Babbit, 128 So. 801, 806 (Fla. 1930)).
814. *Dove*, 698 So. 2d at 588; *Culpepper*, 132 F.3d at 695–96.
815. 704 So. 2d 1110 (Fla. 5th Dist. Ct. App. 1998).

and Set Aside Foreclosure Sale.'"[816] Federal National filed a complaint seeking to foreclose upon a first mortgage against Pamela Johnson.[817] The mortgage encumbering the home was executed by Pamela and her then husband, Vernon Floyd, in the original principal amount of $11,000. After their divorce and Pamela's subsequent death, Vernon resided within the home with the children, and the mortgage went into default with the remaining balance of $3,045.96.[818]

Personal service of the complaint could not be made "because the sheriff's process server could not locate the property."[819] The death of Pamela was never confirmed. Federal National filed an amended complaint naming Pamela Johnson or her heirs as defendant. Afterwards, Federal National filed an Affidavit of Constructive Service alleging that the heirs could not be found after diligent search.[820]

After a second letter was sent to Vernon "specifying the amount necessary to reinstate the mortgage," the trial court entered final summary judgment in favor of Federal National.[821] Vernon was notified to vacate the premises after the foreclosure sale. The trial court denied Vernon's motion to set aside the sale.[822] The appellate court agreed with Vernon that Federal National failed to conduct a diligent search.[823]

Prior to constructive notice, a plaintiff must first file an affidavit showing "that a diligent search has been made to discover the names and addresses of the defendants."[824] In this case, Federal National's affidavit stated that the Social Security Administration database was searched for probate records and vital statistics without success.[825] The records did confirm that Pamela Johnson was deceased.[826] Federal National did not locate the property, inquire into those in possession of the property, or talk with neighbors, relatives, or friends.[827]

Federal National's failure to pursue Vernon after his previous inquiries about reinstating the mortgage shows that Federal National never

816. *Id.* at 1111.
817. *Id.*
818. *Id.*
819. *Id.*
820. *Floyd*, 704 So. 2d at 1111.
821. *Id.*
822. *Id.* at 1111–12.
823. *Id.* at 1112.
824. *Id.* (citing FLA. STAT. §§ 49.03(1), .041(1), .071 (1995)).
825. *Floyd*, 704 So. 2d at 1112.
826. *Id.*
827. *Id.*

"reasonably employ[ed] the knowledge at [its] command."[828] Federal National failed to conduct a diligent search and inquiry as required by the constructive notice statute by completely ignoring the parties in possession of the premises.[829]

"Strict compliance with constructive service statutes is required."[830] The record showed a diligent effort to find the information needed in order to accomplish personal service on those in possession of the property was not made.[831] The appellate court believed Federal National "would have learned additional facts necessary to accomplish personal service if someone had found" the property and went there to see who had possession.[832]

Kirkland v. Miller.[833] Kirkland appealed Final Judgment of Ejectment awarded in favor of Sportsmen's, the "original owner of the subject real property."[834] The trial court stated Kirkland only had "a beneficial interest in an Illinois land trust."[835] Thus, ejectment was a proper remedy. The trial court determined there was only a personal property interest, and foreclosure was unnecessary.[836] The appellate court reversed.[837]

Miller was a trustee with legal and equitable title to the property identified in the trust. Sportsmen's and Mary Shearer, the principals, only had a beneficial interest. Miller went about explaining the documents for closing to Kirkland, which included a contract showing Sportsmen's sale of the beneficial interest to Kirkland for $40,000.[838] Kirkland executed a security agreement which assigned the beneficial interest back to Miller as security for the $40,000 debt recognized as a "'Purchase Money Mortgage' and include[ed] a charge for 'State Documentary Stamps on Deed.'"[839] Kirkland was to make monthly payments for twenty years, and if default occurred, there would be an "automatic assignment" of the entire beneficial interest to Sportsmen's.[840] After default, Miller was to sell the trust property, and after costs and fees were paid out, the balance of the sale

828. *Id.* (quoting Batchin v. Barnett Bank, 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994) (quoting Canzoniero v. Canzoniero, 305 So. 2d 801, 803 (Fla. 4th Dist. Ct. App. 1975))).

829. *Id.*

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

831. *Id.*

832. *Id.* at 1113.

833. 702 So. 2d 620 (Fla. 4th Dist. Ct. App. 1997).

834. *Id.* at 620.

835. *Id.*

836. *Id.*

837. *Id.*

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

839. *Id.* at 621.

840. *Id.*

proceeds was to be delivered to Kirkland. Kirkland believed that a mortgage was created.[841]

Pursuant to section 697.01 of the *Florida Statutes*, an instrument is said to be a mortgage if, "when taken alone or in conjunction with surrounding facts, it appears to have been given for the purpose of securing payment of money."[842] "Whenever property belonging to one person is held by another as security for [a debt], the transaction is considered a mortgage.[843]

The transaction in this case "was not a valid Illinois land trust; it was a mortgage securing indebtedness."[844] If there were default, Kirkland's interest in the property reverted to Sportsmen's.[845] As such, the transaction was deemed "a mortgage subject to the rules of foreclosure."[846]

Najera v. Nationsbank Trust Co.[847] Najera "appeal[ed] from a final summary judgment of foreclosure by NationsBank."[848] The appellate court reversed because it believed "issues of material fact" remained on the record "which should not [be] disposed of by summary judgment."[849]

Najera's deposition showed that he requested a copy of the property appraisal but never obtained it. General Development Corporation said it would take care of the appraisal because "'no bank would loan out more money on a loan . . . than the value of the property.'"[850] Najera paid a fee for the appraisal, with the understanding that it "was being done to verify the property would provide the lending institution with sufficient collateral for the loan."[851]

The appellate court believed "the allegations and [the] record creat[ed] issues of fact concerning whether the Najeras relied upon the existence of a professional appraisal to support the loan values, and whether they would have entered into this transaction had those representations not been made."[852] The record here established far more than the assertion of inflated values.

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841. *Id.*

842. *Id.* (quoting Hialeah, Inc. v. Dade County, 490 So. 2d 998 (Fla. 3d Dist. Ct. App. 1986) (citing Cinque v. Buschlen, 442 So. 2d 1034 (Fla. 3d Dist. Ct. App. 1983))); *see* FLA. STAT. § 697.01 (1985).

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

844. *Id.*

845. *Id.*

846. *Id.* at 622.

847. 707 So. 2d 1153 (Fla 5th Dist. Ct. App. 1998).

848. *Id.* at 1154.

849. *Id.*

850. *Id.* (quoting deposition).

851. *Id.*

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

> G[eneral] D[evelopment] C[orporation] and GDV [Financial Corporation] collectively misrepresented the value of the lot the Najeras already owned, the value of the condo for which they were induced to swap the lot, the fact that they were to have conventional financing (at least a 25% equity-to-loan ratio), that the rental market in the area was sufficiently strong to cover their mortgage payments, that the resale market for GDC properties was strong at the false sales prices, and that there existed and would be provided a professional appraisal to back up the value of the property provided to them.[853]

The appellate court recognized that "[i]f the alleged course of fraudulent conduct on the part of GDC and GDV [were] established at trial, and if it is shown was reasonably relied upon by the Najeras, these proofs could provide them with a defense to this foreclosure action."[854]

Southeast & Associates, Inc. v. Fox Run Homeowners Ass'n.[855] The issue before the court was "whether the owners may set aside a foreclosure sale [where constructive service was] based on affidavits of diligent search and inquiry which were facially sufficient and complied with the statutory requirements."[856]

On July 1, 1995, an association assessment for semiannual maintenance became due. Albert and Rose Love received a notice of delinquency from the association. The notice stated that the association could file a lien against the home and foreclose at a later date.[857] When the Loves failed to pay the assessment, a lien was filed against the property. A partial payment was made which the association returned with a notice stating that if full payment were not made, a foreclosure suit would be initiated.[858]

When the association planned to foreclose, it hired a process server to serve the Loves. The server failed to recognize that the Loves were at their New York address and attempted numerous times to serve them at their Fox Run address and at another Florida address said to be attributed to them.[859] Since personal service was not able to be made, the association served by publication after filing an affidavit of diligent search and an affidavit of constructive service.[860] Final summary judgment of foreclosure was filed

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853. *Id.*
854. *Id.*
855. 704 So. 2d 694 (Fla. 4th Dist. Ct. App. 1997).
856. *Id.* at 695.
857. *Id.*
858. *Id.*
859. *Id.*
860. *Fox Run*, 704 So. 2d at 695.

against the Loves.[861] Southeast and Associates, the successful bidder at the foreclosure sale, received a certificate of title. In return, the Loves made a motion "to set aside the sale based on an insufficient service of process."[862] "The trial court entered an order finding lack of diligent search and inquiry by Fox Run Association, and [set] aside the foreclosure sale."[863]

Section 49.041 of the *Florida Statutes* provides that:

> a person may be served by publication upon verified statement showing on its face that [a] "diligent search and inquiry have been made to discover the name and residence" of the [individual] being served. If the court finds that the verified statement is defective, or the diligent search is deficient, the court must [decide] "whether the trial court's judgment of foreclosure would be void or voidable."[864]

If voidable, a foreclosure sale resulting from constructive service cannot be set aside as against a bona fide purchaser.[865]

The plaintiff here followed the favored approach. It "filed a detailed affidavit listing the [many] attempts [to deliver] personal service, the contact with the neighbors, the two skip traces, and the trip to a retail establishment where the process server learned that the lessee had moved out in the middle of the night."[866]

Also, "'where one of two innocent parties must suffer a loss as the result of the default of another, the loss shall fall on the party who is best able to avert the loss and is the least innocent.'"[867] The Loves did not make the requisite maintenance payment and could have told the Association of their move to New York.[868] In addition, someone on the Loves' behalf kept signing the certified letters and made partial payments.[869]

United Companies Lending Corp. v. Abercrombie.[870] The issue presented was whether "the circuit court abused its discretion when it declined to set aside a mortgage foreclosure sale of real property."[871] The

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861. *Id.* at 695.
862. *Id.* at 696.
863. *Id.*
864. *Id.* (quoting Batchin v. Barnett Bank, 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994)).
865. *Fox Run*, 704 So. 2d at 696.
866. *Id.*
867. *Id.* at 697 (quoting Jones v. Lally, 511 So. 2d 1014, 1016 (Fla. 2d Dist. Ct. App. 1987)).
868. *Id.*
869. *Id.*
870. 713 So. 2d 1017 (Fla. 2d Dist. Ct. App. 1998).
871. *Id.* at 1018.

appellate court held that the circuit court was mistaken in its view of what its scope of discretion is in such a matter.[872]

United Companies Lending Corporation sued to foreclose its mortgage on a residence owned by the appellee. "The circuit court entered a final judgment . . . and scheduled a foreclosure sale to be held at the Sarasota County Courthouse."[873] United's counsel agreed to attend the sale, but due to an illness in the attorney's family, United sent another attorney to appear. That attorney arrived early for the foreclosure sale at the wrong courthouse, and only five minutes before the sale, the clerk informed him that the sale was to be held in Sarasota. The clerk in Sarasota declined to delay the bidding. By the time another attorney arrived, the property had been sold to Darrell Crane for $1,000.[874]

United filed an objection to the sale and a motion to have the sale set aside on the grounds that there was a "gross inadequacy of price and the mistaken failure of its agent to attend."[875] Evidence at the hearing proved that the property was worth over $125,000.00 and that United was going to bid as high as $181,898.82.[876] Crane testified that he would have bid up to $115,000.00.[877]

The circuit court found that the price paid for the property at the sale was grossly disproportionate.[878] However, it denied United's motion because the court found that the "inadequate price resulted from the unilateral mistake of United's [counsel], and not from any mistake, misconduct, or irregularity on the part of . . . anyone else who participated in the sale."[879] The circuit court cited *Wells Fargo Credit Corp. v. Martin*[880] and *Sulkowski v. Sulkowski*[881] for authority.[882] The appellate court decided the circuit court mistakenly believed that this appellate court, unlike the third and fourth districts, determined that the mistake cannot be a unilateral mistake by the complaining party.[883] However, the law of this appellate district does not differ from the other districts and follows the holding in *Arlt v. Buchanan.*[884] In *Arlt*, the general rule that came about was

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872. *Id.*
873. *Id.*
874. *Id*
875. *Abercrombie*, 713 So. 2d at 1018.
876. *Id.*
877. *Id.*
878. *Id.*
879. *Id.*
880. 605 So. 2d 531 (Fla. 2d Dist. Ct. App. 1992).
881. 561 So. 2d 416 (Fla. 2d Dist. Ct. App. 1990).
882. *Abercrombie*, 713 So. 2d at 1018.
883. *Id.* at 1018–19.
884. *Id.* (citing Arlt v. Buchanan, 190 So. 2d 575 (Fla. 1966)).

> that standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct, or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result.[885]

This court did not construe "person connected with the sale" to mean that it had to be a person who was physically present at the sale.[886] So, the circuit court mistakenly read this court's past opinions to the contrary.[887]

Whether the complaining party has made the showing necessary to set aside a foreclosure sale is a discretionary decision that may be reversed only when the court has grossly abused its discretion.[888] The court found that in the present case, the circuit court's discretion was restricted by a mistaken understanding of the law in this district and reversed and remanded for reconsideration.[889] The court stated no opinion as to the balance of equities in this case, but stated that, in one set of circumstances, "the fact that the inadequate sale price was caused by the complaining party's own mistake might tip the balance of equities in favor of the successful bidder; in another case, it might not."[890]

XVI. OPTIONS AND RIGHTS OF FIRST REFUSAL

Holloway v. Gutman.[891] The evidence presented was that the parties had a three-year lease with a purchase option. When that lease was about to expire, they negotiated a renewal. The landlord tendered a copy of the original with the term "whited-out."[892] They never did expressly agree to a particular length. The tenant testified that he thought it would be for another three years, but the landlord testified that the tenant had said that he simply did not care; so they never reached an exact length. Because the option lacked an essential term so it was not complete, there was no meeting of the minds. There was no contract, oral or written.[893]

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885. Arlt v. Buchanan, 190 So. 2d 575, 577 (Fla. 1966) (citations omitted).
886. *Abercrombie*, 713 So. 2d at 1019.
887. *Id.* at 1018.
888. *Id.*; *see* RSR Investments, Inc. v. Barnett Bank, 647 So. 2d 874 (Fla. 2d Dist. Ct. App. 1994).
889. *Abercrombie*, 713 So. 2d at 1019–20.
890. *Id.* at 1019.
891. 707 So. 2d 356 (Fla. 5th Dist. Ct. App. 1998).
892. *Id.* at 358.
893. *Id.*

Pomares v. J. Krantz Enterprises, Inc.[894] The purchase option for a business included the building and land where it was located. The price was to be the fair market value. If the parties could not agree on the value, then it would be set by a licensed appraiser. If the parties could not agree on an appraiser, then each was to select a licensed appraiser, and their appraisals were to be averaged. The trial court found this option to be enforceable and the seller appealed.[895] The Third District Court of Appeal reversed.[896] It apparently had no difficulty with the price, but held that the option was unenforceably vague and indefinite because it failed to specify the terms or time of payment.[897]

XVII. RIPARIAN RIGHTS

Lee v. Williams.[898] This court resolved the issue of whether the appellant had a "right to construct a boatlift" by looking at which neighbor "owns the nonnavigable tidelands of Florida."[899]

> [The two neighbors'] lots are contiguous. The westerly boundary of the Williams' lot [Lot 13,] is defined as the centerline of Butler's Branch, a small waterway shown on the plat of Butler's Replat. [The] northern boundary of [the Lees' lot, Lot 12,] is Julington Creek, a navigable body of water. The waters of Butler's Branch and Julington Creek join at the northwest end of the Lees' property.[900]

In 1960, the owner of Lot 13 excavated a navigable canal to run through and across Lot 13, and through and across the conflux of Butler's Branch and Julington Creek and into Julington Creek.[901] In 1961, when the Williams purchased Lot 13, the canal had been excavated. In 1961, if the boatlift had been erected "where it is today, it would have been o[ver] dry land."[902] Over the years, the canal bank eroded toward the common boundary line, and in the 1980's, the owner of Lot 12 constructed a bulkhead along the then existing bank of the canal. Surveys show that a great portion

894. 711 So. 2d 615 (Fla. 3d Dist. Ct. App. 1998).
895. *Id.* at 616.
896. *Id.*
897. *Id.*
898. 711 So. 2d 57 (Fla. 5th Dist. Ct. App. 1998).
899. *Id.* at 57.
900. *Id.* at 57–58.
901. *Id.* at 58.
902. *Id.*

of this bulkhead was built on Lot 13.[903] In 1993, the Lees purchased Lot 12 and, without the Williams' knowledge, sometime in 1994 constructed a boat lift "in the canal adjoining the previously constructed bulkhead. The boat lift is located entirely within Lot 13" and the Williams, upon discovering this, protested its construction.[904]

The issue that this court looked at was "whether the canal, which traverses nonnavigable tidelands within the Williams' lot, is privately owned by [the Williams] or whether it is sovereignty land available for public use."[905] The trial court found that *Clement v. Watson*[906] was dispositive.[907] In *Clement*, the court found that Watson was able to exclude Clement from fishing privileges in a cove surrounded by property owned by Watson's wife.[908] The Supreme Court of Florida affirmed the basis of the decision in *Clement* when it defined navigable waters and emphasized that waters are not navigable merely because they are affected by the tides.[909]

The court distinguished between sovereignty and privately owned lands as follows:

> The shore of navigable waters which the sovereign holds for public uses is the land that borders on navigable waters and lies between ordinary high and ordinary low water mark. This does not include lands that do not immediately border on the navigable waters, and that are covered by water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and lowlands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation. Lands not covered by navigable waters and not included in the shore space between ordinary high and low water marks immediately bordering on navigable waters are the subjects of private ownership, at least when the public rights of navigation, etc., are not thereby unlawfully impaired.[910]

The court concluded in *Clement* that the majority of states, including Florida, base their determination on whether the water is navigable, and not upon whether waters are tidal.[911] The appellants, however, argued that

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903. *Lee*, 711 So. 2d at 58.
904. *Id.*
905. *Id.*
906. 58 So. 25 (Fla. 1912).
907. *Lee*, 711 So. 2d at 58.
908. *Clement*, 58 So. at 27.
909. *Lee*, 711 So. 2d at 58 (citing Clement v. Watson, 58 So. 25 (Fla 1912)).
910. *Id.* at 59.
911. *Clement*, 58 So. at 26 (emphasis omitted).

reliance on *Clement* was an error and that the 1988 decision by the United States Supreme Court in *Phillips Petroleum Co. v. Mississippi*,[912] governed.[913] Therefore, the appellants concluded that all of Florida's tidelands are sovereignty lands of the state.[914] In *Phillips Petroleum*, the United States Supreme Court held that "[t]he states, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide."[915] However, the Court also held that the states "have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[916]

This court looked to see how Florida law "defined the limits of lands held in public trust and what private rights in tidelands" Florida recognizes.[917] No Supreme Court of Florida case has overruled *Clement*, nor has any case held that "a nonnavigable tideland [is a] sovereignty land."[918] Therefore, the appellate court affirmed the trial court's decision that the land is not to be sovereignty land.[919]

XVIII. SALES

Whitehurst v. Camp.[920] An agreement for deed provided for "'interest at the rate of 10 per centum (10%) per annum payable on the whole sum remaining from time to time unpaid.'"[921] The buyers defaulted and sellers brought a successful foreclosure action, but sellers appealed, in part, because the court applied a lower postjudgment interest based on section 55.03(1) of the *Florida Statutes*.[922] The statute established a statutory rate for judgments but provided that it did not displace a rate of interest established by a written contract.[923] At issue, therefore, was whether the language in this agreement for deed applied the ten percent interest rate postjudgment as well as prejudgment.[924] The Supreme Court of Florida ruled that the contract

912. 484 U.S. 469 (1988).
913. *Lee*, 711 So. 2d at 59.
914. *Id.*
915. *Id.* at 60 (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 481 (1988)).
916. *Id.* (citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1988)).
917. *Id.*
918. *Lee*, 711 So. 2d at 62.
919. *Id.* at 64.
920. 699 So. 2d 679 (Fla. 1997).
921. *Id.* at 680 (quoting Whitehurst v. Camp, 677 So. 2d 1361 (Fla. 1st Dist. Ct. App. 1996)).
922. *Id.*; FLA. STAT. § 55.03(1) (1995).
923. FLA. STAT. § 55.03(1) (1995).
924. *Whitehurst*, 699 So. 2d at 681.

language did not apply postjudgment.[925] To do so would require explicit language. Otherwise, the terms of the contract are extinguished by a judgment in a manner similar to the contract merging into the deed in a real estate sale. In both situations, the contractual term can survive only if the intent of the parties is made clear.[926]

Gilchrist Timber Co. v. ITT Rayonier, Inc.[927] The seller of a 22,000 acre tract provided the buyers with a year old appraisal. Unfortunately, the zoning shown on the tract was inaccurate. After unsuccessfully trying to get the zoning changed, the buyers filed suit in federal court seeking damages.[928] The jury found for the plaintiffs, but the trial judge granted a judgment notwithstanding the verdict.[929] The case was appealed to the eleventh circuit, which certified the following question to the Supreme Court of Florida:

> WHETHER A PARTY TO A TRANSACTION WHO TRANSMITS FALSE INFORMATION WHICH THAT PARTY DID NOT KNOW WAS FALSE, MAY BE HELD LIABLE FOR NEGLIGENT MISREPRESENTATION WHEN THE RECIPIENT OF THE INFORMATION RELIED ON THE INFORMATION'S TRUTHFULNESS, DESPITE THE FACT THAT AN INVESTIGATION BY THE RECIPIENT WOULD HAVE REVEALED THE FALSITY OF THE INFORMATION.[930]

The Supreme Court of Florida answered the question with a qualified "yes," adopting the position of section 552 of the Restatement (Second) of Torts, but subject to Florida's doctrine of comparative negligence.[931] A party who negligently misinforms another may be held liable if the other party reasonably relies on that information to its detriment.[932]

The eleventh circuit would then have to apply that answer in reviewing the judgment notwithstanding the verdict.[933] The jury had been instructed that the buyers had no affirmative duty to investigate the truthfulness of statements made by the seller.[934] However, the buyers could have been negligent in not investigating the facts on their own. That presented a

925. *Id.* at 684.
926. *Id.*
927. 696 So. 2d 334 (Fla. 1997).
928. *Id.* at 336.
929. *Id.*
930. *Id.* at 335.
931. *Id.* at 339.
932. *Gilchrist Timber*, 696 So. 2d at 337.
933. *Id.* at 336.
934. *Id.*

question of fact, and reversal would be necessary so that the issue of comparative negligence could be presented to the jury.[935]

The seller lost on its other points. Most importantly, handing over the appraisal was a representation of the facts contained therein. The zoning was represented incorrectly.[936] To establish that this constituted negligent misrepresentation, it would only be necessary to show that the misrepresented fact was material to the buyers.[937] However, that did not require the buyers to have communicated to the sellers that such a fact would affect their decision to purchase.[938] What was required was only that it would have made a difference in their decision.[939]

Kehle v. Modansky.[940] Kehle and Peralta signed a purchase contract which required a $120,000 deposit. Kehle wrote out the check and delivered it to the seller. Due to insufficient funds, the check was "dishonored."[941] It had not been made good by the time of the closing, so the closing never occurred. Seller then brought this suit for breach of contract and for statutory damages for tendering a worthless check.[942] The trial court granted summary judgment for seller on both counts, $120,000 for liquidated damages and $360,000 (treble damages) for the worthless check.[943] The defendants appealed, primarily on their defense that they lacked knowledge that the check was worthless, but the district court affirmed.[944] Lack of knowledge simply was not a defense.[945] The court also rejected the defenses of "waiver" and "conditional delivery" to the statutory damages claim.[946] These had not been properly raised as affirmative defenses, but the court noted that these would not have been defenses under the worthless check statute anyway.[947]

Nelson v. Wiggs.[948] Buyers saw a "For Sale By Owner" sign in rural west Dade County. They bought the property because they wanted a place to plant trees and raise animals.[949] They "requested no inspections of the

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935. *Id.*
936. *Id.* at 339.
937. *Gilchrist Timber*, 696 So. 2d at 339.
938. *Id.*
939. *Id.*
940. 696 So. 2d 493 (Fla. 4th Dist. Ct. App. 1997).
941. *Id.* at 494.
942. *Id.*
943. *Id.*
944. *Id.*
945. *Kehle*, 696 So. 2d at 494.
946. *Id.*
947. *Id.*
948. 699 So. 2d 258 (Fla. 3d Dist. Ct. App. 1997).
949. *Id.* at 259.

property and did not [ask any questions of] the neighbors."[950] What they missed was that the land, except for the buildings which were built on high ground, flooded every rainy season. While they could still live in the house, it became an island on which animals also sought to escape the waters. It was a very difficult situation. The trial court found that the buyers did not ask about flooding and the seller did not volunteer the information.[951] The critical question was whether the seller was under a duty to disclose the seasonal flooding to the buyers under *Johnson v. Davis*.[952] The majority of this panel answered the question in the negative.[953]

Under *Johnson v. Davis*, the seller is required to disclose "facts materially affecting the value of the property which are not readily observable and are not known to the buyer."[954] The buyers should have known that Florida's rainy season might make low lying land near the Everglades subject to flooding. Moreover, the buyer-husband was a contractor who had visited the county building department to review permits and the like.[955]

Judge Sorondo dissented vigorously.[956] He characterized the buyers as very "simple people" and noted there was nothing in the record to indicate that there were visible signs of flooding of the nearby levee.[957] The transaction took place during the "dry season." The usual inspections would not have revealed that flooding was a problem. Nor was there any obligation to question neighbors about unseen problems. Moreover, the seller had been informed of the buyers' intended use of the land and she must have known that the flooding would make that difficult. The conclusion is that "'elementary fair conduct' demanded full disclosure in this case."[958]

Ni v. Deltona Corp.[959] The buyer was purchasing three undeveloped lots in a subdivision under three separate contracts. Each required the seller to refund part of the money paid[960] in the event buyer defaulted after having paid fifteen percent of the principal. Buyer defaulted after having paid in excess of fifteen percent of the principal. Having received no refund, buyer sued. The seller defended that it was protected by the two-year statute of

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950. *Id.* at 260.
951. *Id.*
952. 480 So. 2d 625 (Fla. 1985).
953. *Nelson*, 699 So. 2d at 260.
954. 480 So. 2d at 629.
955. *Nelson*, 699 So. 2d at 261.
956. *Id.* at 261 (Sorondo, J., dissenting).
957. *Id.* at 263.
958. *Id.* at 265.
959. 701 So. 2d 888 (Fla. 5th Dist. Ct. App. 1997):
960. *Id.* at 889. The seller would have to refund the lesser of either a) the amount the buyer had paid in excess of the 15%; or b) the amount the buyer paid in excess of the seller's actual damages. *Id.*

repose found in the federal Land Sales Act.[961] It argued that the statute of repose was applicable because the refund provision was mandated by the Act. The district court rejected that argument and reversed.[962]

The statute provided that a buyer could rescind a contract that did not include a provision for refunding the payments when the buyer had paid more than fifteen percent of the price.[963] The two-year statute of repose gave buyer only two years from the date of contracting to rescind the contract.[964] However, the buyer in this case did not seek rescission; this buyer brought an action for a refund based on the provision in the contract. The federal statute of repose did not apply to such an action.[965]

Ribak v. Centex Real Estate Corp.[966] The residential development was adjacent to a plant that treated both fresh water and wastewater. Twenty-two residential home buyers alleged that they were told that it was a fresh water treatment plant, but not that it treated wastewater. They sued for, inter alia, fraud, conspiracy, negligent supervision, breach of duty to disclose, negligent misrepresentation, and violation of the Florida Land Sales Practices Act.[967] The trial court granted partial summary judgment because the plant was not located on the land sold, and the buyers appealed.[968] The district court affirmed the summary judgment in favor of the defendants, e.g., the developer, who had not made the representations, but it reversed and remanded as to the others.[969] The Fourth District Court of Appeal concluded that the critical question was whether the existence of a wastewater treatment plant nearby was a material fact.[970] If that fact would have affected the decision to purchase the property, then it was material; and materiality was a question of fact that would have to be decided by the jury.[971]

A later decision from the fourth district seems to contradict *Ribak* in regard to the definition of materiality.[972] In *Billian v. Mobil Corp.*,[973] buyers of a condominium unit sued for damages or, in the alternative, rescission

961. 15 U.S.C. § 1703(d)(3) (1994).
962. *Ni*, 701 So. 2d at 889.
963. 15 U.S.C. § 1703(d)(3) (1994).
964. *Id.*
965. *Ni*, 701 So. 2d at 889.
966. 702 So. 2d 1316 (Fla. 4th Dist. Ct. App. 1997).
967. *Id.* at 1316; *see* FLA. STAT. §§ 498.001–.063 (1997).
968. *Ribak*, 702 So. 2d at 1317.
969. *Id.* at 1318.
970. *Id.* at 1317.
971. *Ribak*, 702 So. 2d at 1317–18.
972. Billian v. Mobil Corp., 710 So. 2d 984 (Fla. 4th Dist. Ct. App. 1998).
973. 710 So. 2d 984 (Fla. 4th Dist. Ct. App.1998).

based on the developer's nondisclosure of construction defects.[974] The case turned on whether the defects were material. The trial court refused to give the standard jury instruction for a material fact in regard to a fraudulent misrepresentation because it was, "one that is of such importance that [the buyers] either would not have entered into the transaction or would not have paid the same price for the unit."[975] The jury's verdict was for the developer/seller; the buyers appealed, and the fourth district affirmed.[976]

The court noted that *Johnson v. Davis*,[977] the seminal case on the duty to disclose, required disclosure of "facts materially affecting the value of the property," not facts materially affecting the value of the property to the buyers.[978] That eliminates the subjective value of the property to the buyers. It makes the test an objective one. The court admitted that this was a narrower test than the one traditionally used for fraudulent misrepresentation.[979] Hopefully the Supreme Court of Florida will clarify whether a different standard is appropriate or merely the product of a missing phrase.

The district court also pointed out that the traditional subjective standard should be applied in a rescission action that was not based on *Johnson v. Davis* type nondisclosure.[980] Consequently, the fact that the jury found the defendants not liable for nondisclosure under *Johnson v. Davis* would not necessarily preclude the court from granting rescission based on facts that had been concealed.[981] The critical factor would be whether those facts, if known to the buyers, would have led to their not making the purchase.[982]

Stroud v. Crosby.[983] The record contained evidence that the seller had owned lots 690 and 691. When he sold 690, a portion of 691 was included. Later, he listed 691 for sale. He advised the listing broker that he did not own all of lot 691 and gave the broker a copy of the survey that correctly showed what part of 691 he did own. The Multiple Listing Service ("MLS") properly portrayed the dimensions of lot 691 as reduced by the earlier sale.[984]

Buyers saw the property. They never requested or obtained any additional evidence, but proceeded to make an offer which the seller accepted.[985]

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974. *Id.* at 986.
975. *Id.* at 987.
976. *Id.* at 986.
977. 480 So. 2d 625 (Fla. 1985).
978. *Billian*, 710 So. 2d at 987.
979. *Id.* at 988–89.
980. *Id.* at 992.
981. *Id.*
982. *Id.*
983. 712 So. 2d 434 (Fla. 2d Dist. Ct. App. 1998).
984. *Id.* at 435.
985. *Id.* at 436.

The contract described the property by its street address and as lot 691, but did not include a legal description. Buyers then had a survey made by their own surveyor, but that survey did not reveal that the seller only owned part of lot 691.[986] At the closing, seller gave buyers a copy of his survey showing the proper dimensions. Buyers then realized their mistake but went through with the closing anyway. The deed had the proper legal description for only part of lot 691.[987]

Some time after the closing, the buyers realized the magnitude of their mistake. The lot was too small for the home they planned to build, so they brought this action for rescission. The trial court entered a final judgment in favor of the buyers on the theory of fraudulent misrepresentation, but the district court reversed.[988]

Reversal is warranted where the appellate court does not find competent substantial evidence to support the trial court's findings of fact.[989] The trial judge failed to identify what fraudulent misrepresentations the seller had made, and the district court judges could not find any evidence of fraudulent misrepresentation in the record.[990] Buyers had incorrectly assumed they were buying the entire lot; that alone was not a sufficient basis for rescission.[991]

Sunbank v. Retirement Facility at Palm-Aire, Ltd.[992] Buyers sued for damages and specific performance based on an alleged breach of contract. The legal claims were tried to a jury, which delivered a verdict for the buyers.[993] After the verdict, the buyers filed notices for a nonjury trial of their specific performance claims, but the judge granted the seller's motion for a directed verdict denying specific performance.[994] The buyers appealed and the district court reversed.[995]

The seller's motion for the directed verdict was based on the buyers' having failed to introduce sufficient evidence to support their claim for specific performance.[996] However, that ignored the fact that specific performance is equitable relief. There is a right to have legal claims decided

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986. *Id.*

987. *Id.* at 435–36.

988. *Stroud*, 712 So. 2d at 435–36.

989. *Id.* at 436. *See generally* Clegg v. Chipola Aviation, 458 So. 2d 1186, 1187 (Fla. 1st Dist. Ct. App. 1984).

990. *Stroud*, 712 So. 2d at 436.

991. *Id.*

992. 698 So. 2d 392 (Fla. 4th Dist. Ct. App. 1997).

993. *Id.* at 392.

994. *Id.* at 392–93.

995. *Id.* at 392. The damages award to the plaintiff-buyers was, however, affirmed. *Sunbank*, 698 So. 2d at 392.

996. *Id.*

by a jury, and a claim for jury trial was made in this case.[997] Equitable claims are decided by the judge. When claims of legal and equitable relief are made in the same case, the legal claims are usually tried to the jury first with the judge later hearing such additional evidence as might be needed to resolve the equitable claims. In difficult cases, the judge might hold what amounts to two separate trials or might require all evidence be presented before the jury to expedite matters. In this case, however, there was nothing in the record to indicate that the judge had ordered the buyers to present their specific performance evidence at the same time as they presented damages evidence.[998] Thus, the buyers could have anticipated the opportunity to present more evidence on that claim. To grant the seller's motion for a directed verdict at that point was premature and reversible error.[999]

XIX. SLANDER OF TITLE

Clearman v. Dalton.[1000] This opinion resulted from a motion for rehearing or clarification.[1001] The Clearmans sought rehearing of the court's unpublished order granting attorneys' fees to the Clearmans. This court withdrew the previous opinion and the order awarding the Clearmans appellate fees.[1002]

The Clearmans recovered a judgment of $150,000 against the Daltons. The Daltons filed for bankruptcy and stated there were two secured mortgages against their homestead. The first mortgage in favor of the Daltons' son was never recorded, and the second mortgage to Monticello Bank was recorded but never delivered. The Daltons never amended their bankruptcy petition to correct the "error."[1003]

The trustee in bankruptcy elected to avoid the liens and obtained an order from the bankruptcy court avoiding the mortgages and preserving the avoided obligations "for the benefit of the estate."[1004] The mortgages were assigned to the Clearmans. After they recorded the assignments and the judgments avoiding the mortgages, the Clearmans "attempted to foreclose on

997. *Id.* at 393.

998. To secure equitable relief, the buyers would have to prove that the remedy at law was inadequate and that the equities balanced in their favor. *Sunbank*, 698 So. 2d at 392. These are not part of the damages action. *Id.*

999. *Sunbank*, 698 So. 2d at 393.

1000. 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998), *replacing original opinion*, 22 Fla. L. Weekly D2022a.

1001. *Id.*

1002. *Id.* at 325.

1003. *Id.*

1004. *Id.*

the interest acquired from the [t]rustee."[1005] Dalton counterclaimed "to quiet title and for slander of title."[1006] The trial court denied foreclosure but found against the Clearmans on Dalton's counterclaim for slander of title and awarded Dalton attorneys' fees.[1007]

The appellate court agreed with the trial court.[1008] Although the obligations evidenced by avoiding the mortgages were preserved for the estate, section 544, chapter 11 of the *United States Code* "does not place the [t]rustee (or the [t]rustee's assignees) in the place of the former mortgagees with the power to foreclose and avoid . . . Dalton's homestead claim."[1009] The bankruptcy estate had an assignable interest in the mortgages subject to Dalton's claim of homestead.[1010] The assignees paid a fair price for the assignment and could assert that interest.[1011] The Daltons could be required to establish the fact of homestead.[1012]

"[F]iling of judgments [does not] constitute slander of title, even if the assignment of the estate's interest was in the nature of a quit claim [sic] deed."[1013] The Daltons willingly filed their bankruptcy petition and submitted their property to bankruptcy.[1014] Therefore, they could not subsequently "complain if the assignee of the estate's interest requires that they prove their entitlement to the homestead exemption."[1015]

XX. SUBMERGED LANDS

City of West Palm Beach v. Board of Trustees of Internal Improvement Trust Fund.[1016] The court reversed final summary judgment entered in favor of the Board of Trustees of the Internal Improvement Trust Fund that granted fee simple ownership of submerged lands in the Board.[1017] The Board was to issue a disclaimer to the City for the land beneath the four piers.[1018]

1005. *Clearman*, 708 So. 2d. at 325.
1006. *Id.*
1007. *Id.*
1008. *Id.*
1009. *Id.*
1010. *Clearman*, 708 So. 2d at 325.
1011. *Id.*
1012. *Id.*
1013. *Id.*
1014. *Id.*
1015. *Clearman*, 708 So. 2d at 325.
1016. 22 Fla. L. Weekly D2028 (Fla. 4th Dist. Ct. App. Aug, 27, 1997), *opinion withdrawn and superceded on reh'g by* 714 So. 2d 1060 (Fla. 4th Dist. Ct. App. 1998).
1017. *Id.*
1018. *Id.*

The City claimed ownership of submerged land known as Palm Harbor Marina in a suit to quiet title. The trial court stated that the City was entitled only to a disclaimer as to the land immediately beneath the four piers it constructed before the repeal of the Butler Act.[1019] The Butler Act was repealed in 1957 and was later replaced by section 253.12 of the *Florida Statutes* that stated "[t]itle to all lands heretofore filled or developed is herewith confirmed in the upland owners and the trustees shall on request issue a disclaimer to each owner."[1020]

The question was whether the improvements made by the City fell within the parameters of the Butler Act. Specifically, the issues before the court were:

> [w]hether all the activities of the city in constructing a municipal marina or boat basin including four substantial piers in 1947 and 1948, and the dredging of the boat basins in between and surrounding the piers resulted in a *permanent improvement* so that title vested in accordance with the Butler Act.[1021]

The court relied on the third district's opinions in *Internal Improvement Trust Fund v. Key West Conch Harbor, Inc.*[1022] and *Jacksonville Shipyards, Inc. v. Department of Natural Resources.*[1023] In *Key West*, the court stated the issue as not whether the dredging alone was a sufficient improvement to convey title under the Butler Act, since moorings and a dock were involved.[1024] That court also looked to the other activities involved in the construction of the marina. The court in this case reasoned that the *Key West* case applied because the piers would be useless without the incidental dredging for the piers to be utilized as part of the basin.[1025] As with *Key West*, this case also does not deal with dredging that was done for the sole purpose of filling other land.[1026]

The court here adopted the third district's view that the issue of whether a dredging constituted an improvement should be decided on a case by case

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1019. *Id.* at D2029.

1020. *Id.* (citing Act of June 11, 1957, ch. 57-362, §1, 1957 Fla. Laws (codified as amended at FLA. STAT. § 253.12)).

1021. *Board of Trustees*, 22 Fla. L. Weekly at D2029.

1022. 683 So. 2d 144 (Fla. 3d Dist. Ct. App. 1996).

1023. *Id.*; *see* Jacksonville Shipyards, Inc. v. Department of Natural Resources, 466 So. 2d 389 (Fla. 1st Dist. Ct. App. 1985).

1024. *Board of Trustees*, 22 Fla. L. Weekly at D2029; *see Key West*, 683 So. 2d at 145.

1025. *Board of Trustees*, 22 Fla. L. Weekly at D2029.

1026. *Id.*

basis.[1027] The piers would be useless as part of the marina without the dredged area surrounding and in between.[1028] As such, the trial court erred in determining that the title to submerged lands was vested in the Board.[1029]

XXI. TAXATION

Kuro, Inc. v. Department of Revenue.[1030] Kuro, Inc. ("Kuro"), appealed a final order which assessed an additional documentary stamp tax, collectively, on conveyances of eight unencumbered condominium units.[1031] Stock issued by Kuro in exchange for the condominiums was concluded in the final order to constitute consideration and, pursuant to the applicable statutes and rules, this consideration was equal to the fair market value of the condominiums.[1032] The documentary stamp tax was based on the fair market value. This court reversed, finding that levying the additional tax was error.[1033]

The condominiums were owned by a father and son team in 1991. In 1994, the father and son incorporated Kuro. Then, they transferred the titles of the units to the corporation to avoid the potential liability for managing the eight rental units. The father and son transferred each condominium unit to Kuro by warranty deed. Each deed recited nominal consideration of ten dollars and Kuro paid the minimum documentary stamp tax on each transaction.[1034] The Department of Revenue ("DOR") determined that additional documentary stamp taxes were due. The administrative law judge recommended the assessment of additional documentary stamp taxes, and the DOR entered a final order adopting these recommendations.[1035]

The appellate court first looked at section 201.02(1), of the *Florida Statutes*, which states "that a purchaser of real estate is required to pay a documentary stamp tax of $0.70 on each $100 of consideration paid for the property."[1036] It further states that when consideration is given in exchange for real property or any interest therein is other than money, it is presumed that the consideration is equal to the fair market value of the real property.[1037]

1027. *Id.*
1028. *Id.*
1029. *Id.*
1030. 713 So. 2d 1021 (Fla. 2d Dist. Ct. App. 1998).
1031. *Id.*
1032. *Id.* at 1021–22.
1033. *Id.* at 1022.
1034. *Id.*
1035. *Kuro*, 713 So. 2d at 1022.
1036. *Id.* (citing FLA. STAT. § 201.02(1) (1993)).
1037. *Id.*; *see* FLA. STAT. § 201.02(1) (1993).

The court found that Kuro was not a purchaser within the meaning of section 210.02(1).[1038] Therefore, no additional taxes were due. Section 210.02(1) applies to transfers of real estate for consideration to a purchaser, which has been defined by the Supreme Court of Florida as "one who obtains or acquires property by paying an equivalent in money or other exchange in value."[1039] The DOR's rule that deals with stock as consideration merely creates a rebuttable presumption.[1040] In this situation, Kuro successfully rebutted the presumption.[1041]

The appellate court found the conveyances were for the benefit of the father and son, who were availing themselves of the advantages of incorporation and that the father and son still were the beneficial owners although not the legal owners.[1042] At the time the deeds were recorded, the father and son owned all of the real estate and Kuro's stock.[1043] The father and son did not receive anything that they did not already have.[1044] Therefore, all that occurred were book transactions and not sales to a purchaser.[1045] The court reversed the DOR's final order.[1046]

S & W Air Vac Systems, Inc. v. Department of Revenue.[1047] The appellate court affirmed the final administrative decision which held S & W liable to the Department of Revenue for use taxes as the licensee of real property, pursuant to section 212.031 of the *Florida Statutes*.[1048]

S & W owned coin-operated air vac machines used to vacuum cars and add air to tires. Store owners having these machines received monthly compensation in the form of a percentage of the units' gross receipts. S & W had the responsibility to collect money from the machines, make repairs, and pay licensing fees and taxes on them.[1049] S & W described this agreement as a "revenue sharing arrangement."[1050] The hearing officer found that payment was based on the right to place the machine in these stores, and store owners should not be gaining compensation when the

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1038. *Kuro*, 713 So. 2d at 1022.

1039. *Id.* (citing Florida Dep't of Revenue v. De Maria, 338 So. 2d 838, 840 (Fla. 1976)).

1040. *Id.*

1041. *Id.*

1042. *Id.*

1043. *Kuro*, 713 So. 2d at 1023.

1044. *Id.*

1045. *Id.* (citing State ex rel. Palmer-Florida Corp. v. Green, 88 So. 2d 493 (Fla. 1956)).

1046. *Id.*

1047. 697 So. 2d 1313 (Fla. 5th Dist. Ct. App. 1997).

1048. *Id.* at 1314; *see* FLA. STAT. 212.031 (1995).

1049. *S & W Air Vac*, 697 So. 2d at 1314–15.

1050. *Id.* at 1315.

machines are removed.[1051] The hearing officer concluded that S & W had been granted licenses for the use of real property. Section 212.031 of the *Florida Statutes* dictated that use taxes were owed to the Department.[1052]

First, the facts showed that the air-vac machines were not the subject of a bailment. A "bailment" is a contractual relationship among parties in which the subject matter of the relationship is delivered temporarily to and accepted by one other than the owner.[1053]

Next, the arrangement with the store owners could not constitute joint ventures. To establish a joint venture, five elements must be established in addition to those required to form a basic contract. These elements include: 1) a community of interest in the performance of the common purpose; 2) joint control or right of control; 3) joint proprietary interest in the subject matter; 4) a right to share in the profits; and 5) a duty to share in any losses which may be sustained.[1054] Although the first element was met, the court recognized that the others were not.[1055]

S & W also questioned whether convenience stores and gas stations met the use requirement of section 212.031 of the *Florida Statutes*.[1056] The statute states, "[i]t is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property"[1057] The hearing officer and the Department of Revenue concluded the transactions between S & W and store owners were taxable under section 212.031.[1058] That statute defines "business" as "any activity engaged in by any person, or caused to be engaged in by him, with the object of private or public gain, benefit, or advantage."[1059]

In this situation, "the licensors operated a commercial premises designed to attract customers for revenue-generating purposes."[1060] The ventures included income derived from a range of premises activity. So, it was not a clearly erroneous interpretation to determine that store owners

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1051. *Id.*

1052. *Id.*

1053. *Id.*; *see* 5 FLA. JUR. 2D *Bailments* § 1 (1978).

1054. *S & W Air Vac*, 697 So. 2d at 1315; *see* Conklin Shows, Inc. v. Department of Revenue, 684 So. 2d 328 (Fla. 4th Dist. Ct. App. 1996); *see also* Kislak v. Kreedian, 95 So. 2d 510, 515 (Fla. 1957).

1055. *S & W Air Vac*, 697 So. 2d at 1315.

1056. *Id.* at 1316; *see* FLA. STAT. § 212.031 (1995).

1057. *S & W Air Vac*, 697 So. 2d at 1316 (citing FLA. STAT. § 212.031 (1995)).

1058. *Id.*

1059. *Id.* (citing FLA. STAT. § 212.02(2) (1989)).

1060. *Id.* at 1317.

were in the business of granting a license under section 212.02 of the *Florida Statutes*.[1061]

Smith v. Welton.[1062] The issue this court heard on appeal was whether section 193.155(8)(a) of the *Florida Statutes* is facially unconstitutional in light of Article VII, Section (4)(c) of the *Florida Constitution*.[1063] Article VII, Section (4)(c) provides:

> Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:
>
> . . . .
>
> (c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1, [1994]. This assessment shall change only as provided herein.
>
> 1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:
>
> (A) three percent (3%) of the assessment for the prior year.
>
> (B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.
>
> 2. No assessment shall exceed just value.
>
> 3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided therein.
>
> 4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.
>
> 5. Changes, additions, reductions or improvements to homestead property shall be assessed as provided for by general

1061. *Id.*

1062. 710 So. 2d 135 (Fla. 1st Dist. Ct. App. 1998).

1063. *Id.* at 136; *see* FLA. STAT. § 193.155(8)(a) (1995); *see also* FLA. CONST. art VII, § 4(c).

> law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.
>
> 6. In the event of a termination of homestead status, the property shall be assessed as provided by general law.[1064]

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

> (8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:
>
> (a) If errors are made in arriving at any annual assessment under this section due to material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.[1065]

The trial court found that section 193.155(8)(a) is unconstitutional because the constitution states clearly that the assessment of just value shall only change as provided by the statute, and section 193.155(8)(a) permits changes to the assessment that are not found in the constitution.[1066] This court found that subsection (8)(a) of section 193.155 of the *Florida Statutes* is facially unconstitutional, because the purported exception to the three percent rule contained in section 193.155(8)(a) is not one provided for in the constitution.[1067]

The Supreme Court of Florida has held that provisions of the constitution "cannot be altered, contracted or enlarged" by the legislation.[1068] It determined the statute in question would defeat the purpose of Article VII, Section (4)(c) by allowing constant reassessments of homesteads when the purpose of section (4)(c) of Article VII is to encourage the preservation of homestead property in the face of increasing real estate development and rising property values and assessments.[1069]

The district court found no merit to Appellant's argument that without section 193.155(8)(a), there would be inequitable taxation since the constitution expressly mandates the special or inequitable taxation.[1070] Only the homestead property receives the three percent cap, and, therefore, non-homestead property, commercial, agricultural, and noncommercial

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1064. *Smith*, 710 So. 2d at 136–37 (quoting FLA. CONST. art. VII, § 4(c)).
1065. *Id.* at 137 (quoting FLA. STAT. § 193.155(8)(a) (1997)).
1066. *Id.* at 136.
1067. *Id.* at 137.
1068. *Id.* at 138 (citing Osterndorf v. Turner, 426 So. 2d 539, 544 (Fla. 1982)).
1069. *Smith*, 710 So. 2d at 138.
1070. *Id.* at 137.

recreational land are excluded from the three percent cap.[1071] Furthermore, the constitution provides that assessments will not exceed just value, but does not imply that assessments will be below just value.[1072] Therefore, this court held that the trial court correctly granted summary judgment.[1073]

Legislative changes to chapter 98 include, but are not limited to, the following:

The Florida Legislature enacted chapter 98-185 to be retroactive to January 1, 1998 and to be effective until it expires July 1, 1999.[1074] This chapter provides for a partial abatement of ad valorem taxation where property has been destroyed or damaged by tornados.[1075] The application for such abatement "must be filed by the owner with the property appraiser before March 1, following the tax year in which the destruction or damage occurred."[1076] Chapter 98-185 has the details and criteria to be included in the application and what events will occur if the property appraiser determines the applicant to be entitled to such partial abatement.[1077]

Legislative changes to chapter 196 include, but are not limited to, the following:

Section 196.197 of the *Florida Statutes* and its subparts were created to qualify the continuing care facility established under chapter 651 of the *Florida Statutes*, for exemption under section 196.1975 of the *Florida Statutes*.[1078] Continuing care facilities shall have a $25,000 homestead exemption from the assessed valuation of the property for each apartment occupied on January first of the year for which exemption from ad valorem taxation is requested.[1079] These provisions shall take affect January 1, 1999, and shall affect the 1999 tax rolls in each subsequent year's tax rolls.[1080]

XXII. TIMESHARES

Effective April 30, 1998, amendments to chapter 721 became effective. Those changes include, but are not limited to, the following:

1071. *Id.*

1072. *Id.* at 137–38 (citing Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992)).

1073. *Id.* at 138.

1074. Act of May 23, 1998, ch. 98-185, §2, 1998 Fla. Laws 1617, 1617.

1075. *Id.*, §1, 1998 Fla. Laws at 1617.

1076. *Id.*, §1, 1998 Fla. Laws at 1616.

1077. *Id.*, §1, 1998 Fla. Laws at 1616–17.

1078. FLA. STAT. § 196.197 (1997).

1079. *Id.* § 196.1975(9)(a) (1997).

1080. Act of May 22, 1998, ch. 98-177, §3, 1998 Fla. Laws 1597, 1598 (codified as amended at FLA. STAT.§ 196.197).

To section 721.05 of the *Florida Statutes*, the legislature added a definition of "regulated short term product."[1081] That term is defined to mean a contractual right, offered by the seller, to use accommodations of a timeshare plan, provided that the agreement is executed in Florida on the same day the purchaser received an offer to acquire an interest in a timeshare plan and does not execute a purchase contract, after attending a sales presentation. The acquisition of the right to use includes an agreement that all or a portion of the consideration the prospective purchaser paid for the right to use will be applied to or credited against the price the purchaser will pay in the future for a timeshare interest, or the future purchase price of a timeshare interest will be locked in.[1082]

It is interesting to note that the legislature deleted section 721.075(4) of the 1997 *Florida Statutes* when creating the 1998 supplement.[1083] That paragraph required the developer to file an irrevocable letter of credit, surety bond, or other assurance acceptable to the director of the division where the aggregate represented value of all incidental benefits offered by a developer to a purchaser exceeded five percent of the purchase price paid by that purchaser is no longer a part of the statutory scheme.[1084]

To section 721.09 of the *Florida Statutes* the legislature added sub paragraph (c).[1085] This new provision provides for the seller's ability to immediately cancel all outstanding reservation agreements, refunding all escrow funds to perspective purchasers, and discontinuing accepting reservation deposits or advertising availability of reservation agreements, where the time share plan subject to the reservation agreement had not been filed with the division as required by Florida law within ninety days after the date the division approved the reservation agreement filing.[1086]

Subparagraph (d) was also added.[1087] This paragraph permits the seller who has filed a reservation agreement and escrow agreement as required by statute to advertise the reservation agreement providing the material meets the criteria prescribed by the subsections to subparagraph (d).[1088]

To section 721.11 of the *Florida Statutes* the legislature added subparagraph (6) and its subparts.[1089] These provisions provide that failing to provide cancellation rights or disclosures required in connection with the sale of a regulated short-term product automatically constitutes a

1081. FLA. STAT. § 721.05(27) (Supp. 1998).
1082. *Id.*
1083. *Id.* § 721.075(4).
1084. *Id.*
1085. *Id.* § 721.09(c).
1086. FLA. STAT. § 721.09(c) (Supp. 1998).
1087. *Id.* § 721.09(d).
1088. *Id.*
1089. *Id.* § 721.11(6).

misrepresentation in accordance with section 721.11(4)(a).[1090] Section 721.11(6)(a) requires the filing within ten days prior to use of a standard form of any agreement relating to the sale of a regulated short term product.[1091] Subparagraph (b) of that statute establishes the right of a purchaser of a regulated short term product to cancel the agreement until midnight of the tenth calendar day following the execution date of the agreement.[1092] It also provides that the right of cancellation may not be waived by the prospective purchaser or anyone on its behalf.[1093] Subparagraph (c) and its subparts with respect to this same statute provide for statements that must be included in an agreement for purchase of a regulated short term product.[1094] Further, subparagraph (d) of the same statute provides for a series of statements in conspicuous type that must be included in an agreement for the purchase of a regulated short term product.[1095]

Subparagraph (e) of the foregoing statute also provides for an exemption from the requirements of paragraphs (b), (c), and (d).[1096] Where the seller provides the purchaser with the right to cancel the purchase of a regulated short term product for any time up to seven days before the purchaser has reserved use of the accommodations, but certainly in no event less than ten days, and if the seller refunds the total amount of all payments made by the purchaser, although reduced by the proportion of any benefits the purchaser has actually received prior to the effective date of the cancellation, the specific value of which has been agreed to by the purchaser and seller, the short term product offer is exempt from the requirements of the aforementioned paragraphs.[1097]

To section 721.15 of the *Florida Statutes* the legislature added subparagraph (1)(b).[1098] This section provides for allocating total common expenses for a condominium or cooperative timeshare plan and allowing such to vary on a reasonable basis if there is any interest in a common element attributable to each time share parcel or time share cooperative parcel equals to share the total common expenses allocatable to that parcel.[1099]

1090. *Id.* § 721.11(4)(a).
1091. FLA. STAT. § 721.11(6)(a) (Supp. 1998).
1092. *Id.* § 721.11(6)(b).
1093. *Id.*
1094. *Id.* § 721.11(6)(c).
1095. *Id.* § 721.11(6)(d).
1096. FLA. STAT. § 721.11(6)(e) (Supp. 1998).
1097. *Id.*
1098. *Id.* § 721.15(1)(b).
1099. *Id.*

To chapter 721 the legislature added Part III entitled "Foreclosure of Liens on Timeshare Estates."[1100] Section 721.80 of the *Florida Statutes* provides that Part III may be cited as the "Timeshare Lien Foreclosure Act."[1101] This part consists of sections 721.80 through 721.86 and should be read in detail to become familiar with the rights and procedures involved.[1102]

Furthermore, the legislature added Part IV to the chapter.[1103] This consists of establishing a Commissioner of Deeds to take acknowledgments, proofs of execution, and oaths outside the United States in connection with the execution of any instruments relating to or being used in connection with a time share estate.[1104] This part consists of sections 721.96 through 721.98 and should be read in detail.[1105]

XXIII. TITLE INSURANCE

Security Union Title Insurance Co. v. Citibank N.A.[1106] The First District Court of Appeal was asked to review a jury verdict finding the title insurance underwriter vicariously liable for fraud committed by its agent, an attorney, when he made fraudulent representation to the lender to obtain loans, some of which benefited him personally and others of which benefited his clients. Noting that the agent was expressly authorized only to issue title insurance commitments and policies, and that the losses did not occur from his acting in such a capacity, the appellate court found no vicarious liability under that authority.[1107]

Next, it considered whether there might be vicarious liability arising from the agent's acting within his apparent authority.[1108] In doing so, the appellate court noted that at least one element needed for this liability is that there must have been some representation by the principal.[1109] Here the facts showed only that the principal made representations that the agent had the authority to issue title commitments and policies. The fraudulent acts involved the agent's representations made to obtain loans. There were no representations by the underwriter that the agent had any authority to make

1100. *Id.* § 721.80.

1101. FLA. STAT. § 721.80–.86 (Supp. 1998).

1102. *Id.*

1103. *Id.* § 721.96.

1104. *Id.* § 721.97.

1105. *Id.* §§ 721.96–.98.

1106. 715 So. 2d 973 (1st Dist. Ct. App. 1998).

1107. *Id.* at 974.

1108. *Id.*

1109. *Id.* at 975. Presumably this representation must be one that would lead the claimant to have relied reasonably on the appearance that the agent had the authority to commit the act that caused the harm.

statements as a closing agent to obtain loans. Also, it was clear that the loans were for his personal benefit and his clients' benefit. Therefore, the appellate court reversed and remanded with instructions to enter a judgment in favor of the underwriter.[1110]

XXIV. ZONING AND PUBLIC LAND USE CONTROLS

Villas of Lake Jackson, Ltd. v. Leon County.[1111] The current landowners, or their predecessors in title, acquired a large tract of land on the shore of a lake. Most of it had been developed with apartment complexes when the county, concerned about the impact of overdevelopment on the lake, rezoned the area to single family housing. The landowners sued in federal court. The United States district court dismissed the Takings Clause claim on ripeness grounds, and they also refused to exercise supplemental jurisdiction over the inverse condemnation claim based on Florida law; these rulings were not appealed.[1112]

The focus of the appeal was the summary judgment against the landowners on their due process and equal protection claims. The United States Court of Appeals for the Eleventh Circuit affirmed the due process decision because there was "undisputed evidence of the County's interest in protecting the water quality at the lake," and the down zoning bore a rational relation to that goal. [1113] Similarly, denial of the equal protection claim was affirmed because of "the undisputed evidence of the unique aspects of the tract as contrasted to other assertedly similarly situated properties and the lack of evidence of invidious discrimination."[1114] The court devoted most of its energies to explaining why it affirmed the denial of the due process taking claim.[1115] In brief, the court concluded that there was no such cause of action under the *United States Constitution*.[1116] A concise review of United States Supreme Court decisions involving regulatory takings clearly established that the plaintiffs in this case, claiming a violation of federal rights that had vested under an earlier zoning regulation, were limited to actions based on violations of substantive due process, procedural due process, and the Takings Clause.[1117]

1110. *Id.* at 976.
1111. 121 F.3d 610 (11th Cir. 1997).
1112. *Id.* at 611.
1113. *Id.* at 614.
1114. *Id.* at 615.
1115. *Id.* at 612–14.
1116. *Villas*, 121 F.3d at 615.
1117. *Id.*

Ammons v. Okeechobee County.[1118] Plaintiffs bought land on which to live and start a construction business. A county zoning officer had advised them that the land could be used for these purposes.[1119] They applied for and received an occupational license at that address and began the business. Later, they applied for a building permit for the house which had space to receive business deliveries.[1120] Fifteen months later, the county realized that the business was prohibited by the zoning. The county attorney sent plaintiffs a letter informing them of the error and ordering them to stop business activities at that location.[1121]

Plaintiffs brought this suit to enjoin the county from revoking their occupational license and for damages on a variety of theories. Summary judgment was granted against the plaintiffs, so they brought this appeal.[1122] The district court affirmed as to the estoppel and due process claims.[1123] The basis for the injunction claim was that the county should be equitably estopped due to the representations of zoning officials. Landowners are on constructive notice of zoning laws and the limited powers of zoning officials. The zoning officials had no power to permit, either intentionally or through error, a landowner to violate the zoning ordinance. Relief in equity would be inappropriate because "[i]t would not serve public policy well to permit such mistakes to persist when they affect public welfare, like planning and zoning decisions do," nor could the plaintiffs recover damages under section 1983, chapter 42 of the *United States Code* for a denial of due process of law.[1124] An occupational license, being merely a privilege and not involving a fundamental right, may be constitutionally rescinded where procedural due process is observed.[1125] Plaintiffs here received a hearing on the revocation.[1126]

City of Dania v. Florida Power & Light[1127] and *City of Jacksonville Beach v. Marisol Land Development, Inc.*[1128] In the *City of Dania* case, Florida Power and Light ("FPL") filed an application for a special exception so it could build an electrical substation in an area where that was not

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1118. 710 So. 2d 641 (Fla. 4th Dist. Ct. App. 1998).

1119. *Id.* at 642.

1120. *Id.* at 642–43.

1121. *Id.* at 643.

1122. *Id.*

1123. *Ammons*, 710 So. 2d at 643. The summary judgment on the equal protection count was reversed because the county had not filed any affidavits as to that claim. *Id.* Consequently, summary judgment should not have been granted. *Id.*

1124. *Id.* at 645.

1125. *Id.*

1126. *Ammons*, 710 So. 2d at 645.

1127. 23 Fla. L. Weekly D271 (4th Dist. Ct. App. Jan. 21, 1998).

1128. 706 So. 2d 354 (Fla. 1st Dist. Ct. App. 1998).

otherwise allowed. Under the City Code, special exceptions "shall be permitted" based upon compliance with seven requirements, two of which were: the use would not cause substantial injury to other property in the neighborhood; and the use would be compatible with adjoining development and the intended purpose of the district.[1129] The Commission held a public hearing. Testimony was presented by members of the public, a property appraiser, and a certified land planner. Then, following the recommendation of the City Planning and Zoning Board, the city commission denied the exception.[1130]

The circuit court granted FPL's petition for certiorari, so the City sought certiorari review in the district court of appeal.[1131] The district court reversed for two reasons.[1132] First, the circuit court had ruled that the City had an especially heavy burden of proof to sustain a denial of the application because the exception was being sought to provide for essential services, i.e., electric power.[1133] The district court could find nothing in the case law or the city code to support that ruling.[1134] Imposing the wrong burden of proof was a departure from the essential requirements of the law necessitating reversal.[1135] Second, the fourth district concluded that the circuit court had departed from the essential requirements of the law by substituting its own view of the evidence for that of the city commission.[1136] When reviewing local administrative action on a certiorari petition under rule 9.030(c)(3) of the *Florida Rules of Appellate Procedure*, the circuit court acts as an appellate court.[1137] As such, it could not reweigh the evidence.[1138] Its role regarding the weight of the evidence was only to determine if the fact finder had substantial competent evidence on which to base its decision.[1139] Here, the record revealed the fact finder's opinion was supported by the presentations of factual evidence by members of the public and testimony from two experts.[1140] The circuit court's order did not explain why this was

1129. *Florida Power & Light*, 23 Fla. L. Weekly at D272; *see* DANIA CITY CODE § 6.40 (1998).

1130. *Florida Power & Light*, 23 Fla. L. Weekly at D271.

1131. *Id.*

1132. *Id.* at D272–73.

1133. *Id.* at D272.

1134. *Id.*

1135. *Florida Power & Light*, 23 Fla. L. Weekly at D273.

1136. *Id.*

1137. *Id.* at D272; *see* FLA. R. APP. P. 9.030(c)(3).

1138. *Florida Power & Light*, 23 Fla. L. Weekly at D272.

1139. *Id.*

1140. *Id.*

not substantial competent evidence and the district court could not see any reason to agree with that conclusion.[1141]

The trial court had made the same mistake in *City of Jacksonville Beach v. Marisol Land Development, Inc.*[1142] The rezoning petition had been rejected by the city council after a full hearing. Twelve citizens had spoken in opposition to the rezoning, and the city's planning staff's comments, recommending against the rezoning, had been read into the record. The city council concluded that rezoning would be inconsistent with its comprehensive plan. The circuit court had disagreed and overturned the city council's decision.[1143] That was, the first district ruled, essentially *de novo* review in which the circuit court substituted its own weighing of the evidence for that of the city council.[1144] That is not the circuit court's role in certiorari review of administrative action, and in doing so, the circuit court applied incorrect law requiring reversal.[1145]

City of Miami Beach v. Robbins[1146] and *Bird-Kendall Homeowners Ass'n v. County Board of County Commissioners.*[1147] These third district cases involved opposite sides of spot zoning. Both reached the district court via certiorari review of a circuit court decision. In *City of Miami Beach*, we have reverse spot zoning. The City Commission upzoned the landowner's land and the two adjacent blocks to RM-1 based upon an architectural study and proposed amendments to the comprehensive plan. On review, the court characterized the results as a "veritable island of RM-1 zoning" in "a vast sea of RM-2 and other types of zoning."[1148] This was characterized as "reverse spot zoning" because it subjects this property to restrictions from which virtually all the neighbors are free.[1149] It was invalid because it was confiscatory.[1150] However, the court offered the observation that if circumstances were to change, such as the proposed amendments to the comprehensive plan being adopted and other areas also being rezoned, then the decision might not prevent the City from successfully rezoning this land to RM-1.[1151]

1141. *Id.*

1142. 706 So. 2d 354, 355 (Fla. 1st Dist. Ct. App. 1998).

1143. *Id.*

1144. *Id.* at 356.

1145. *Id.*

1146. 702 So. 2d 1329 (Fla. 3d Dist. Ct. App. 1997).

1147. 695 So. 2d 908 (Fla. 3d Dist. Ct. App. 1997), *rev. denied by* Garcia v. Bird-Kendall Homeowners Ass'n, 701 So. 2d 867 (Fla. 1997).

1148. *Robbins*, 702 So. 2d at 1330.

1149. *Id.*

1150. *Id.*

1151. *Id.* at 1330–31.

In *Bird-Kendall*, the county commissioners downzoned "a tiny, 0.23 acre tract," an area the size of a typical subdivision house lot, to allow the landowner to operate a feed store when that was prohibited in the surrounding area.[1152] This was characterized as spot zoning "to the nth degree."[1153] In fact, Chief Judge Schwartz wrote, "[t]he extent of the violation of this principal is so pronounced in this case that the term 'spot zoning' does not do it justice. Perhaps 'melanoma zoning' or, for short, 'melazoning' would be more appropriate."[1154]

G.B.V. International, Ltd. v. Broward County.[1155] The developer sought site plan approval for a mixed use development. Initially, the plan had been rejected by the city because it had too many units per acre.[1156] However, the city's and county's comprehensive plans allowed for "flex units," a form of transferred development rights under which the number of units can be transferred from other areas within the borders of that government.[1157] Utilizing flex units, the developer got approval by the city.[1158] However, getting approval from the county was another matter. Although it was only reviewing the plan for compatibility with the county's comprehensive plan, the County Commissioners denied site plan approval, expressly disapproving of the city's use of the flex units, even though the city was within its authority in using them.[1159] The developer filed a petition for certiorari review by the circuit court. It denied relief based on estoppel.[1160] The Fourth District Court of Appeal granted common law certiorari and quashed the circuit court's order.[1161]

The standard for such review is whether there has been a miscarriage of justice due to a violation of a clearly established principle of the law.[1162] The district court found that it had occurred when the circuit court went beyond the evidence that had been before the County Commissioners and relied on a ground not considered by the Commissioners.[1163] Moreover, site plan approval is a quasi-judicial function in which the Commissioners apply policy rather than set it.[1164] Site plan approval should be granted to all who

1152. *Bird-Kendall*, 695 So. 2d at 909.
1153. *Id.*
1154. *Id.* at 909 n.1.
1155. 709 So. 2d 155 (Fla. 4th Dist. Ct. App. 1998).
1156. *Id.* at 155–56.
1157. *Id.* at 156.
1158. *Id.*
1159. *Id.*
1160. *G.B.V.*, 709 So. 2d at 155.
1161. *Id.*
1162. *Id.*
1163. *Id.*
1164. *Id.* at 156.

meet the requirements of the law.[1165] In this case, the developer had submitted a plan that complied with the law, so site plan approval was a ministerial function.[1166] Broward County was ordered to approve the site plan.[1167]

Poulos v. Martin County[1168] and *Florida Rock Properties v. Keyser*.[1169] These two cases dealt with challenges to government action under section 163.3215 of the *Florida Statutes*.[1170] In *Poulos*, a developer obtained a development order from the Martin County Commission. The redevelopment order was challenged under this section by a third person. As required, the challengers filed a verified complaint with the county to give it a chance to rectify the alleged inconsistency with the county's comprehensive plan.[1171] Martin County Commission refused to set aside the development order. Following the statutory procedure, the challengers then filed the complaint in the circuit court, commencing this action for declaratory and injunctive relief.[1172] The question was whether the circuit court should then act as a reviewing court exercising certiorari jurisdiction or grant a trial de novo.[1173] The circuit court chose review as under a certiorari petition, but the Fourth District Court of Appeal reversed.[1174]

Section 163.3215 of the *Florida Statutes* provided that the verified complaint must be filed with the local government no later than thirty days after it had taken an action inconsistent with the comprehensive plan.[1175] Then the local government had thirty days to respond.[1176] If dissatisfied with the response, the aggrieved person had to file the action in circuit court within thirty days.[1177] In sum, the action in circuit court could be filed as much as ninety days after the complained of action of the local government.[1178] However, under the rules,[1179] a petition for certiorari, the means by which a unsuccessful applicant for approval of a development

1165. *G.B.V.*, 709 So. 2d at 156.
1166. *Id.*
1167. *Id.*
1168. 700 So. 2d 163 (Fla. 4th Dist. Ct. App. 1997).
1169. 709 So. 2d 175 (Fla. 5th Dist. Ct. App. 1998).
1170. FLA. STAT. § 163.3215 (1995).
1171. *Poulos*, 700 So. 2d at 163.
1172. *Id.*
1173. *Id.* at 164.
1174. *Id.* at 163.
1175. FLA. STAT. § 163.3215 (1997).
1176. *Id.*
1177. *Id.*
1178. *Id.*
1179. FLA. R. APP. P. 9.100(c)(1).

order obtains review, must be filed within thirty days.[1180] By the process of deduction, section 163.3215 of the *Florida Statutes* proceeding could not be certiorari. Therefore, it must be a statutory procedure in the form of an original *de novo* action.[1181]

The issue in *Florida Rock* was standing under this statute.[1182] At the request of the landowner, the County rezoned Florida Rock's 509 acres from agricultural to mining.[1183] The challenger had a record as a lifelong activist in environmental and wildlife matters, and he was the owner of land approximately ten miles away.[1184] He was also an environmental and land use lawyer practicing in the county.[1185] He claimed that the comprehensive plan required that twenty-five percent be set aside to preserve native vegetation. Florida Rock and the County disagreed, arguing that the set-aside was inapplicable.[1186] The challenger filed a verified complaint seeking declaratory relief under the statute.

The statute provided that "[a]ny aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order... that is not consistent with the comprehensive plan."[1187] It further defined "aggrieved or adversely affected party" as one who "will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan."[1188] The statute did not specify the degree to which a protected interest must be affected, other than to provide that "[t]he alleged adverse interest... shall exceed in degree the general interest in community good shared by all persons."[1189] The court concluded that the challenger here had not demonstrated a specific injury.[1190] Being a property owner in the county was not enough. Owning a business or even a law practice in the county was not enough. In sum, the challenger here had only proved that he was a citizen with an interest in the environment, and that was not enough to establish standing.[1191]

Judge Sharp provided a written dissent, pointing out that the statute did not require a challenger to have a property interest injured by the

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1180. *Id.*
1181. *Poulos*, 700 So. 2d at 165–66.
1182. *Florida Rock*, 709 So. 2d at 176.
1183. *Id.* at 176.
1184. *Id.*
1185. *Id.*
1186. *Id.*
1187. *Florida Rock*, 709 So. 2d at 176–77; *see* FLA. STAT. § 163.3215(1) (1995).
1188. *Florida Rock*, 709 So. 2d at 177; *see* FLA. STAT. § 163.3215(2) (1995).
1189. *Florida Rock*, 709 So. 2d at 177.
1190. *Id.*
1191. *Id.*

governmental action, but that seemed to be the way the majority was reading the statute.[1192] The challenger had taken an active part in the process by attending Planning Commission hearings, appealing the Planning Commission's decision to the County Commission, arguing the appeal before the Commission, and bringing this case.[1193] He had moved to the county because of the wildlife habitat that would be affected by the rezoning decision and had a clear record of defending the environment.[1194] If he did not have standing under the statute, then standing under it was reduced to those who could show monetary harm.[1195]

XXV. CONCLUSION

The foregoing survey presents selected materials of significance to those involved in real estate. There seems to be no consistent pattern to the case law and legislative development, but there were also few surprises. The law has continued to evolve in interesting ways, and we hope that this survey proves useful in following that evolution.

1192. *Id.* at 178–79 (Sharp, J., dissenting).
1193. *Id.*
1194. *Florida Rock*, 709 So. 2d at 178.
1195. *Id.* at 179.