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2007-2008 Survey of Florida Law Affecting Business Owners

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2007–2008 SURVEY OF FLORIDA LAW AFFECTING BUSINESS OWNERS

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I. INTRODUCTION

Hundreds of Florida appellate decisions rendered in the past year could be said to affect the conduct of business in Florida.[1] This survey does not attempt to deal with them all. Only cases addressing matters of first impression, involving conflicts between the District Courts of Appeal or questions stated by a District Court to be of great public importance and certified to the Supreme Court of Florida, or cases clarifying or expanding existing principles of law have been included.[2]

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1. *See* Barbara Landau, *2006–2007 Survey of Florida Law Affecting Business Owners*, 32 NOVA L. REV. 21, 22 (2007) [hereinafter Landau, *2006–2007 Survey*]. This survey picks up where last year's survey left off. *Id.* The topics included are similar to last year's survey, there being noteworthy cases in most of the same areas, and several new topics have been added. *Id.* at 22–23.

2. *See id.* A few cases did not fit squarely into any of these categories, but the facts or application of the law was unusual. *Id.*

II. ALTERNATIVE DISPUTE RESOLUTION

A. *Arbitration*

Mr. Johnson, the chief operating officer of Rocksolid Granite, Inc. (Corporation), executed an agreement with All Top Granite, Inc. (All Top) signing "only in his capacity as the chief operating officer of [the Corporation.]"[3] The agreement contained an arbitration clause.[4] A dispute developed and All Top began arbitration against both Mr. Johnson, in his individual capacity, and the Corporation.[5] Mr. Johnson first asked the arbitrator, and then the trial court, to prohibit the arbitration against him since he signed the agreement only in his official capacity and not individually.[6] Although All Top conceded that the agreement had been signed by Mr. Johnson only in his official capacity, the trial court, relying on *Alterra Healthcare Corp. v. Estate of Linton*,[7] ruled that Mr. Johnson had to arbitrate the claims against him.[8] The ruling was appealed by Mr. Johnson, and the Fourth District Court of Appeal reversed.[9] The appellate court distinguished *Alterra Healthcare Corp.*, stating that the situation there was the reverse of the case under consideration.[10] In *Alterra Healthcare Corp.*, it was a party bound by the arbitration provision who was seeking to avoid arbitration, the party there being found to be a third-party beneficiary of the contract.[11] On the other hand, explained the Fourth District, in *Johnson v. Pires*,[12] it was a nonparty who sought to avoid arbitration.[13] The Fourth District Court of Appeal noted that there are several theories under which a non-signatory may be bound by an arbitration agreement, one of which is agency theory.[14] However, the court found that the agency exception does not apply when a person signs only in

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3. Johnson v. Pires, 968 So. 2d 700, 701 (Fla. 4th Dist. Ct. App. 2007).
4. *Id.*
5. *Id.*
6. *Id.*
7. 953 So. 2d 574 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
8. *Johnson*, 968 So. 2d at 701.
9. *Id.* at 701–02.
10. *Id.* at 701.
11. *Alterra Healthcare Corp.*, 953 So. 2d at 579. It should be noted that *Alterra Healthcare Corp.* involved both situations, that is, a nonparty to the agreement seeking to compel a nonparty to arbitrate. *See id.* at 578–79. The nonparty who sought arbitration was found to be subject to the arbitration clause under the doctrine of "respondeat superior." *Id.*; *see also* McCarthy v. Azure, 22 F.3d 351, 357 (1st Cir. 1994).
12. 968 So. 2d at 700
13. *Id.* at 701.
14. *Id.*

his or her corporate capacity,[15] citing *Charter Air Center, Inc. v. Miller*[16] and *McCarthy v. Azure*.[17] The Fourth District concluded that arbitration could not be forced on Mr. Johnson, although "[i]t is thus apparent that . . . [he] could have enforced the arbitration provision against [All Top] who agreed to arbitrate."[18]

B. *Enforcement of Settlement Agreement*

In an earlier incarnation of *Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd.* (*Architectural Network I*),[19] discussed in the last survey,[20] the Second District Court of Appeal remanded the case to the trial court for an evidentiary hearing to determine if Architectural Network, Inc.'s attorney "had [the] authority to settle" the litigation between Architectural Network,

15. *Id.* at 702.

16. 348 So. 2d 614 (Fla. 2d Dist. Ct. App. 1977).

17. 22 F.3d 351 (1st Cir. 1994).

18. *Johnson*, 968 So. 2d at 702. Unlike the Fourth District Court of Appeal in *Johnson*, the United States Court of Appeals for the First Circuit, in *McCarthy*, held that a nonparty to the arbitration agreement, the appellant there could not compel a party to the agreement to arbitrate. *McCarthy*, 22 F.3d at 363. Although, as the First Circuit noted, there are exceptions to this rule. *See id.* at 356–57. The court stated that:

> [p]erhaps most important from a policy standpoint, adopting appellant's proposal would introduce a troubling asymmetry into the law. . . . In appellant's scenario, then, the agent, though he could not be compelled to arbitrate, nonetheless could compel the claimant to submit to arbitration. In other words, an agent for a disclosed principal would enjoy the benefits of the principal's arbitral agreement, but would shoulder none of the corresponding burdens. He would have found a way, contrary to folklore, to run with the hare and hunt with the hounds.

Id. at 361.

The First District Court of Appeal in *Alterra Healthcare Corp.* allowed a nonparty—the employee of Alterra Healthcare Corporation—to bring the arbitration action. Alterra Healthcare Corp. v. Estate of Linton, 953 So. 2d 574, 579 (Fla. 1st Dist. Ct. App. 2007) (per curiam). The First District Court of Appeal held that the doctrine of respondeat superior applied to make Alterra Healthcare Corporation's employees subject to the arbitration agreement. *Id.* at 578–79. However, the First District was not called upon to address what would have happened had the situation been reversed, that is, if it was the other party—here a third-party beneficiary—that had sought arbitration against the employee of Alterra Healthcare Corporation. *Id.* at 579. If the employee had then objected to the arbitration, under the court's reasoning, it appears that the employee would have been compelled to arbitrate. *See id.* On the other hand, the Fourth District did not explain in *Johnson* why it was "apparent" that Johnson, the employee/officer, could enforce arbitration, while it could not be enforced against him. *Johnson*, 968 So. 2d at 702. *Johnson* brings into clear focus the First Circuit's expression of concern in *McCarthy* about "a rule that [would] allow a party to use the courts to vindicate his rights while at the same time foreclosing his adversary from comparable access." McCarthy, 22 F.3d at 361.

19. 933 So. 2d 732 (Fla. 2d Dist. Ct. App. 2006).

20. *See* Landau, *2006–2007 Survey*, *supra* note 1, at 33–34.

Inc. and Gulf Bay Land Holdings II, Ltd.[21] The trial court held the required evidentiary hearing and enforced the settlement agreement, with final judgment entered for Gulf Bay Land Holdings II, Ltd.[22] Architectural Network, Inc. appealed, and the Second District Court of Appeal reversed.[23] Gulf Bay Land Holdings II, Ltd. failed to meet its burden of proof, which required it to show that Architectural Network's attorney had the "'clear and unequivocal' authority to settle" the case on behalf of Architectural Network, with the Second District Court of Appeal reiterating that the "courts have been very stringent in what they find to be . . . 'clear and unequivocal.'"[24]

III. BUSINESS ENTITIES AND AGREEMENTS

A. *Franchises*

Can an officer or a shareholder of a corporate franchisor be held personally accountable for violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), sections 501.201–501.213 of the *Florida Statutes*, or the Florida Franchise Act, section 817.416 of the *Florida Statutes*?[25] Yes, according to the Fifth District Court of Appeal in *KC Leisure, Inc. v. Haber*.[26] KC Leisure, Inc. (KC) alleged that it paid $50,000 to Relay Transportation, Inc. (Relay) for what Relay described as a "license" but that, according to KC, was actually a franchise agreement allowing KC to sell and rent electric vehicles.[27] Eleven months after the payment was made, KC tried, without success, to have the agreement rescinded, sending "written notice to Relay" and its officer and stockholder, Mr. Haber.[28] KC then sued Relay, Mr. Haber, and others alleging that Mr. Haber was an active participant in a scheme by Relay to provide misleading, incomplete, and incorrect information to KC as the franchisee, thus violating FDUTPA and the Florida Franchise Act.[29] The trial court concluded that liability under FDUTPA is imposed only "on 'sellers and not their shareholders or individuals who act for

21. *Architectural Network I*, 933 So. 2d at 733–34.

22. Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd. (*Architectural Network II*), 989 So. 2d 662, 662 (Fla. 2d Dist. Ct. App. 2008).

23. *Id.* at 663.

24. *Id.* (quoting Weitzman v. Bergman, 555 So. 2d 448, 449 (Fla. 4th Dist. Ct. App. 1990)).

25. *See* KC Leisure, Inc. v. Haber, 972 So. 2d 1069, 1071 n.2, 1075 n.3 (Fla. 5th Dist. Ct. App. 2008); FLA STAT. §§ 501.201–.213 (2005); FLA. STAT. § 817.416 (2005).

26. *See KC Leisure, Inc.*, 972 So. 2d at 1071.

27. *Id.* at 1071–72.

28. *Id.* at 1072.

29. *Id.* at 1072, 1075.

[them].'"[30] The trial court also "found no specific allegations that Mr. Haber personally participated in" alleged to be in violation of the Florida Franchise Act.[31] The complaint against Mr. Haber was then dismissed by the trial court with prejudice.[32] The trial court was wrong on both counts said the Fifth District Court of Appeal.[33] The allegations were sufficient to state a claim under FDUTPA against Relay.[34] Further, if there is corporate liability, there may be individual liability, provided that it is proved that the "individual defendant actively participated in or had some measure of control over the corporation's deceptive practices."[35] Finding nothing in the case law under the Federal Trade Commission Act that per se prevents suing an officer or shareholder of a corporate franchisor for deceptive trade practices,[36] the Fifth District Court of Appeal concluded that KC's allegations, that Mr. Haber directly participated in the conduct giving rise to FDUTPA violations, were sufficient as against Mr. Haber.[37] Likewise, the allegations set forth a cause of action against Mr. Haber for fraudulent practices under the Florida Franchise Act.[38]

B. *Corporations*

Minority shareholders who disagree with the majority's decision on major corporate transactions, such as the sale or transfer of all of the corporation's assets, have the right to have their shares valued—appraisal rights—and bought back by the corporation.[39] The issue in *Williams v. Stanford*[40] was whether or not the statutory appraisal rights procedure was the exclusive remedy available to the dissenting minority.[41] The action causing offense to the minority shareholders in *Williams* was the majority shareholders' alleged engineering of the transfer of all of the assets held by the old corporation to a

30. *Id. at* 1072.
31. *KC Leisure, Inc.*, 972 So. 2d at 1075.
32. *Id.* at 1072, 1075.
33. *See id.*
34. *Id.* at 1073.
35. *Id.*
36. *KC Leisure, Inc.*, 972 So. 2d at 1073. The FDUTPA claim in count one was based on deceptive and unfair trade practices "in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." *Id.* at 1072.
37. *Id.* at 1074.
38. *Id.* at 1075.
39. Williams v. Stanford, 977 So. 2d 722, 726–27 (Fla. 1st Dist. Ct. App. 2008) (citing FLA. STAT. § 607.1302(1) (2003)).
40. *Id.* at 722.
41. *Id.* at 724.

new corporation that excluded the old corporation's shareholders.[42] The old corporation's assets were transferred to the new corporation in return for the new corporation's assumption of the liabilities of the old corporation.[43] No money changed hands.[44] Separate from the exercise of their appraisal rights, the minority shareholders brought a shareholder-derivative action against, *inter alia*, the new corporation and the majority shareholder asking for rescission of the asset transfer, and the "imposition of a constructive trust" on the profits of the new corporation.[45] The minority shareholders alleged "unfair dealing and breaches of fiduciary duty [over a period of] several years," resulting in the lowering of the value of the old corporation's shares.[46] The essential question in this case, according to the First District Court of Appeal, is whether the appraisal rights statute prevented "judicial scrutiny of the transfer of . . . assets from" the old corporation to the new.[47] The appellate court answered that question in the negative and went on to hold that additional remedies, including rescission and "the imposition of a constructive trust," may be available to the minority shareholders.[48] The court observed that it was the first Florida appellate court's duty "to interpret the governing provision[], . . . section 607.1302" of the *Florida Statutes*, as amended in 2003.[49] The First District Court of Appeal concluded that if minority shareholders can "raise facially sufficient and serious allegations of unfairness," their relief would not be "limited to the statutory remedy of offering up their shares for a fair price."[50]

Cassedy v. Alland Investments Corp.[51] involved a demand for a corporate accounting.[52] Alland Investments Corporation (Alland) was formed as a Florida corporation for the purpose of buying Texas real estate and developing it.[53] Mr. Cassedy invested $315,000 in the enterprise.[54] The real estate purchase was never completed and, at the end of June 1999, Mr. Cassedy asked Alland for a full accounting.[55] About a week later, Alland sent Mr.

42. *Id.* at 725.
43. *Id.*
44. *See Williams*, 977 So. 2d at 725.
45. *Id.* at 726.
46. *Id.*
47. *Id.*
48. *See id.* at 730–31.
49. *Williams*, 977 So. 2d at 727.
50. *Id.* at 724.
51. 982 So. 2d 719 (Fla. 1st Dist. Ct. App. 2008).
52. *Id.* at 720.
53. *Id.*
54. *Id.*
55. *Id.*

Cassedy "a 'single page accounting summary'" attached to correspondence to the effect that Alland had "'the rest of the year'" to complete a comprehensive accounting.[56] Additional correspondence followed between the parties that summer and, on August 18, 1999, Alland wrote to Mr. Cassedy stating that Mr. Cassedy had the summary since July 6, 1999, and that no paperwork evidencing efforts to buy the real estate was ever sent to Alland.[57] Alland was subsequently dissolved.[58] On June 15, 2006, after the corporation had been dissolved, Mr. Cassedy filed suit seeking a final accounting.[59] Alland moved for summary judgment arguing that the action "was barred by the statute of limitations because [it was] in 1999" and that Mr. Cassedy's claim accrued.[60] The trial court granted the motion, and Mr. Cassedy appealed.[61] The First District Court of Appeal agreed with Alland in that, even though the accounting action was an equitable action, the statute of limitations did apply.[62] However, regardless of whether the five-year contract statute of limitations contained in section 95.11(2)(b) of the *Florida Statutes* is applicable to written contracts or the four-year statute of limitations on oral contract actions set forth in section 95.11(3)(k) of the *Florida Statutes* is applied, Mr. Cassedy's suit was not barred.[63] According to the First District Court of Appeal, the statute of limitations did not start "to run in 1999 because there [was] no repudiation of the duty to provide a final accounting."[64]

IV. CHOICE OF LAW AND CONFLICT OF LAWS

The main issue in *Lanoue v. Rizk*[65] was whether the Ontario or the Florida statute of limitations controlled in an action brought by a lender against a borrower.[66] The borrower, while in Ontario, simultaneously signed a prom-

56. *Cassedy*, 982 So. 2d at 720.
57. *Id.*
58. *See id.*
59. *Id.*
60. *Id.*
61. *Cassedy*, 982 So. 2d at 720.
62. *Id.*
63. *Id.*; FLA. STAT. §§ 95.11(2)(b), (3)(k) (2008).
64. *Id.*
65. 987 So. 2d 724 (Fla. 3d Dist. Ct. App. 2008).
66. *Id.* at 725. In addition to deciding the conflict of law issue, the Third District Court of Appeal concluded that summary judgment was improperly granted in favor of the lender, as there was an issue of fact regarding who made certain late payments. *Id.* at 727. For the statute of limitations to be tolled under the Ontario statute, part payment must be made "'by the person against whom the claim is made or by the person's agent.'" *Id.* (quoting Limitations Act, 2002 S.O., ch. 24, Sched. B, § 13(11)). The proceeds of the loan were to be used for a restaurant located in Key Biscayne, Florida. *Id.* at 725. There were three borrowers: 1)

issory note and a general security agreement which contained a description of the collateral given as security for the loan.[67] The general security agreement (GSA) was referred to in the promissory note; the note providing that "'[f]or prepayment terms and special conditions," the GSA was to "be read in conjunction with [the] note and all said terms shall apply to'" the note.'"[68] The promissory note did not address the issue of choice of law, but the GSA did.[69] The choice of law provision in the GSA provided that "'the laws of the Province of Ontario and the State of Miami'" would govern.[70] The reference to "Miami" was determined by the trial judge to be a scrivener's error—the State of Florida having been intended—and the Third District Court of Appeal agreed.[71] With that issue resolved, the Third District Court of Appeal still had to choose between the law of Ontario and Florida; it chose Ontario.[72] Since the lawsuit was in Florida, Florida choice of law rules had to be consulted first.[73] For causes of action sounding in contract, Florida follows the rule of *lex loci contractus*.[74]

V. CONSUMER RIGHTS

A. *Deceptive Trade Practices*

Auto leasing customers of S.D.S. Autos, Inc. (S.D.S.) and Brumos Motor Cars, Inc. (Brumos) brought a class action against S.D.S. and Brumos under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).[75] Although the lessees had signed leases requiring arbitration and containing express class action waivers, the trial court denied the motions of S.D.S. and Brumos, and refused to dismiss the class action suit based on the arbitration provision.[76] The leases recited that they were governed by the Federal Arbi-

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the appellant Lanoue; 2) a corporation that was dissolved prior to the lawsuit; and 3) a third party who was not made a party to the lawsuit. *Lanoue*, 987 So. 2d at 725–26.

67. *Id.* at 726. The opinion does not make a reference to any "collateral" other than the note. *See id.* at 725–27.

68. *Id.* at 726.

69. *Id.*

70. *Lanoue*, 987 So. 2d at 726.

71. *Id.*

72. *Id.* at 727.

73. *Id.*

74. *Id.* (citing, among other cases, State Farm Mut. Auto Ins. Co. v. Roach, 945 So. 2d 1160, 1163 (Fla. 2006), *noted in* Landau, *2006–2007 Survey*, *supra* note 1, at 41–43).

75. S.D.S. Autos, Inc. v. Chrzanowski (*S.D.S. Autos I*), 976 So. 2d 600, 602 (Fla. 1st Dist. Ct. App. 2007).

76. *Id.* at 603.

tration Act (FAA).[77] S.D.S. and Brumos appealed.[78] The First District Court of Appeal acknowledged that the FAA represents "'clear federal policy'" favoring arbitration, and that states cannot require persons who have consented to arbitration to later resort to a lawsuit, except where contract defenses would render the contractual provisions invalid under state law,[79] citing the United States Supreme Court's decision in *Perry v. Thomas*.[80] The First District also noted that the United States Supreme Court stated in *Dean Witter Reynolds, Inc. v. Byrd*[81] that arbitration agreements are to be "'rigorously enforced.'"[82] The First District expressed due regard for federal pronouncements on the sanctity of arbitration agreements but observed that state law may "invalidate an arbitration provision without [offending] the FAA '[if] the law at issue governs contracts generally and not arbitration agreements specifically.'"[83] The First District Court of Appeal then reviewed the remedial nature of FDUTPA and, affirming the order of the trial court, held that barring auto leasing customers from pursuing class actions where each claim might be small would frustrate the benefits and intent of FDUTPA.[84] The class action waiver in this case was inconsistent with Florida's public policy and therefore unenforceable.[85]

In a related short per curiam decision on consolidated appeals by S.D.S. and Brumos, the First District Court of Appeal upheld the trial court's class action certification in *S.D.S. Autos, Inc. v. Chrzanowski* (*S.D.S. Autos II*)[86] under *Florida Rule of Civil Procedure* 1.220(b)(2)–(b)(3) "of two classes of consumers" covered by FDUTPA.[87] The court cited its decision in *Davis v. Powertel, Inc.*,[88] where it held that:

> [I]n a class action for damages under FDUTPA, class certification does not require proof of each individual putative class member's actual reliance on an alleged deceptive act because an actionable deceptive trade practice is one which is "likely to deceive a con-

77. *Id.* at 604.
78. *Id.* at 603.
79. *Id.* at 605 (quoting *Byrd*, 470 U.S. at 221).
80. 482 U.S. at 483.
81. 470 U.S. 213 (1985).
82. *S.D.S. Autos I*, 976 So. 2d at 605 (quoting *Perry*, 482 U.S. at 490).
83. *Id.* (quoting Bess v. Check Express, 294 F.3d 1298, 1306 (11th Cir. 2002)).
84. *Id.* at 608, 611.
85. *Id.* at 611.
86. 982 So. 2d 1 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
87. *Id.* (citing Fla. R. Civ. P. 1.220(b)(2)–(3)).
88. 776 So. 2d 971 (Fla. 1st Dist. Ct. App. 2000).

sumer acting reasonably in the same circumstances," not one upon which any individual plaintiff "actually relied."[89]

C. *Warranties*

Larrain and Sotomayor (Buyers) bought a 2001 Ford Expedition from Bengal Motor Co. Ltd. (Bengal Motor) in 2005.[90] As part of the transaction, the Buyers were given a limited warranty for the car.[91] They signed a separate agreement with Bengal Motor to arbitrate any disputes that might arise from the dealings between Bengal Motor and the purchasers.[92] The automobile was allegedly defective and Bengal Motor did not successfully repair it during the term of the warranty.[93] Larrain and Sotomayor then sued Bengal Motor alleging, among other things, violation of warranties under the Magnuson-Moss Warranty Act.[94] The trial court granted Bengal Motor's motions to compel arbitration, and Larrain and Sotomayor appealed.[95] The Third District Court of Appeal reversed and remanded.[96] The Magnuson-Moss Warranty Act and the "single document rule," adopted by the Federal Trade Commission, recognize that the parties may agree to alternate dispute resolution, but language to this effect must be in the same document as any warranty extended.[97] The "single document rule" was not satisfied as there were two documents here, the warranty and the arbitration agreement.[98]

89. *S.D.S. Autos II*, 982 So. 2d at 1 (quoting *Davis*, 776 So. 2d at 974).

90. Larrain v. Bengal Motor Co., 976 So. 2d 12, 13 (Fla. 3d Dist. Ct. App. 2008).

91. *Id.*

92. *Id.* The agreement provided that arbitration applied to any claim, including claims of the purchaser and the dealer arising "from a 'relationship with third parties who do not sign'" the agreement. *Id.* Could those nonparties be compelled to arbitrate? Could those nonparties compel the parties to arbitrate? If so, under what circumstances? *See* McCarthy v. Azure, 22 F.3d 351, 361–63 (1st Cir. 1994) (holding that a nonparty to an arbitration agreement cannot compel a party to the agreement to arbitrate); Charter Air Ctr., Inc. v. Miller, 348 So. 2d 614, 616–17 (Fla. 2d Dist. Ct. App. 1977) (holding that a non-signatory, under the agency exception, is not bound by an arbitration agreement when it is signed in his or her official capacity).

93. *Larrain*, 976 So. 2d at 13.

94. *Id.* at 13–14.

95. *Id.* at 14.

96. *Id.* at 14–15.

97. *Larrain*, 976 So. 2d at 14.

98. *See id.*

VI. CONTRACTS

A. *Formation*

In this offer and acceptance case, Mr. Dougherty, an attorney, represented both "his mother, Kathleen Dougherty, and his fiancée's solely-owned corporation, Franklin Pond, Inc." (the buyers).[99] Specifically, Mr. Dougherty had section 1031 like-kind exchange funds that had to be used for the purchase of other real estate.[100] Mr. Dougherty had dealt with Mr. and Mrs. Ricci before, and he knew the Riccis were trying to sell certain real estate.[101] After Mr. Dougherty contacted Mr. Ricci, Mr. Ricci showed up at Mr. Dougherty's office with "a proposed contract" for the sale of their real estate for 1.5 million dollars.[102] The proposed contract, an offer, had already been signed by Mr. and Mrs. Ricci.[103] Mr. Dougherty made some changes to the proposed contract, inserted the names of the buyers, signed and initialed the agreement on their behalf, as buyers, and arranged for the earnest money deposit to be made to Mr. Ricci.[104] Mr. Ricci also initialed the changes.[105] When Mr. and Mrs. Ricci did not close the sale after they had been asked, and failed to cure a title defect, the buyers brought an action against Mr. and Mrs. Ricci seeking specific performance.[106] The action was dismissed, and the buyers appealed.[107] The Fifth District Court of Appeal affirmed.[108] A contract for the purchase of real estate that could be specifically enforced did not come into being.[109] The changes Mr. Dougherty made to the proposed contract amounted to a counteroffer to Mr. and Mrs. Ricci.[110] Mr. Ricci agreed to the counteroffer, but Mrs. Ricci did not.[111] The court found no support for the buyers' "argument that Mr. Ricci had . . . apparent authority

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99. Franklin Pond, Inc. v. Ricci, 979 So. 2d 386, 387 (Fla. 5th Dist. Ct. App. 2008).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Franklin Pond, Inc.*, 979 So. 2d at 388.
105. *Id.*
106. *Id.* At this point, Mr. Dougherty had become one of the buyers, his mother having assigned to him her interest under "the purported contract." *Id.*
107. *Id.* at 387.
108. *Franklin Pond, Inc.*, 979 So. 2d at 389.
109. *See id.*
110. *Id.* at 388.
111. *Id.*

to act on" Mrs. Ricci's behalf to accept the counteroffer, and there was no evidence that Mrs. Ricci ratified the changes and Mr. Ricci's actions.[112]

B. *Remedies*

Mastec, Inc. v. TJS, L.L.C.[113] involved a complicated fact pattern concerning a protracted real estate sale transaction, title defects, construction of a Florida Association of Realtors preprinted form VAC–6 10/00 and amendments to the form, numerous extensions, and subsequent attempted extensions of the closing date.[114] The trial court decided that Mastec, Inc. (Seller) breached the contract and granted the request by TJS, L.L.C., and Lakeland Granite and Marble, Inc. (Buyers) for specific performance.[115] The Seller appealed, and the Second District Court of Appeal held that as provided in the contract,[116] time was of the essence, the real estate contract expiration date was February 15, 2004, and "the [c]ontract called for concurrent performances by the" Buyers and Seller.[117] Actually tendering payment to the Seller and demanding conveyance of title by Seller, were conditions precedent to ordering specific performance.[118] The trial court did not make any finding that there had been a tender prior to February 15, 2004, nor, said the Second District Court of Appeal, could the trial court have so found on the evidence presented.[119] There having been no tender, the Seller was not obligated to convey.[120]

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112. *Id.* at 388–89. The trial court's finding that Mr. Dougherty did not have the required express authority to act on behalf of the buyers provided additional support for the Fifth District's affirmance of the trial court's dismissal of the action against the Riccis. *Franklin Pond, Inc.*, 979 So. 2d at 389. Ratification by the other buyers of Mr. Dougherty's acts was not discussed. *Id.* It would appear that the result would have been the same even if the buyers had ratified Mr. Dougherty's acts, since the appellate court found no acceptance of the counteroffer by Mrs. Ricci. *See id.* at 388–89.

113. 979 So. 2d 285 (Fla. 2d Dist. Ct. App. 2008).

114. *Id.* at 286–89.

115. *Id.* at 290–91.

116. *Id.* at 292. The Second District Court of Appeal made at least two references to the fact that "[t]he 'time is of the essence' provision" was in bold print. *Id.* at 286 n.3.

117. *Mastec*, 979 So. 2d at 292.

118. *See id.* at 292 (citing Booth v. Bobbitt, 114 So. 513, 514 (Fla. 1927)).

119. *See id.*

120. *See id.*

C. *Right of First Refusal*

Old Port Cove Condominium Ass'n One v. Old Port Cove Holdings, Inc. (*Old Port I*),[121] involving a right of first refusal, and reviewed in the 2006–2007 Survey,[122] made its way to the Supreme Court of Florida.[123] The Fourth District Court of Appeal had ruled that the common law rule against perpetuities had been retroactively abrogated by section 689.225 of the *Florida Statutes*—the developer having argued that the rule applied to the right of first refusal at issue—with the result that the right of first refusal was upheld as against the developer.[124] The Fourth District acknowledged that its abrogation holding put it in conflict with *Fallschase Development Corp. v. Blakey*,[125] and it certified the question.[126] In addition, the Fourth District indicated that it had some doubt as to whether the rule against perpetuities applied to the right of first refusal in the first place, but the Fourth District did not decide that issue because of its determination as to the abrogation of the common law rule against perpetuities.[127] The Supreme Court of Florida, as a matter of first impression, held that "the rule against perpetuities does not apply to rights of first refusal."[128] The Supreme Court of Florida also ruled that section 689.225 of the *Florida Statutes* did not have retroactive effect.[129] The Court thereby affirmed the Fourth District Court of Appeal as to result, while agreeing with the First District in *Fallschase* that section 689.225 of the *Florida Statutes* did not have retroactive effect.[130] *Fallschase* was disapproved "to the extent it [found] that the common law rule [against perpetuities] applie[d] to rights of first refusal."[131] Instead, rights of first refusal are to be "analyzed under the rule [against] unreasonable restraints on alienation."[132]

121. 954 So. 2d 742 (Fla. 4th Dist. Ct. App. 2007).
122. Landau, *2006-2007 Survey*, *supra* note 1, at 65.
123. *See* Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One (*Old Port II*), 986 So. 2d 1279 (Fla. 2008).
124. *See id.* at 1281.
125. 696 So. 2d 833 (Fla. 1st Dist. Ct. App. 1997).
126. *Old Port I*, 954 So. 2d at 746–47.
127. *See id.* at 743–44.
128. *Old Port II*, 986 So. 2d at 1281.
129. *See id.*
130. *Id.*
131. *Id.*
132. *Id.* at 1288.

D. *Exculpatory Clauses*

The Applegates' daughter, age five, was injured at camp while participating in a water skiing wakeboard activity.[133] The Applegates had signed a liability exculpatory agreement on behalf of their daughter and themselves.[134] The Applegates sued Cable Water Ski, L.C. (Cable), the operator of the camp, for negligence and sought damages for injury to their daughter, and included a loss of services claim in the complaint.[135] The trial court awarded summary judgment to Cable finding that the exculpatory clause was an unambiguous waiver of the claims by the Applegates.[136] The Fifth District Court of Appeal affirmed the summary judgment in favor of Cable with respect to the Applegates' loss of services claim, which was not contested on appeal.[137] The Fifth District Court of Appeal noted that exculpatory agreements are not looked at favorably by the law on public policy grounds.[138] When a minor is the subject of a liability exculpatory clause favoring a commercial enterprise, Florida—as *parens patriae*—has "a strong intent to protect children from harm."[139] Consequently, the appellate court concluded that the exculpatory clause was unenforceable for reasons of public policy.[140] However, in so deciding, the court emphasized that its ruling was "limited to commercial enterprises."[141] The court certified the following question to the Supreme Court of Florida as one of great public importance: "WHETHER A CONTRACT CONTAINING AN EXCULPATORY CLAUSE, SIGNED BY A PARENT ON BEHALF OF HER CHILD, IN FAVOR OF A COMMERCIAL ENTERPRISE, IS ENFORCEABLE TO DEFEAT THE CHILD'S ACTION TO RECOVER FOR PERSONAL INJURIES SUSTAINED BY THE CHILD AS A RESULT OF THE ENTERPRISE'S NEGLIGENCE."[142] The court also went to some lengths to explain its view that the public policy result might have been different had the defendant been a "not-for-profit, community-based organization."[143]

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133. Applegate v. Cable Water Ski, L.C., 974 So. 2d 1112, 1114 (Fla. 5th Dist. Ct. App. 2008).
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Applegate*, 974 So. 2d at 1114.
139. *Id.*
140. *Id.* at 1115.
141. *Id.*
142. *Id.* at 1116.
143. *Applegate*, 974 So. 2d at 1115–16.

E. *Limitation of Damages*

The Second District Court of Appeals set out in detail the facts of *Paul Gottlieb & Co. v. Alps S. Corp.*[144] Briefly stated, Alps South Corp. (Alps) made medical devices and Paul Gottlieb & Co. (Gottlieb) supplied special fabric to Alps.[145] Alps incorporated the fabric into the liners it made for use by amputees with prosthetic devices.[146] Although Alps' customers were pleased with the new liners, it was not long before the situation changed.[147] After Gottlieb provided different fabric to Alps without Alps' consent, Alps began to get complaints from its customers.[148] Alps' and Gottlieb's relationship worsened.[149] Alps did not pay a bill from Gottlieb, and Gottlieb sued Alps.[150] Alps filed a counterclaim for damages alleging breach of warranty.[151] Gottlieb was awarded nearly $29,000 in damages on its claim for non-payment.[152] The damage award to Alps on its counterclaim was almost $695,000, consisting mainly of lost profits, and Gottlieb appealed.[153] The Second District Court of Appeal characterized the case as a "'battle of the forms.'"[154] The back of Gottlieb's finished goods contract provided that "BUYER SHALL NOT IN ANY EVENT BE ENTITLED TO, AND SELLER SHALL NOT BE LIABLE FOR INDIRECT OR CONSEQUENTIAL DAMAGES OF ANY NATURE, INCLUDING, WITHOUT BEING LIMITED TO, LOSS OF PROFIT, PROMOTIONAL OR MANUFACTURING EXPENSES, INJURY TO REPUTATION OR LOSS OF CUSTOMER."[155] The Alps purchase order did not contain the liability limitations of the Gottlieb contract.[156] As the court noted, "[t]his dispute arises from the common, but risky, commercial practice where the seller and buyer negotiate a contract involving goods by exchanging each others' standardized forms."[157] However, section 672.207 of the *Florida Statutes*, contained in Florida's version of the Uniform Commercial Code, is

144. Paul Gottlieb & Co. v. Alps S. Corp., 985 So. 2d 1, 3–4 (Fla. 2d Dist. Ct. App. 2007).
145. *Id.* at 3.
146. *Id.*
147. *Id.* at 3–4.
148. *Id.* at 4.
149. *Gottlieb*, 985 So. 2d at 4.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* Exactly $633,939.04 of the award represented lost profit. *Gottlieb*, 985 So. 2d at 9.
154. *See id.* at 5.
155. *Id.* at 4.
156. *See id.* at 5–6.
157. *Id.* at 4.

supposed to resolve the issue of differing forms used between merchants that cover the same transaction.[158] Specifically, a contract between merchants can be formed despite an acceptance that contains new or modified terms, even though a contract may not have been formed under the "common law mirror image rule."[159] Under section 672.207(2) of the *Florida Statutes*, additional terms, for example, Gottlieb's damage limitation clause, "become a part of the contract *unless*:" 1) acceptance is limited, by the express terms of the offer, to the terms of the offer; or 2) the additional terms result in a material alteration of the contract; or 3) notice of objection to the additional terms "has already been given or is given within a reasonable time after notice of [the additional terms] is received."[160] The Second District determined that under the facts of the case, the only issue to be decided was whether the Gottlieb damages limitation clause constituted a material alteration of the contract.[161] Alps, as the party seeking to exclude from the contract the damages limitation clause—which it admitted it had not read at the time—had the burden of proving a material alteration.[162] To carry its burden, Alps had to demonstrate that the damages limitation clause had the effect of causing it unreasonable "surprise or hardship."[163] As to surprise, the Gottlieb contract with the damages limitation clause "was the sixth in a series" of contracts between the parties, all of which contracts had the clause, and thus, Alps did not carry its burden of proof as to surprise.[164] As to hardship, Alps failed to inform Gottlieb of major ramifications of Gottlieb's breach of contract, thus not indicating any severe economic hardship.[165] Alps did not meet its burden of proving hardship.[166] Gottlieb's limitation of damages clause was a part of the contract.[167] Therefore, Alps could not recover lost profits or other consequential damages.[168] However, Alps could recover direct "benefit-of-the-bargain" damages and incidental damages.[169] The case was reversed and remanded for the determination of Alps' direct and incidental damages.[170]

158. *Gottlieb*, 985 So. 2d at 5–6.
159. *Id.* at 6.
160. *Id.* (citing FLA. STAT. § 672.207(2) (2007)).
161. *Id.*
162. *Id.* at 6–7.
163. *Gottlieb*, 985 So. 2d at 7.
164. *Id.* at 7–8.
165. *Id.* at 8.
166. *Id.*
167. *See id.*
168. *Gottlieb*, 985 So. 2d at 10.
169. *Id.*
170. *Id.*

F. *Attorney's Fees - Prevailing Party*

Padula & Wadsworth Construction, Inc. (Contractor) hired Port-A-Weld, Inc. (Subcontractor), and the subcontract between them contained a relatively unique attorney's fees provision.[171] In addition to providing that the party that did not prevail would be liable for all attorney's fees and court costs of the prevailing party, the clause provided that "a party shall not be considered as a 'prevailing party' if its recovery shall be less than 75% of its claim amount."[172] The subcontractor sued the contractor, alleging nonpayment of the balance due under the subcontract, and a claim for attorney's fees and court costs were included.[173] The contractor filed a compulsory counterclaim.[174] The trial court ruled that the contractor prevailed as to the subcontractor's claim and the subcontractor prevailed on the contractor's compulsory counterclaim.[175] The trail court said that "attorney's fees for both sides, [were] a wash"[176] Appeals followed, and the Fourth District Court of Appeal, in *Port-A-Weld, Inc. v. Padula & Wadsworth Construction, Inc.*,[177] reversed the trial court's decision as to attorney's fees and costs.[178] Since "compulsory counterclaims are not, . . . as a matter of law," claims distinct from the main claim, there cannot, where there is a compulsory counterclaim be more than one winner; "one party must prevail."[179] The court rejected the idea that there could be a tie in an action for breach of contract.[180] Thus, under the Supreme Court of Florida's test in *Moritz v. Hoyt Enterprises, Inc.*,[181] the prevailing party is the one in fact winning on the significant issues.[182] Finding that the subcontractor won on the significant issues before the trial court, the Fourth District pointed out that the inquiry could not end there in light of the seventy-five percent requirement in the subcontract.[183] The question presented was "whether the 'significant issue' test" under *Moritz* can be modified contractually.[184] The court noted that

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171. Port-A-Weld, Inc. v. Padula & Wadsworth Constr., Inc., 984 So. 2d 564, 566, 568–69 (Fla. 4th Dist. Ct. App. 2008).
172. *Id.* at 567–68.
173. *Id.* at 566.
174. *Id.* at 569.
175. *Id.* at 568.
176. *Port-A-Weld*, 984 So. 2d at 568.
177. *Id.* at 564.
178. *Id.* at 566.
179. *Id.* at 569.
180. *Id.*
181. 604 So. 2d 807 (Fla. 1992).
182. *Id.* at 810.
183. *Port-A-Weld*, 984 So. 2d at 569.
184. *Id.*

depending on how it was determined, the subcontractor may have been a sixty percent winner or it may have been a more than eighty percent winner.[185] Was "the contractual 75% threshold in" the subcontract enforceable or was it "contrary to public policy?"[186] Calling it "a matter of first impression," the court determined that the Supreme Court of Florida's "significant issue" test cannot be altered by contract.[187] The Fourth District agreed with the Fifth District Court of Appeal in *P & C Thompson Bros. Construction Co. v. Rowe*[188] that a provision under which a party may actually prevail but yet has to pay the other party's attorney's fee "can be seen as" against public policy.[189] In addition, the attorney's fee reciprocity statute, section 57.105(7) of the *Florida Statutes*, was cited by the court as additional support for the conclusion that the seventy-five percent winner provision in the subcontract was against public policy.[190] The subcontractor was entitled to recover fees and costs.[191]

In *M.A. Hajianpour, M.D., P.A. v. Khosrow Maleki, P.A.*,[192] decided two months before *Port-A-Weld*, the Fourth District Court of Appeal found that the parties had "battled to a draw" and concluded that the trial court did not abuse its discretion by refusing to award attorney's fees under a prevailing party provision where the "court determine[d] that neither party prevailed."[193] *Hajianpour* is not mentioned in *Port-A-Weld*.[194]

In another attorney's fee case, Skylark Sports, L.L.C. (the tenant) obtained a judgment against Islander Beach Club Condominium (the landlord) based on a lease dispute.[195] The trial court awarded attorney fees and costs to the tenant of approximately $192,000 based on the following provision in the lease: "ATTORNEY'S FEES: In the event that either party incurs legal fees or costs in the enforcement of this Lease or any provision hereof, whether

185. *Id.* at 570.
186. *Id.* at 569.
187. *Id.* at 569–70.
188. 433 So. 2d 1388 (Fla. 5th Dist. Ct. App. 1983).
189. *Id.* at 1389.
190. *Port-A-Weld*, 984 So. 2d at 569–70. Section 57.105(7) of the *Florida Statutes* provides, with respect to contracts entered into after October 1, 1988, "[i]f a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action." FLA. STAT. § 57.105(7) (2008).
191. *Port-A-Weld*, 984 So. 2d at 570.
192. 975 So. 2d 1288 (Fla. 4th Dist. Ct. App. 2008).
193. *Id.* at 1290 (citing Merchs. Bonding Co. v. City of Melbourne, 832 So. 2d 184, 186 (Fla. 5th Dist. Ct. App. 2002)).
194. *See generally Port-A-Weld*, 984 So. 2d at 564.
195. Islander Beach Club Condo. v. Skylark Sports, L.L.C., 975 So. 2d 1208, 1210 (Fla. 5th Dist. Ct. App. 2008).

suit is filed or not, shall be entitled to recover and to receive payment of reasonable attorneys' [fees] and costs incurred *by* the other party."[196] The Fifth District Court of Appeal reversed the fee award because the court found that the fee provision "clearly makes no sense."[197] The provision did "not reflect any clear intention . . . as to whom, when, and how attorney's fees or costs should be allowed."[198] The trial court's reading into and rewriting the clause so as "to make it a prevailing party" clause was improper, as was its interpretation of the word "by" as meaning "from."[199]

G. *Action Against State*

ContractPoint Florida Parks, L.L.C. (ContractPoint) "entered into a concessions" contract with the Florida Department of Environmental Protection (DEP).[200] DEP had legislative authority to make the contract.[201] Eventually, ContractPoint sued DEP for breach of contract.[202] ContractPoint won the lawsuit and was awarded damages exceeding $600,000.[203] DEP raised section 11.066 of the *Florida Statutes* as a bar to enforcement of the judgment.[204] Specifically, DEP relied on section 11.066(3) which reads in part that "[n]either the state nor any of its agencies shall pay or be required to pay monetary damages under the judgment of any court except pursuant to an appropriation made by law."[205] The trial court ruled in DEP's favor but the First District Court of Appeal reversed, certifying the following question to the Supreme Court of Florida:

> DOES SECTION 11.066, FLORIDA STATUTES, APPLY WHERE JUDGMENTS HAVE BEEN ENTERED AGAINST THE STATE OR ONE OF ITS AGENCIES IN A CONTRACT ACTION?"[206]

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196. *Id.* at 1209 (emphasis added).
197. *Id.* at 1211.
198. *Id.*
199. *Id.*
200. Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, L.L.C., 986 So. 2d 1260, 1262 (Fla. 2008).
201. *Id.* at 1263.
202. *Id.* at 1262.
203. *Id.*
204. *Id.*
205. *ContractPoint Fla. Parks, L.L.C.*, 986 So. 2d at 1265 (quoting FLA. STAT. § 11.066(3) (2008)).
206. *Id.* at 1261–62.

The Supreme Court of Florida answered the question in the negative finding that section 11.066 of the *Florida Statutes* was intended to apply to judgments against the state in the "exercise of its police powers [citing] the Citrus Canker Eradication Program,"[207] and not to judgments resulting from contract actions.[208] The Court noted that its decision in *Pan-Am Tobacco Corp. v. Department of Corrections*[209] predated the legislative enactment of section 11.066.[210] The Court opined that, in *Pan-Am Tobacco Corp.*, with respect to legislatively approved contracts, the legislature intended that they be binding on private parties, the state, and "entities of the state."[211] Being deprived of the means to judicially enforce a judgment for breach of contract renders the contract illusory.[212] As a matter of first impression, the Court held "that section 11.066 was not intended to and does not apply to valid judgments arising from the breach of a legislatively authorized express, written contract by the State or any of its agencies."[213] Justice Wells, joined by Justices Cantero and Bell, dissented.[214]

VII. DEEDS AND TAX SALES, MORTGAGES, LIS PENDENS, AND PARTITION

A. *Deeds and Tax Sales*

In *Jones v. Flowers*,[215] the United States Supreme Court held that when a taxing authority mails a notice of a real estate tax sale and the notice is returned to it unclaimed, due process requires the taxing authority to "take additional, reasonable steps to attempt to provide notice to the" owner of the property to be sold.[216] The *Jones* decision was controlling in *Patricia Weingarten Associates, Inc. v. Jocalbro, Inc.*[217] The Marion County Clerk sent notices to Patricia Weingarten Associates, Inc. (Weingarten) of real estate tax sales for failure to pay real estate taxes with respect to fourteen parcels of real estate.[218] As required by section 197.522(1)(a) of the *Florida Statutes*,

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207. *Id.* at 1267.
208. *Id.* at 1266–67 (citing Haire v. Fla. Dep't of Agric. & Consumer Servs., 870 So. 2d 774, 785 (Fla. 2004)).
209. 471 So. 2d 4 (Fla. 1984).
210. *ContractPoint Fla. Parks, L.L.C.*, 986 So. 2d at 1268.
211. *Id.* (quoting *Pan-Am Tobacco Corp.*, 471 So. 2d at 5).
212. *Id.* at 1270.
213. *Id.* at 1272.
214. *Id.* at 1272–79 (Wells, J., dissenting).
215. 547 U.S. 220 (2006).
216. *Id.* at 225.
217. 974 So. 2d 559, 561 (Fla. 5th Dist. Ct. App. 2008).
218. *Id.*

notices were sent to Weingarten "by certified mail with return receipt requested."[219] The notices were sent "to four different addresses" and all of the notices were returned unclaimed.[220] The Marion County Clerk then "publish[ed] the notice of the application for tax deeds" on the property.[221] The notice was published in a local newspaper of general circulation as required by statute.[222] No response from Weingarten to the published notices was received by the Clerk and "tax deeds were issued" to Jocalbro, Inc. (Jocalbro) for Weingarten's parcels.[223] Weingarten had previously given notice to the Marion County Tax Collector of its current Missouri address.[224] In fact, the Marion County Tax Collector sent to Weingarten, at its correct Missouri address, tax bills for other Marion County property owned by Weingarten.[225] Jocalbro successfully brought an action against Weingarten to quiet title to the property.[226] Weingarten appealed, and the Fifth District Court of Appeal reversed and remanded.[227] The notice of the tax sale, as provided, did not satisfy the due process requirements under *Jones*.[228] Publishing notice of the sale in a local newspaper was inadequate under the circumstances.[229] Once the notices were returned to the clerk as unclaimed, it was incumbent on the clerk to take additional, reasonable steps to give adequate notice as required under *Jones*.[230]

In a slightly later case, *South Investment Properties, Inc. v. Icon Investments L.L.C.*,[231] the Fifth District Court of Appeal reached a different result on facts similar to the facts of *Patricia Weingarten Associates, Inc.*[232] What were the factual differences that distinguished *South Investment Properties, Inc.* from *Patricia Weingarten Associates, Inc.*? In *South Investment Properties, Inc.*, the property owner, Icon Investments, changed its address, but did not give notice to the property appraiser.[233] In addition, no forwarding address was given to the post office.[234] The clerk of court mailed tax sale no-

219. *Id.* at 562.
220. *Id.* at 563.
221. *Id.* at 564.
222. *Patricia Weingarten Assocs.*, 974 So. 2d at 564.
223. *Id.* at 561.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Patricia Weingarten Assocs.*, 974 So. 2d at 561.
228. *Id.* at 561, 565.
229. *Id.* at 564.
230. *Id.* at 563–64 (citing Jones v. Flowers, 547 U.S. 220, 225 (2006)).
231. 988 So. 2d 1114 (Fla. 5th Dist. Ct. App. 2008).
232. *Id.* at 1118.
233. *Id.*
234. *Id.*

tices to Icon Investments by certified mail, return receipt requested, at the last address of Icon Investments known to the property appraiser.[235] In this case, someone, but not the owner, signed for the certified mail and receipts were returned to the clerk.[236] The clerk also published notice in the appropriate newspaper, and the sheriff posted notice at the property address known to it.[237] The notice given satisfied due process in this case.[238]

B. *Mortgages*

Alma O'Connell, her son, and O'Con Manufacturing, Inc., a company owned by them, borrowed $825,000 from Union Planters Bank—now Regions Bank—and gave the bank a promissory note (Note 1) secured by Alma O'Connell's guaranty and "a security interest in the assets of her company."[239] She then borrowed another $400,000 from the bank.[240] For this loan, she gave the bank another promissory note (Note 2) and Note 2 "was secured by a mortgage on real [estate she] owned."[241] The mortgage was recorded and referenced as Note 2.[242] Note 2 contained what is known as a "dragnet clause."[243] The dragnet clause not only referred to the mortgage as securing the $400,000 loan, but also as security for "any other liabilities, indebtedness or obligations of [O'Connell] to [Regions] Bank, however or whenever created."[244] This language is broad enough to include Note 1.[245] Note 2 was not recorded and did not refer to Note 1.[246] Starlines International Corp. (Starlines) bought a fifty percent interest in the mortgaged real estate from Alma O'Connell.[247] Starlines read Note 2, which contained the dragnet clause, and apparently asked Alma O'Connell if there was any pre-existing debt owed to the bank.[248] According to Starlines, she said "no."[249] Starlines

235. *Id.*
236. *S. Inv. Props., Inc.*, 988 So. 2d at 1118.
237. *Id.* at 1116.
238. *Id.* at 1118.
239. Starlines Int'l Corp. v. Union Planters Bank, 976 So. 2d 1172, 1173 (Fla. 4th Dist. Ct. App. 2008).
240. *Id.*
241. *Id.* at 1173–74.
242. *Id.* at 1174.
243. *Id.*
244. *Starlines Int'l Corp.*, 976 So. 2d at 1174.
245. *Id.*
246. *Id.* at 1176.
247. *Id.* at 1174.
248. *Id.* at 1177.
249. *Starlines Int'l Corp.*, 976 So. 2d at 1177.

did not inquire of "the [b]ank as to the existence of a pre-existing debt".[250] After default on Note 1, the bank foreclosed its mortgage.[251] As a result, Starlines lost its equity in the property.[252] Starlines' position in the trial court was that "its interest in the . . . property was superior to that of the [b]ank."[253] It was "a subsequent purchaser without notice" of Note 1.[254] The trial court entered summary judgment for the bank finding that the mortgage secured Note 1 because of the dragnet clause in Note 2.[255] The trial court reasoned that the mortgage itself was recorded, and it referred to Note 2, which placed Starlines on "inquiry notice" of Note 1.[256] Thus, the trial court found that Starlines had notice and its interest was not superior to the bank's interest.[257] On appeal, the Fourth District Court of Appeal aligned itself with the Third District Court of Appeal in *United National Bank v. Tellam*,[258] finding the rule in *Tellam* to be the appropriate rule to apply when the issue presented involves the enforcement of a dragnet clause against a person who is not the borrower.[259] The Fourth District Court of Appeal noted that the Third District Court of Appeal, in *Tellam*, held that in order for a dragnet clause to be enforceable with respect to pre-existing obligations and debts, the clause must "specifically identif[y] by name" the debt or obligations secured.[260] The Fourth District, however, noted that there is an exception to the specificity requirement of *Tellam*.[261] If "it can be shown that the third party otherwise had notice that the specific pre-existing debt at issue was to be included within the grasp of the dragnet clause," the clause will be enforced.[262] The Fourth District acknowledged that it had upheld dragnet clauses[263] as against borrowers, but not, as here, as against a third party.[264] The summary judgment was reversed because of the existence of an issue of fact: Whether

250. *Id.*
251. *Id.* at 1173.
252. *Id.* at 1176.
253. *Id.* at 1175.
254. *Starlines Int'l Corp.*, 976 So. 2d at 1175.
255. *Id.*
256. *Id.*
257. *Id.*
258. 644 So. 2d 97 (Fla. 3d Dist. Ct. App. 1994).
259. *Starlines Int'l Corp.*, 976 So. 2d at 1176.
260. *Id.* at 1175 (citing United Nat'l Bank v. Tellam, 644 So. 2d 97, 98 (Fla. 3d Dist. Ct. App. 1994)).
261. *Id.* at 1176.
262. *Id.*
263. *See generally* Robert C. Roy Agency, Inc. v. Sun First Nat'l Bank of Palm Beach, 468 So. 2d 399, 400 (Fla. 4th Dist. Ct. App. 1985).
264. *Starlines Int'l Corp.*, 976 So. 2d at 1176.

Starlines had implied actual notice of Note 1, there having been "no express actual notice."[265]

C. *Lis Pendens*

Watermark Marina of Palm City, L.L.C. (Watermark), as buyer, and the Nickersons, as seller, entered into a contract for purchase and sale of real estate.[266] When the Nickersons did not close on the sale, Watermark sued them seeking specific performance.[267] Watermark filed a notice of lis pendens, and the trial court required a $200,000 bond to be filed by Watermark.[268] When the lis pendens expired, Watermark did not extend it.[269] Watermark then requested that the bond be discharged and that Watermark be permitted to substitute corporate stock to cover payment of damages, if any, to the Nickersons for damages found to have resulted from the prior recording of the lis pendens.[270] The Nickersons objected to the substitution, but the trial court allowed it.[271] Certiorari review was sought by the Nickersons.[272] The Fourth District Court of Appeal granted the writ and quashed the lower court order that allowed the substitution of the stock for the lis pendens bond.[273] The court agreed with the Nickersons that section 48.23(3) of the *Florida Statutes*, as implemented by *Florida Rule of Civil Procedure* 1.610(b), required a bond.[274] The statute "allow[s] courts to control notices of lis pendens as injunctions" and under the rule a bond is required before a temporary injunction may be granted.[275] The trial court's decision to require a bond in the first place is a matter of discretion.[276] But once the trial court exercises its discretion to require a bond, a bond must be posted.[277] "A pledge of collateral simply is not a bond."[278] Judge Polen dissented, and would not have granted certiorari.[279]

265. *Id.* at 1177.
266. Nickerson v. Watermark Marina of Palm City, L.L.C., 978 So. 2d 187, 188–89 (Fla. 4th Dist. Ct. App. 2008).
267. *Id.* at 189.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Nickerson*, 978 So. 2d at 189.
272. *Id.*
273. *Id.* at 190.
274. *Id.*
275. *See id.*
276. *Nickerson*, 978 So. 2d at 190.
277. *Id.*
278. *Id.*
279. *Id.* at 191 (Polen, J., dissenting).

How strong does a litigant's claim to real property have to be to support maintenance of a lis pendens placed on the subject property?[280] That was the question considered by the Fifth District Court of Appeal in *Nu-Vision, L.L.C. v. Corporate Convenience, Inc.*[281] Corporate Convenience, Inc. (lessor) entered into a commercial lease agreement with Nu-Vision, L.L.C. (lessee).[282] Prior to the execution of the lease agreement, the lessee sent the lessor a letter that contemplated a purchase of the property by the lessee.[283] The letter went on to say that "'a contract will follow'" if the letter was signed by both of the parties.[284] The letter was signed by both parties, but a contract never followed.[285] The parties signed the lease agreement, which had only "one oblique reference" to a possible purchase of the leased property by the lessee, and a contract for sale and purchase was never made between the parties.[286] The lessor sued the lessee for eviction based on nonpayment of rent.[287] The lessee counterclaimed for specific performance based on its "purchase option" agreement, and the lessee filed a notice of lis pendens against the real estate.[288] The lessor moved to discharge the lis pendens and its motion was granted.[289] The lessee petitioned for certiorari review of the dissolution of the lis pendens.[290] Certiorari was denied.[291] The Fifth District Court of Appeal noted that a writing signed by the person to be charged[292] and containing essential terms for the sale and purchase of real estate, was required to support an action for specific performance.[293] All the lessee had was a letter naming the parties, with the address of the property, "and a sliding scale for the purchase price."[294] The majority of the court found those elements "insufficient to support [an action] for specific performance."[295]

280. *See generally* Nu-Vision, L.L.C. v. Corporate Convenience, Inc., 965 So. 2d 232 (Fla. 5th Dist. Ct. App. 2007).
281. *Id.* at 232, 234.
282. *Id.* at 233.
283. *Id.*
284. *Id.*
285. *Nu-Vision, L.L.C.*, 965 So. 2d at 233–34.
286. *Id.* at 233–34.
287. *Id.*
288. *Id.* at 234.
289. *Id.* at 233.
290. *Nu-Vision, L.L.C.*, 965 So. 2d at 233.
291. *Id.*
292. *Id.* at 234 (citing De Vaux v. Westwood Baptist Church, 953 So. 2d 677, 681 (Fla. 1st Dist. Ct. App. 2007)). *De Vaux* was reviewed in Landau, *2006–2007 Survey*, *supra* note 1, at 55–56.
293. *Nu-Vision, L.L.C.*, 965 So. 2d. at 234.
294. *Id.* at 234–35.
295. *Id.* at 235.

Since the lessee's counterclaim for specific performance failed to state a claim on which relief could be granted, lessee failed, as a matter of law, to "'establish a fair nexus between the apparent legal or equitable ownership of the property and the [underlying] dispute [described] in the lawsuit.'"[296] Fair nexus requires a "'good faith, viable claim.'"[297] The claim here failed to pass that test.[298] The majority said it would be unfair and "contrary . . . to public policy to allow" flimsy claims to support lis pendens.[299] Judge Thompson dissented.[300] He would have quashed the lower court's order based on *Chiusolo v. Kennedy*.[301]

In *Shields v. Schuman*,[302] one of several additional lis pendens cases decided during the survey period,[303] Shields was a twenty-five percent shareholder in a corporation that owned certain real estate.[304] Schuman owned the remaining seventy-five percent of the stock in the corporation.[305] Schuman caused the corporation to enter into a contract to sell the real estate to Blue Water VII, L.L.C. (Blue Water), despite the fact that Shields objected.[306] Shields sought to enjoin the consummation of the sale claiming that the price was not high enough.[307] A notice of lis pendens was also filed by Shields.[308] Posting of a bond of $8,500,000 was required by the trial court as a condition "to maintain the lis pendens."[309] The bond was not posted, which resulted in the dissolution of the lis pendens.[310] Blue Water then sought dismissal of two counts of the complaint, claiming there was a cloud on Blue Water's title.[311] Blue Water requested, as an alternative, that Shields be required to post a bond to maintain the two counts.[312] The trial court, although reluctant

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296. *Id.* at 234 (quoting Chiusolo v. Kennedy, 614 So. 2d 491, 492 (Fla. 1993)).
297. *Id.* (quoting Bergmann v. Slater, 922 So. 2d 1110, 1112 (Fla. 4th Dist. Ct. App. 2006)).
298. *Nu-Vision, L.L.C.*, 965 So. 2d at 234.
299. *Id.* at 235.
300. *Id.* at 236 (Thompson, J., dissenting).
301. *Id.* (relying on *Chiusolo*, 614 So. 2d at 493).
302. 964 So. 2d 813 (Fla. 4th Dist. Ct. App. 2007).
303. *See, e.g.*, Real Invs., L.L.C. v. Oaks Group, Inc., 973 So. 2d 643 (Fla. 4th Dist. Ct. App. 2008); Suarez v. KMD Constr., Inc., 965 So. 2d 184 (Fla. 5th Dist. Ct. App. 2007).
304. *Shields*, 964 So. 2d at 813.
305. *Id.*
306. *Id.*
307. *Id.* at 813–14.
308. *Id.* at 814.
309. *Shields*, 964 So. 2d at 814.
310. *Id.*
311. *Id.*
312. *Id.*

to do so, required Shields to post bond if he wished to continue the lawsuit.[313] Shields filed a petition for certiorari.[314] The Fourth District Court of Appeal granted the writ and the order requiring bond was quashed.[315] The trial court's order requiring a bond "not related to a lis pendens, violate[d] [Shields's] constitutional right of access to the courts."[316]

D. *Partition*

Brothers Nick and Peter Geraci owned approximately 290 acres of real estate in Hillsborough County described as "ripe for development."[317] The brothers did not get along; Peter wanted out of the business relationship, and eventually, Peter sued Nick alleging that the real estate "was not divisible without prejudice to the owners" and sought an order directing that the property be sold.[318] Nick denied that the real estate was indivisible and counterclaimed seeking the appointment of three commissioners pursuant to section 64.061(1) of the *Florida Statutes* for the purpose of effectuating the partition.[319] Instead, the trial court held "an evidentiary hearing to determine whether the property could be [partitioned] without prejudice to either brother."[320] At the conclusion of the hearing, the trial court ruled that the real estate could not be partitioned and a public sale of the real estate was ordered.[321] Nick appealed arguing that the trial court was required to appoint commissioners who would make the call as to whether the real estate could be divided in kind without prejudice to the parties, citing sections 64.061(1) and 64.071(1) of the *Florida Statutes*.[322] Describing the case as "a matter of first impression,"[323] the Second District Court of Appeal affirmed the trial court on the strength of section 64.061(4) of the *Florida Statutes*.[324] The Second District Court of Appeal held that section 64.061(4) allowed the trial court to bypass the appointment of commissioners process and go directly to

313. *Id.* at 813–14.
314. *Shields*, 964 So. 2d at 813.
315. *Id.* at 814.
316. *Id.*
317. Geraci v. Geraci, 963 So. 2d 904, 905 (Fla. 2d Dist. Ct. App. 2007).
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.* at 905–06.
322. *Geraci*, 963 So. 2d at 907.
323. *Id.* at 905.
324. *Id.* at 907.

the issue of whether the property could be divided in kind without prejudice to the parties.[325]

VIII. EMINENT DOMAIN

A. *Condemnation*

The Florida Department of Transportation (DOT), in connection with "the widening of State Road 40 west of Ocala," filed a suit seeking to condemn part of the real estate owned by System Components Corporation (System Components).[326] System Components then purchased additional real estate on which to build a new facility and, in the interim, leased space to which it temporarily relocated the business.[327] DOT and System Components agreed on everything but the proper calculation of damages to the business pursuant to section 73.071(3)(b) of the *Florida Statutes*.[328] System Components argued that damages were measured by "the total value of the business" on the date of taking—as if the company no longer existed.[329] DOT's position was that the measure of damages was "actual damages" less, or mitigated by, value that could be attributed to "the relocation and continu[ed] operation of the business."[330] The trial court instructed the jury to make both calculations.[331] According to the jury, "the total value of the business was $2,394,964.00," but considering "the relocation and continuing operation of the business," damages were $1,347,911.00.[332] The trial court awarded System Components the latter amount, and System Components appealed.[333] System Components relied on *Department of Transportation v. Tire Centers, L.L.C.*,[334] where the Fourth District Court of Appeal held that business damages provided in section 73.071(3)(b) of the *Florida Statutes* are not subject to mitigation by an "'off-site cure.'"[335] The Fifth District Court of Appeal noted that while there might not be a "'duty to mitigate'

325. *Id.*
326. Sys. Components Corp. v. Dep't of Transp., 985 So. 2d 687, 688 (Fla. 5th Dist. Ct. App. 2008).
327. *Id.*
328. *Id.* at 688–89.
329. *Id.* at 689.
330. *Id.*
331. *Sys. Components Corp.*, 985 So. 2d at 689.
332. *Id.*
333. *See id.*
334. 895 So. 2d 1110 (Fla. 4th Dist. Ct. App. 2005).
335. *Sys. Components Corp.*, 985 So. 2d at 689 (citing *Tire Ctrs., L.L.C.*, 895 So. 2d at 1113).

business damages" on the part of the condemnee, once relocation of the business was accomplished and business continued, the benefit of doing so must be offset against the total value of the business.[336] The Fifth District Court of Appeal affirmed the trial court and certified such conflict with the Fourth District Court of Appeal.[337]

In another case, the DOT obtained an order of taking, in July 2001, for Parcel 104 in Indian River County alongside State Road 60 for the purpose of widening the road.[338] St. John's Water Control District filed a counterclaim for inverse condemnation of Parcel 104A.[339] After trial on May 30, 2006, on the counterclaim, the trial court awarded the Board of Supervisors of St. John's Water Control District more than five million dollars for Parcel 104A, using the trial date for valuation and compensation under section 73.071(2) of the *Florida Statutes*.[340] The Fourth District Court of Appeal reversed and remanded for a new trial and re-valuation.[341] "[I]n an inverse condemnation proceeding," "'the better rule'" is to use the date of appropriation for purposes of valuing compensation.[342]

IX. EMPLOYMENT LAW

A. *Workers' Compensation*

Gayer was employed by Labor Finders of Broward, Inc. (Labor Finders), a provider of temporary workers.[343] Labor Finders paid Gayer an hourly wage, and Gayer received workers' compensation coverage through Labor Finders.[344] Fine Line Construction & Electric, Inc. (Fine Line) "leased" Gayer from Labor Finders and put him to work.[345] His job required the use of "a tall folding ladder and an electric drill," and while performing the work, Gayer fell off the ladder that had been furnished to him by Fine Line.[346] He

336. *Id.* at 692.
337. *Id.* at 693.
338. Dep't of Transp. v. Bd. of Supervisors, 981 So. 2d 605, 605 (Fla. 4th Dist. Ct. App. 2008).
339. *Id.* at 606.
340. *Id.*
341. *Id.*
342. *Id.* (quoting County of Volusia v. Pickens, 439 So. 2d 276, 277 (Fla. 5th Dist. Ct. App. 1983)).
343. Gayer v. Fine Line Constr. & Elec. Inc., 970 So. 2d 424, 425 (Fla. 4th Dist. Ct. App. 2007).
344. *See id.*
345. *Id.*
346. *Id.*

was severely injured.[347] Was the ladder defective in some way and its manufacturer liable?[348] That was difficult to determine because the ladder "could not be located."[349] Gayer sued Fine Line claiming spoliation of evidence, that is, the ladder.[350] Fine Line successfully 'moved for summary judgment, arguing that it had no duty to preserve the ladder under section 440.39(7), [of the] *Florida Statutes*, because [it] was not Gayer's 'employer.'"[351] The Fourth District Court of Appeal reversed.[352] The claim for spoliation depends on there being a "duty to preserve evidence."[353] The Fourth District found this duty in section 440.39 of the *Florida Statutes* and quoted the Third District Court of Appeal in *General Cinema Beverages of Miami, Inc. v. Mortimer*,[354] stating that "[t]he point of section 440.39 is to preserve causes of action against third-party tortfeasors and to impose a duty of cooperation to that end."[355] But was Gayer an employee of Fine Line and thus owed a duty by Fine Line to preserve evidence?[356] The Fourth District referred to what it called "the majority rule under the doctrine of lent employment."[357] "[I]f the general employer simply arranges for labor without heavy equipment, the transferred worker then becomes the employee of the special employer."[358] From there, the court had little difficulty concluding that Fine Line was "a special employer of a borrowed employee"—Gayer—and fit within the definition of "employer" used in section 440.39.[359]

In *Doe v. Footstar Corp.*,[360] the parents of a minor child, as her next friends and guardians, brought an action against Footstar Corporation (Footstar) for damages resulting from the alleged negligent hiring of their daughter's supervisor at Footstar, claiming the supervisor had assaulted their daughter.[361] The trial court ruled that the action against Footstar was barred

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347. *Id.*
348. *See Gayer*, 970 So. 2d at 426 n.1.
349. *Id.* at 425.
350. *Id.*
351. *Id.* at 426.
352. *Id.*
353. *Gayer*, 970 So. 2d at 426 (quoting Flagstar Cos. v. Cole-Ehlinger, 909 So. 2d 320, 322–23 (Fla. 4th Dist. Ct. App. 2005)).
354. 689 So. 2d 276 (Fla. 3d Dist. Ct. App. 1995).
355. *Gayer*, 970 So. 2d at 427 (quoting *Mortimer*, 689 So. 2d at 279).
356. *See id.* at 426–28.
357. *Id.* at 428.
358. *Id.* at 427 (quoting Folds v. J.A. Jones Constr. Co., 875 So. 2d 700, 703 (Fla. 1st Dist. Ct. App. 2004)).
359. *Id.* at 428–29.
360. 980 So. 2d 1266 (Fla. 2d Dist. Ct. App. 2008).
361. *Id.* at 1267. Some of the other allegations were negligent retention, assault, and battery. *Id.*

by the workers' compensation exclusivity rule, section 440.11 of the *Florida Statutes*.[362] The Second District Court of Appeal acknowledged that the result seemed harsh, but that "[t]here is no exception to the exclusive remedy" rule under section 440.11.[363] Therefore, the decision of the trial court was affirmed.[364]

B. *Reasonable Expectation of Privacy*

State v. Young[365] is a *Fourth Amendment* search and seizure case involving a warrantless search by police of a computer furnished by an employer to an employee at the employer's place of business—in this case, a church.[366] Suffice it to say, that if the employer does not have a clearly articulated, widely circulated, written policy allowing it to search computers it has provided its employees at work, then in the absence of valid consent or a valid warrant, search of a computer by police will be subject to fact laden scrutiny under the *Fourth Amendment* as to whether the employee had a legitimate expectation of privacy.[367] In *Young*, the police seized a clergyman's computer at the church relying on permission to do so from another employee of the church who was not the clergyman's supervisor.[368] The evidence obtained from the computer and later related statements by the clergyman were suppressed by the trial court.[369] The State appealed, and the First District Court of Appeal affirmed.[370] The church did not have a specific policy regarding its access to employees' computers.[371] In the absence of an explicit policy concerning inspection of computers, can it be said that the employee had a legitimate expectation of privacy concerning his computer?[372] Under the facts of this case—"focus[ing] on the operational realities of the workplace"—the court concluded that this employee did.[373] The employee's office was not regularly shared with anyone else, the office could be locked—there were three keys to the office door and the employee had two

362. *Id.*
363. *Id.* at 1267–68.
364. *Footstar Corp.*, 980 So. 2d at 1268.
365. 974 So. 2d 601 (Fla. 1st Dist. Ct. App. 2008).
366. *Id.* at 606, 608.
367. *See id.* at 609 (citing State v. Purifoy, 740 So. 2d 29, 30 (Fla. 1st Dist. Ct. App. 1999)).
368. *Id.* at 606–07.
369. *Id.* at 608.
370. *Young*, 974 So. 2d at 606.
371. *Id.* at 612.
372. *See id.* at 608–09.
373. *Id.* at 609.

of the keys—when absent, the employee kept the door locked, and the employee's computer was not on a network with any other computer.[374] The employer's ownership of the computer did not matter because the employee "was the sole regular user."[375] However, an employee would not have a reasonable expectation of privacy if a third party has or "reasonably appears to have common authority over the" property—a computer—and the third party gave consent to the search.[376] That circumstance was not present here.[377] The court noted that police may rely on a third party's apparent common authority to give consent if the reliance is reasonable, even in the absence of actual authority.[378] The appellate court found that in this case, the facts did not support a finding that the church employee giving permission to the police search had common authority, nor was it reasonable for the police to think that he did.[379] The clergyman's statements given to the police after the recitation of the *Miranda* warning[380] were also suppressed as being "fruit of the poisonous tree."[381]

X. FIDUCIARY DUTY AND GOVERNANCE

The President of the Greenwich Association, Inc. (Association), "on behalf of the unit owners," signed an agreement with Greenwich Apartments, Inc. that settled a dispute over the use of a parking garage.[382] In May 2001, shortly after the agreement was signed, the circuit court entered a final order dismissing the lawsuit, and the settlement was incorporated into the order.[383] There was no appeal.[384] The problem was that the settlement agreement was never put to a vote of the Association's unit owners.[385] The Association brought suit against Greenwich Apartments, Inc. in April 2005.[386] The Association asked the court to reform or cancel the settlement agreement alleging

374. *Id.* at 611.
375. *Young*, 974 So. 2d at 611.
376. *Id.* at 609 (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).
377. *Id.* at 612.
378. *Id.* at 610.
379. *Id.* at 612.
380. *Young*, 974 So. 2d at 607.
381. *Id.* at 610 (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963), *and* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 387 (1920)).
382. Greenwich Ass'n v. Greenwich Apartments, Inc., 979 So. 2d 1116, 1117 (Fla. 3d Dist. Ct. App. 2008).
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*

an ultra vires act on the part of its then president that amounted to fraud.[387] The trial court granted Greenwich Apartment Inc.'s motion for summary judgment on the basis of *Florida Rule of Civil Procedure* 1.540(b).[388] According to the trial court, this rule required the Association to bring its action "within one year of the" court's earlier final order, that is, by May 2002, which it did not do.[389] *Florida Rule of Civil Procedure* 1.540(b) requires that relief from a court's final judgment, decree, or order based on, inter alia, intrinsic or extrinsic fraud, "'misrepresentation, or other misconduct of an adverse party'" must be brought within a year of the court's order.[390] The Third District Court of Appeal found the 2001 judgment to be voidable, but not void, and therefore, the exception to the one year rule applicable to void judgments did not apply.[391] The rule, however, does not put a limit on the relief from judgment a court may grant for fraud on the court.[392] As to fraud on the court, the Third District Court of Appeal determined that cognizable "[f]raud upon the court" in this case had to be extrinsic fraud defined as "where a party is prevented from 'trying an issue before the court and the prevention itself becomes a collateral issue to the cause.'"[393] By contrast, intrinsic fraud is "'the presentation of misleading information on an issue before the court that was tried or could have been tried.'"[394] The Third District Court of Appeal found that the complaint of fraud on the court was intrinsic, if fraud at all, and was time barred by *Florida Rule of Civil Procedure* 1.540(b).[395]

XI. INTELLECTUAL PROPERTY AND INTERNET

Mr. O'Shea sued Cordis Corporation (Cordis) and Johnson & Johnson alleging that he was injured as a result of a defective "stent implanted in him."[396] As part of the discovery process, Mr. O'Shea made requests for production of documents which Cordis claimed were confidential proprietary

387. *Greenwich Ass'n*, 979 So. 2d at 1118.
388. *Id.* at 1117; FLA. R. CIV. P. 1.540(b).
389. *See id*; *see Greenwich Ass'n*, 979 So.2d at 1117.
390. *Id.* at 1118 (quoting FLA. R. CIV. P. 1.540(b)).
391. *Id.* at 1118–19.
392. *Id.* at 1118; *see* Fla. R. Civ. P. 1.540(b).
393. Greenwich Ass'n, 979 So. 2d at 1118 (quoting Parker v. Parker, 950 So. 2d 388, 391 (Fla. 2007)).
394. *Id.* (quoting *Parker*, 950 So. 2d at 391).
395. *Id.* at 1119.
396. Cordis Corp. v. O'Shea, 988 So. 2d 1163, 1164 (Fla. 4th Dist. Ct. App. 2008) (per curiam).

trade secret items.[397] Mr. O'Shea's attorney asked for an order that would allow him to disclose to other lawyers confidential information gleaned during discovery.[398] The trial court issued such an order containing procedures designed to maintain confidentiality.[399] The trial court also denied Cordis's motion to prohibit Mr. O'Shea's attorney from sharing the confidential information with other attorneys, regardless of their involvement in collateral litigation concerning the stent.[400] Cordis petitioned for certiorari review of the trial court's order.[401] The petition was granted, and the trial court's order was quashed.[402] By not limiting "sharing" confidential information to counsel in collateral litigation over the stent, the trial court's order was too broad.[403] Cordis demonstrated the order's potential of causing it irreparable harm.[404] Judge Farmer dissented.[405]

XII. JURISDICTION AND VENUE

A. *Jurisdiction*

Aspsoft, Inc. (Aspsoft) sued WebClay, Inc. (WebClay), and Mr. Allen alleging "breach of an oral contract."[406] Mr. Allen, a North Carolina resident, was the registered agent and president of WebClay.[407] WebClay's principal place of business was also in North Carolina.[408] Did Florida's long-arm statute, section 48.193 of the *Florida Statutes*, justify the trial court's exercise of personal jurisdiction over both WebClay and Mr. Allen?[409] Aspsoft

397. *Id.* at 1164–65.
398. *Id.* at 1164.
399. *Id.* at 1165.
400. *Id.*
401. *O'Shea*, 988 So. 2d at 1164.
402. *Id.* at 1164, 1168.
403. *Id.* at 1168.
404. *Id.* at 1166.
405. *Id.* at 1168.
406. Aspsoft, Inc. v. WebClay, 983 So. 2d 761, 763–64 (Fla. 5th Dist. Ct. App. 2008).
407. *Id.* at 764.
408. *Id.*
409. *Id.* at 765. The Fifth District Court of Appeal's description of the contents of the affidavits submitted by the parties does not include an indication that payments by WebClay to Aspsoft were expressly required to be made in Florida. *Id.* at 764. The Fifth District Court of Appeal concluded that:

> [T]he facts set forth in Aspsoft's amended complaint and affidavits are sufficient to support the conclusion that personal jurisdiction over WebClay by the Florida courts is proper pursuant to Florida's long-arm statute since the affidavits state that WebClay breached the parties' oral contract by failing to make payments which were due to be made in Florida.

alleged that WebClay, represented by Mr. Allen, hired Aspsoft to do software consulting for WebClay and agreed to pay Aspsoft in response to invoices to be sent to WebClay by Aspsoft every two weeks.[410] Aspsoft submitted affidavits stating that all work done by Aspsoft for WebClay occurred in Florida.[411] The trial court, relying on the recommendations of a General Magistrate, dismissed the suit against WebClay and Mr. Allen with prejudice.[412] The trial court found that the defendants did not have the minimum amount of contacts with Florida for the court's exercise of personal jurisdiction over them.[413] The trial court also found that Florida's statute of frauds, section 725.01 of the *Florida Statutes*, barred the breach of contract claim.[414] The Fifth District Court of Appeal affirmed the trial court's dismissal with prejudice in favor of Mr. Allen.[415] However, it reversed the trial court as to WebClay.[416] Citing *Venetian Salami Co. v. Parthenais*,[417] the Fifth District subjected the facts to a two-part jurisdictional analysis: "(1) whether the facts set forth one or more of the predicate acts enumerated in section 48.193 of the *Florida Statutes*; and, if so, then (2) whether the facts set forth the defendant's minimum contacts with Florida necessary to satisfy federal constitutional due process requirements."[418] "[M]inimum contacts are established if the court finds that 'the defendant's conduct and connection with the forum [s]tate are such that he should reasonably anticipate being haled into court there.'"[419] The court observed that under sections 48.193(1)(a) and (g) of the *Florida Statutes*, "[o]perating, conducting, engaging in, or carrying on a business or business venture in [the] state [and b]reaching a contract in this state by failing to perform acts required by the contract to be performed in this state," are sufficient acts to justify personal jurisdiction over an entity, therefore, paying Aspsoft's invoices conferred jurisdiction on Florida courts over Webclay.[420] The Fifth District Court of Appeal had no problem concluding WebClay had these minimum contacts with Florida and could "rea-

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Aspsoft, Inc., 983 So. 2d at 766. However, in its amended complaint, Aspsoft alleged that some payments were made to it in Florida. *Id.* at 763–64.

410. *Id.* at 764.

411. *Id.*

412. *Id.*

413. *See Aspsoft, Inc.*, 983 So. 2d at 764.

414. *Id.* at 768–69.

415. *Id.* at 769.

416. *Id.*

417. 554 So. 2d 499 (Fla. 1989).

418. *Aspsoft, Inc.*, 983 So. 2d at 765.

419. *Id.* (citing Glovegold Shipping, Ltd. v. Sveriges Angfartygs Assurans Forening, 791 So. 2d 4, 11 (Fla. 1st Dist. Ct. App. 2000)).

420. *Id.* at 766.

sonably anticipate being haled into court there".[421] As to the statute of frauds ground for dismissing Aspsoft's lawsuit, the Fifth District Court of Appeal held that only if the oral contract could not possibly be performed within the statute's threshold of one year could the statute of frauds be said to apply.[422] Aspsoft's complaint against WebClay was reinstated.[423]

In *Renaissance Health Publishing, L.L.C. v. Resveratrol Partners, L.L.C.*,[424] Renaissance Health Publishing, L.L.C. (Renaissance), a Florida corporation, brought a trade libel action in Florida against Resveratrol Partners, L.L.C. (Resveratrol), "a Nevada limited liability company."[425] Renaissance asserted that the court had jurisdiction over Resveratrol under Florida's long-arm statute, section 48.193 of the *Florida Statutes*.[426] "The trial court granted [Resveratrol's] motion to dismiss" for lack of personal jurisdiction.[427] Renaissance appealed.[428] Resveratrol did not maintain an office, employ agents, own any real estate, have any bank accounts in Florida, or solicit customers by direct mail or advertise in "magazine[s] or periodical[s] delivered to Florida" or by means of "Florida based broadcast or cable advertising."[429] Resveratrol sold its competing product, Longevinex, on its interactive website.[430] "In the three-year period prior to" the lawsuit, Resveratrol made sales "to Florida residents through [its] website" which sales "represented 2.4% of [its] total gross domestic sales."[431] During the same period, eighty-six of its books and e-books were sold to Florida residents for a total of $2101.83.[432] The Fourth District Court of Appeal not only found that the requirements of section 48.193 were satisfied, it also found sufficient minimum contacts to satisfy the due process requirements under *Venetian Salami Co.*[433] What tipped the scales in this case is that Resveratrol's website was an interactive website as opposed to a passive website.[434]

421. *Id.* at 766–67 (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297).
422. *Id.* at 769.
423. *See Aspsoft, Inc.*, 983 So. 2d at 769.
424. 982 So. 2d 739 (Fla. 4th Dist. Ct. App. 2008).
425. *Id.* at 740.
426. *See id.* at 740–41.
427. *Id.* at 741.
428. *Id.*
429. *Renaissance*, 982 So. 2d. at 741.
430. *Id.*
431. *Id.*
432. *Id.*
433. *Id.* at 741–42 (citing Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989)).
434. *Renaissance*, 982 So. 2d at 742 (citing Westwind Limousine, Inc. v. Shorter, 932 So. 2d 571, 575 n.7 (Fla. 5th Dist. Ct. App. 2006)).

B. *Venue*

The genesis of the appeal in *McWane, Inc. v. Water Management Services, Inc.*[435] was a lawsuit against several defendants from several states for breach of contract and breach of warranty based on damages alleged to have resulted "from the structural failure of" a pipeline that carried water to St. George Island, in Florida's panhandle.[436] It appears that the plaintiff, Water Management Services, Inc., a Florida corporation, objected to "the enforcement of a . . . contractual forum selection provision" to jurisdictions other than Florida.[437] The trial court agreed that the contractual forum selections should not be enforced.[438] The First District Court of Appeal affirmed.[439] A contractual forum selection provision will not be enforced if it can be shown that by enforcing the provision, the party's "trial in the agreed-upon forum 'will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'"[440] Some inconvenience and extra expense is not enough to overcome a contractual provision.[441] In the case presented, the "legally and factually interrelated claims and cross-claims alleging structural damage to a single line of pipe by multiple defendants from multiple states" supported the trial court's decision.[442]

XIII. LANDLORD AND TENANT RELATIONSHIP

A. *Assignment of Lease*

In *Leesburg Community Cancer Center v. Leesburg Regional Medical Center, Inc.*,[443] Leesburg Regional Medical Center (Regional), as lessor, in 1985, made "a thirty-year ground lease with Leesburg Real Estate Associates, Inc." (Associates), as lessee.[444] The purpose of the lease was to allow "Associates to develop and operate [a] . . . cancer treatment center on the property."[445] The lease forbade Regional from operating "a competing can-

435. 967 So. 2d 1006 (Fla. 1st Dist. Ct. App. 2007).
436. *Id.* at 1007.
437. *Id.*
438. *Id.*
439. *Id.* at 1007–08.
440. *McWane, Inc.*, 967 So. 2d at 1007 (quoting Manrique v. Fabbri, 493 So. 2d 437, 440 n.4 (Fla. 1986)).
441. *Id.*
442. *Id.*
443. 972 So. 2d 203 (Fla. 5th Dist. Ct. App. 2007).
444. *Id.* at 205.
445. *Id.*

cer treatment center . . . within . . . Regional's 'primary service area' during the" lease term.[446] Associates had the right to assign or sublet "all or part of its leasehold."[447] All assignments and subleases were to be made "subject to the terms" of the original ground lease, and the ground lease's terms had to be incorporated by Associates "into any assignment or sublease" made by it.[448] Associates promptly sublet the property to Leesburg Community Cancer Center (Cancer Center), "a limited partnership formed by" Associates' shareholders.[449]

In 2000, Regional bought Associates' leasehold interest for $1,900,000, with the intention of allowing Regional to participate in a nearby competing cancer treatment facility.[450] Regional's position was "that the exclusivity clause" in the lease was personal between it and Associates.[451] Regional argued that its purchase of Associates' leasehold interest extinguished the exclusivity clause.[452] Cancer Center, as sublessee, sought declaratory relief on the issue of the extinguishment of the exclusivity clause.[453] The trial court granted summary judgment to Regional and Cancer Center appealed.[454] The Fifth District Court of Appeal affirmed.[455]

The general rule is that privity of contract does not exist between a lessor and sublessee.[456] Without privity between Regional and Cancer Center, Cancer Center had no right to enforce any of the lease covenants.[457] Had this been an assignment of the leasehold interest from Associates to Cancer Center, then Cancer Center would be standing "in the shoes of the assignor."[458] The Fifth District Court of Appeal found that it was clear that a sublease, not an assignment, was intended, and the parties behaved in this fashion.[459] "If the parties had intended to create a non-compete covenant between Leesburg Regional and any sublessee of Real Estate Associates, they could have easily said so in the ground lease."[460]

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446. *Id.*
447. *Id.*
448. *Leesburg Cmty.*, 972 So. 2d at 205.
449. *Id.*
450. *Id.*
451. *Id.*
452. *Id.*
453. *Leesburg Cmty.*, 972 So. 2d at 205.
454. *Id.* at 204.
455. *Id.*
456. *Id.* at 206.
457. *See id.*
458. *Leesburg Cmty.*, 972 So. 2d at 206 (quoting Lauren Kyle Holdings, Inc. v. Heath-Peterson Constr. Corp., 864 So. 2d 55, 58 (Fla. 5th Dist. Ct. App. 2003)).
459. *Id.*
460. *Id.* at 207.

B. *Personal Guarantee of Lease*

In *Fairway Mortgage Solutions, Inc. v. Locust Gardens*,[461] Fairway Mortgage Solutions (tenant) "entered into a five-year" lease with Locust Gardens (landlord).[462] The lease was signed "on behalf of the tenant" by Fernando Recalde, its president.[463] "[D]irectly below the signature line" was the following, which was hand-printed: "FERNANDO RECALDE, PRESIDENT."[464] Below that line, was the following: "* *NOTE—PERSONAL GUARANTY* THE TENANT SIGN[A]TURE ABOVE ALSO INDICATES ACCEPTANCE OF PERSONALLY GUARANTEEING THIS LEASE AND IS BEING FREELY GIVEN AS PER SECTION 'G' OF THIS LEASE."[465]

The lease agreement provided that the tenant and guarantor would be "jointly and severally liable."[466] "In March 2006, the tenant contacted a real estate [agent], who had [been] the landlord's leasing agent" and informed the agent that the tenant was relocating and needed "assistance in finding a subtenant."[467] The tenant failed to make the April 2006 and later rent payments.[468] The landlord sued for possession, "damages, and breach of guaranty."[469] The tenant argued that the landlord "failed to mitigate damages," and Mr. Recalde claimed that the guaranty language had been added to the lease agreement after the lease was signed "without his knowledge or consent."[470] The trial court entered summary judgment in favor of the landlord on the issue of mitigation of damages and Mr. Recalde's guaranty.[471] The tenant and Mr. Recalde appealed, and the Fourth District Court of Appeal left undisturbed the summary judgment in favor of the landlord concerning mitigation of damages.[472]

The landlord's duty to mitigate damages by trying to re-let the property did not begin until it had retaken possession.[473] That occurred in August

461. 988 So. 2d 678 (Fla. 4th Dist. Ct. App. 2008).
462. *Id.* at 679.
463. *Id.*
464. *Id.*
465. *Id.* at 679–80.
466. *Locust Gardens*, 988 So. 2d at 680.
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.*
471. *Locust Gardens*, 988 So. 2d at 680. The parties stipulated that the landlord was entitled to possession. *Id.*
472. *Id.* at 681.
473. *Id.*

2006, and by November 2006, the landlord had obtained a replacement tenant for part of the square footage leased.[474] The landlord had, in fact, mitigated damages.[475] However, the Fourth District Court of Appeal reversed the summary judgment with respect to the guaranty finding that there were still genuine issues of material fact regarding the validity of the guaranty.[476] A signature on a document that follows the word "by," plus descriptive words identifying the signor "'as a corporate officer or . . . similar [position], does not create personal liability for the'" signor unless the contract has language to the contrary.[477]

C. *Payment into Court Registry*

In *Blandin v. Bay Porte Condominium Ass'n.*,[478] Mr. Blandin owned land on which "a ten-unit condominium building" is located.[479] In 1971, Mr. Blandin, as lessor, made "a 99-year land lease with the building's developer," as lessee.[480] As the developer sold the units, it assigned a percentage interest in the ground lease to the buyers—unit owners—as lessees.[481] The land lease had "a rent escalation clause . . . based [on] the consumer price index."[482] In 2006, "[Mr.] Blandin notified the association and unit owners" of the amount of the increased rent.[483] "[T]he unit owners failed to pay . . . ."[484] Mr. Blandin then sent a three-day notice, but there still was no payment.[485] He then filed an action "for breach of the land lease, [asking for] possession and damages."[486] The unit owners asked the court to "determine the amount of the accrued rent [they must] place[] in the court registry [under] section 83.232" of the *Florida Statutes*.[487]

474. *Id.*
475. *Locust Gardens*, 988 So. 2d at 681.
476. *Id.*
477. *Id.* (citing Robert C. Malt & Co. v. Carpet World Distribs., Inc., 763 So. 2d 508, 510 (Fla. 4th Dist. Ct. App. 2000) (where the scope of the guaranty was not spelled out in the agreement)).
478. 988 So. 2d 666 (Fla. 4th Dist. Ct. App. 2008).
479. *Id.* at 667.
480. *Id.*
481. *Id.*
482. *Id.*
483. *Blandin*, 988 So. 2d at 667.
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.*

"On August 22, 2007, the trial court ordered the unit owners" to pay rent at the old rate until the new amount could be determined.[488] On November 2, 2007, Mr. Blandin moved "for immediate final default judgment of possession," alleging that the unit owners did not make the October or November payments.[489] The association's new management company took the blame for missing the payments.[490] "[T]he trial court denied Mr. Blandin's motion" and ordered him instead to accept the late rent payments which had been offered, as good cause had been shown for the delay.[491] Mr. Blandin appealed the denial of his motion.[492] The Fourth District Court of Appeal reversed and remanded the matter "for the issuance of immediate writs of possession."[493] Subsections (1) and (5) of section 83.232 of the *Florida Statutes*, when read together, allow the trial court to extend the tenant's time to make rent payments only if the court exercises its discretion before the payment due date, not after.[494] If "a tenant fails to timely pay pursuant to a court order, the court" loses the discretion to extend the due date and must "enter an immediate default for possession, without further notice or hearing."[495]

XIV. PIERCING THE CORPORATE VEIL

In *Braswell v. Ryan Investments, Ltd.*,[496] Mrs. Braswell had obtained judgments against her husband, now deceased, resulting from "his failure to make payments" to her under a marital settlement agreement entered into in 2000.[497] The marital home—which Mrs. Braswell no longer occupied—"had been titled in the name of Ryan Investments, Ltd.," (Corporation) since its purchase in 1997.[498] Relying on what is called "'outsider reverse corporate piercing' theory,"[499] Mrs. Braswell tried to execute her judgments by levy on the home alleging that the Corporation was her husband's "alter ego and that he" titled the property in the corporate name to defraud her.[500] The

488. *Blandin*, 988 So. 2d at 667.
489. *Id.*
490. *Id.*
491. *Id.* at 668.
492. *Id.*
493. *Blandin*, 988 So. 2d at 670.
494. *Id.* at 669.
495. *Id.*
496. 989 So. 2d 38 (Fla. 3d Dist. Ct. App. 2008).
497. *Id.* at 38.
498. *Id.*
499. *Id.* (citing Estudios, Proyectos e Inversiones de Centro America, S.A. v. Swiss Bank Corp., S.A., 507 So. 2d 1119, 1120 (Fla. 3d Dist. Ct. App. 1987), *review denied*, 518 So. 2d 1274 (Fla. 1987)).
500. *Id.*

trial court rebuffed her attempt to execute on the home.[501] The Third District Court of Appeal affirmed.[502] The Third District acknowledged that the corporate veil can be pierced when the "'controlling shareholder form[s] or use[s] the corporation to defraud creditors'" for pre-existing obligations.[503] The corporation itself can also be held liable to satisfy the debts of the controlling shareholders when they "'have formed or used the corporation to secrete assets'" thus avoiding "'*preexisting* personal liability.'"[504] These remedies were not available to Mrs. Braswell.[505] The marital home had been held in the Corporation's name for three years prior to the marital settlement agreement.[506]

The obligations of Mr. Braswell to Mrs. Braswell came into being after the home had been titled in the corporate name, not before.[507] It was no secret to Mrs. Braswell that the home was titled in the name of the corporation.[508]

XV. TORTS

A. *Negligence*

Mr. Tringali was a member of L.A. Fitness International (L.A. Fitness), a health club.[509] Mr. Tringali fell from the stepping machine he was using at an L.A. Fitness facility, and he died of heart failure.[510] Mr. Tringali's "daughter, as personal representative of" her father's estate, sued L.A. Fitness for wrongful death, alleging that the health club had a "duty to render aid during a medical emergency" and: 1) failed to medically screen her father; 2) failed to use cardiopulmonary resuscitation (CPR); "3) failed to have an automatic external defibrillator (AED) on its premises and to use it on [her father]; and 4) failed to properly train its employees" to deal with medical emergencies.[511] A judgment was entered against L.A. Fitness, awarding

501. *Braswell*, 989 So. 2d at 39.
502. *Id.* at 41.
503. *Id.* at 38 (quoting *Estudios*, 507 So. 2d at 1120).
504. *Id.* at 39 (quoting *Estudios*, 507 So. 2d at 1120).
505. *Id.*
506. *Braswell*, 989 So. 2d at 39.
507. *Id.* at 38.
508. *Id.* at 38–39.
509. L.A. Fitness Int'l, L.L.C. v. Mayer, 980 So. 2d 550, 556 (Fla. 4th Dist. Ct. App. 2008).
510. *Id.* at 552.
511. *Id.*

damages of $619,650, and L.A. Fitness appealed.[512] At trial, there was testimony to the effect that Mr. Strayer, an employee of L.A. Fitness, was certified in CPR.[513] Immediately upon learning that a patron was in distress, Mr. Strayer "told the receptionist to call 911," which she did.[514] Testimony of the employees and witnesses differed as to how much time elapsed between the time of the 911 call and the arrival of the paramedics, as well as to the amount of time that elapsed between the time Mr. Tringali collapsed and the emergency medical technicians arrived.[515] The estimates were generally about four minutes after the 911 call, but perhaps up to twelve minutes after Mr. Tringali collapsed.[516] Mr. Strayer examined Mr. Tringali in the meantime and decided against CPR as he thought it might "make matters worse."[517] The Fourth District Court of Appeal noted that it appeared that the duty of an owner of a health club to an injured customer was a matter of first impression in Florida.[518] Referring to its decision in *Estate of Starling v. Fisherman's Pier, Inc.*,[519] the Fourth District Court of Appeal approved the Restatement (Second) of Torts, section 314A, "that a proprietor is under an ordinary duty of care to render aid to an invitee after he knows or has reason to know the invitee is ill or injured."[520] Citing decisions from other states, the Fourth District concluded that L.A. Fitness fulfilled its duty to Mr. Tringali by calling for paramedics "within a reasonable time."[521] The court reversed the trial court's judgment and remanded.[522] Along the way, the Fourth District also pointed out that the Florida Legislature had failed to strengthen Florida's Good Samaritan Act, section 768.13 of the *Florida Statutes*.[523] The Fourth District Court of Appeal found that statutory protection for persons like Mr. Strayer was illusory.[524] Had Mr. Strayer performed CPR on Mr. Tringali, he could have been subjected to liability for failure to per-

512. *Id.* at 556.
513. *Id.* at 552.
514. *Mayer*, 980 So. 2d at 552.
515. *Id.* at 552–53.
516. *Id.*
517. *Id.* at 552.
518. *Id.* at 557.
519. 401 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1981).
520. *Mayer*, 980 So. 2d at 557 (citing Hovermale v. Berkeley Springs Moose Lodge, 271 S.E.2d 335, 338 (W. Va. 1980)).
521. *Id.* at 561–62.
522. *Id.* at 562.
523. *Id.* at 561 n.2.
524. *Id.*

form it properly.[525] Mr. Strayer's assessment of Mr. Tringali's condition and decision to forego CPR did not expose him to liability.[526]

B. *Negligent Hiring*

Mr. Stander's death resulted from an automobile accident with Mr. Braswell.[527] Mr. Braswell, an independent contractor, had been hired by Dispoz-O-Products, Inc. to transport paper goods to Florida.[528] The personal representative of Mr. Stander's estate sued Dispoz-O-Products for damages.[529] The personal representative contended that Dispoz-O-Products should be held liable for Mr. Braswell's alleged negligence on several grounds, in particular, because Dispoz-O-Products was negligent in hiring Mr. Braswell.[530] It was further "alleged that Dispoz-O-Products was negligent because it knew or should have known that "the independent contractor it hired was inexperienced, dangerous, negligent, and unfit for the job.[531] The trial court dismissed the personal representative's complaint with prejudice, ruling that the complaint was only conclusory and alleged no facts in support of a cause of action for negligent hiring.[532] The personal representative appealed.[533] The Fourth District Court of Appeal stated the pertinent general rule as "the employer of an independent contractor is not liable for the negligence of the independent contractor because the employer has no control over the manner in which the work is done."[534] The Fourth District acknowledged that its decision in *Suarez v. Gonzalez*[535] is "an exception to the general rule."[536] In *Suarez*, a landlord hired a man to install cabinets in her garage that she was getting into condition to rent.[537] The work was paid for in cash, there was no written contract, and the landlord had no knowledge as to whether or not the cabinet installer was licensed.[538] The landlord did not

525. *See Mayer*, 980 So. 2d at 561 n.2.
526. *See id.* at 563 (Stevenson, J., concurring).
527. Stander v. Dispoz-O-Prods., Inc., 973 So. 2d 603, 606 (Fla. 4th Dist. Ct. App. 2008) (Emas, J., dissenting).
528. *Id.*
529. *See id.*
530. *Id.*
531. *Id.*
532. *Stander*, 973 So. 2d at 605.
533. *Id.* at 604.
534. *Id.* (quoting Suarez v. Gonzales, 820 So. 2d 342, 344 (Fla. 4th Dist. Ct. App. 2002)).
535. 820 So. 2d at 342.
536. *Stander*, 973 So. 2d at 604.
537. *Id.* at 605.
538. *Id.*

even know the installer's name.[539] Later, "one of the cabinets fell, [and t]he tenant was seriously injured."[540] Because of the duty owed by a landlord to a tenant, the exception to the general rule applied in *Suarez*, so the landlord could be held liable.[541] Here, on the other hand, Mr. Stander's personal representative alleged no facts that took this case out of the general rule.[542] Absent such facts, Dispoz-O-Products owed no duty to third parties such as Mr. Stander.[543] Judge Emas dissented.[544] Judge Emas would have held, "as a matter of law, [that] a cause of action exists [in Florida] for negligent selection of an independent contractor [with respect to the shipment of] non-hazardous goods on the highway."[545]

C. *Punitive Damages*

Mr. Hipple, an invitee of Tiger Point Golf and Country Club (Tiger Point), with the help of "two others, forcibly removed a handrail on Tiger Point's" property.[546] During the process, the handrail fell on Mr. Hipple's foot, and a bone in his toe was broken.[547] Mr. Hipple sued Tiger Point for negligence.[548] An affidavit filed in the action stated that "the handrail 'was very badly rusted and in terrible shape.'"[549] There was also evidence to the effect that Tiger Point had notice of the handrail's state of disrepair for almost two weeks before Mr. Hipple was injured.[550] Tiger Point unsuccessfully moved for summary judgment on the issue of punitive damages, and the jury then awarded Mr. Hipple comparative negligence compensatory damages of slightly less than $6500 plus $85,000 in punitive damages.[551] Tiger Point appealed, and the First District Court of Appeal held that the trial court should have granted "summary judgment [to Tiger Point] on the issue of punitive damages."[552] Mr. Hipple failed to make a reasonable showing of entitlement to punitive damages under section 768.72(1) of the *Florida Sta-*

539. *Id.*
540. *Id.*
541. *Stander*, 973 So. 2d at 604.
542. *Id.* at 605.
543. *See id.*
544. *Id.* at 606 (Emas, J. dissenting).
545. *Id.*
546. Tiger Point Golf & Country Club v. Hipple, 977 So. 2d 608, 609 (Fla. 1st Dist. Ct. App. 2007).
547. *Id.*
548. *See id.*
549. *Id.* at 610.
550. *Id.*
551. *Hipple*, 977 So. 2d at 609.
552. *Id.* at 611.

tutes.[553] He failed to demonstrate that Tiger Point's conduct was "'*outrageous*, because of . . . evil motive or . . . reckless indifference to the rights of others.'"[554] According to the First District Court of Appeal, punitive damages require evidence of "willful and wanton misconduct of a character no less culpable than what is necessary to convict of criminal manslaughter."[555] Neglecting, even for a considerable period of time, to repair a clearly defective handrail which results in an injury is conduct not culpable enough to warrant punitive damages.[556]

D. *Liability Disclaimer*

The Loewes contracted with Seagate Homes, Inc. (Seagate) to build a home for them.[557] There was an exculpatory provision in the contract that provided, among other things, that Seagate was released from any liability to the Loewes for personal injury resulting from Seagate's "negligence, gross negligence, strict liability or the intentional conduct of [Seagate], its officers, directors, owners, employees, their successors, legal representatives, and assigns."[558] The Loewes sued Seagate, alleging that shortly after they closed on the purchase and moved into the home, "a bathroom closet door fell off its track and [hit] Mrs. Loewe in the eye, causing serious . . . permanent injur[y]."[559] Their negligence action included a claim for damages based on Mrs. Loewe's injuries, and a count for loss of consortium.[560] Relying on the exculpatory clause, the trial court dismissed the Loewe's complaint with prejudice.[561] The Loewes appealed, and the Fifth District Court of Appeal found several reasons to reverse.[562] First, the exculpatory clause could not absolve Seagate of liability based on intentional torts.[563] Second, and assuming a building code violation may be an issue, a party cannot contract away—in a contract with a person whom the building codes are designed to

553. *See id.* at 610 n.2 (referencing FLA. STAT. § 768.72(1) (2006).
554. *Id.* at 610 n.4 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) (1979)).
555. *Id.* at 610.
556. *Hipple*, 977 So. 2d at 610.
557. Loewe v. Seagate Homes, Inc., 987 So. 2d 758, 759 (Fla. 5th Dist. Ct. App. 2008).
558. *Id.* at 759–60.
559. *Id.* at 759.
560. *Id.*
561. *Id.*
562. *Loewe*, 987 So. 2d at 759.
563. *Id.* at 760 (citing Kellums v. Freight Sales Ctrs., Inc., 467 So. 2d 816, 817 (Fla. 5th Dist. Ct. App. 1985)).

protect—its responsibilities under building codes.[564] Finally, the exculpatory clause could not prevent the Loewes from bringing a claim for negligence because of public policy protecting purchasers and the public from personal injury resulting from improper construction by a building contractor, citing sections 489.101 and 553.781(1) of the *Florida Statutes*.[565]

E. *Tortious Interference with Business Relationship*

Weitnauer Duty Free, Inc. (Weitnauer) had a duty-free store in Port Everglades, and Imperial Majesty Cruise Line, L.L.C. (Cruise Line), which sailed from Port Everglades, had a duty-free store on the ship.[566] Cruise Line "barricaded and prevented" shopping by its passengers at Weitnauer's store while in port.[567] Weitnauer sued Cruise Line for "tortious interference with a contract or business relation[ship]."[568] After a bench trial, the judge entered judgment in favor of Weitnauer, awarding it $1000 in nominal damages even though the court had found that Weitnauer failed to present sufficient evidence to prove actual damages.[569] The judge also awarded $750,000 of punitive damages.[570] The trial court judge found Cruise Line's actions to be "'calculated, predatory, and excessive.'"[571] Cruise Line appealed, and the Fourth District Court of Appeal reversed and remanded.[572] The Fourth District disagreed with the punitive damage award.[573] The court relied on its decision in *Hospital Corp. of Lake Worth v. Romaguera*[574] where it said that when the issue is an award of punitive damages in the context of "tortious interference with a business relationship, . . . 'the two most important criteria are: 1. Whether the interference was *justified*, 2. The nature, extent and *enormity* of the wrong.'"[575] The Fourth District Court of Appeal found that Cruise Line's conduct was not outrageous or egregious enough to support punitive damages.[576] The court also reversed the award of nominal damag-

564. *Id.* (citing John's Pass Seafood Co. v. Weber, 369 So. 2d 616, 618 (Fla. 2d Dist. Ct. App. 1979)).

565. *Id.* at 760–61.

566. Imperial Majesty Cruise Line, L.L.C. v. Weitnauer Duty Free, Inc., 987 So. 2d 706, 707 (Fla. 4th Dist. Ct. App. 2008).

567. *Id.* at 708.

568. *Id.* at 707.

569. *Id.*

570. *Id.*

571. *Imperial Majesty*, 987 So. 2d at 708.

572. *Id.*

573. *Id.*

574. 511 So. 2d 559 (Fla. 4th Dist. Ct. App. 1986).

575. *Imperial Majesty*, 987 So. 2d at 708 (quoting *Romaguera*, 511 So. 2d at 561).

576. *Id.*

es.[577] "[P]roof of actual damages is an element of a cause of action for tortious interference" and Weitnauer did not prove actual damages.[578]

F. *False Light Invasion of Privacy*

In *Rapp v. Jews for Jesus, Inc.* (*Rapp I*),[579] the Fourth District Court of Appeal asked the Supreme Court of Florida if Florida recognizes the tort of false light invasion of privacy, and in *Gannett Co., Inc. v. Anderson*,[580] the First District Court of Appeal asked the Supreme Court of Florida what statute of limitations applies to the tort of false light invasion of privacy.[581] In *Jews for Jesus, Inc. v. Rapp* (*Rapp II*),[582] the Supreme Court of Florida answered the first question in the negative thus mooting the question raised in *Anderson v. Gannett Co., Inc.*[583] The Supreme Court of Florida, in *Rapp II*, found that the tort of false light invasion of privacy was virtually indistinguishable from a cause of action for defamation by implication—"false suggestions, impressions and implications arising from otherwise truthful statements."[584] The Court, citing *Boyles v. Mid-Florida Television Corp.*[585] and

577. *Id.*

578. *Id.*

579. 944 So. 2d 460 (Fla. 4th Dist. Ct. App. 2006). *See* Landau, *2006–2007 Survey*, *supra* note 1, at 110–11.

580. 947 So. 2d 1 (Fla. 1st Dist. Ct. App. 2006). *See* Landau, *2006–2007 Survey*, *supra* note 1, at 108–10.

581. The question certified by the Fourth District Court of Appeal: "[d]oes Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?" *Rapp*, 944 So. 2d at 468. The question certified by the First District Court of Appeal: "[i]s an action for invasion of privacy based on the false light theory governed by the two-year statute of limitations that applies to defamation claims or by the four-year statute that applies to unspecified tort claims?" *Gannett Co., Inc.*, 947 So. 2d at 11.

582. 33 Fla. L. Weekly S849, S849 (Oct. 23, 2008).

583. *Anderson v. Gannett Co., Inc.*, 33 Fla. L. Weekly S856, S856 (Oct. 23, 2008). In *Straub v. Lehtinen, Vargas & Riedi, P.A.*, the plaintiff appealed the trial court's dismissal of "his second amended complaint for false light invasion of privacy." 980 So. 2d 1085, 1086 (Fla. 4th Dist. Ct. App. 2007). The Fourth District Court of Appeal found that the plaintiff's allegations set forth the necessary elements to support a false light invasion of privacy claim under Florida law, relying on *Rapp v. Jews for Jesus, Inc.* (*Rapp I*) and *Gannett Co., Inc. v. Anderson*, but noted that it "previously questioned the vitality of a claim for false light invasion of privacy" and joined in certifying the question previously certified by it in *Rapp*. *Id.* at 1086–87. The Supreme Court of Florida stayed *Straub v. Lehtinen, Vargas & Riedi, P.A.*, pending the Court's decision in *Rapp II*. *Rapp II*, 33 Fla. L. Weekly at S855–56 n.14.

584. *Rapp II*, 33 Fla. L. Weekly at S851 (quoting Armstrong v. Simon & Schuster, Inc., 649 N.E.2d 825, 829–30 (N.Y. 1995).

585. 431 So.2d 627 (Fla. 5thDist. Ct. App. 1983).

Brown v. Tallahassee Democrat, Inc.,[586] confirmed that Florida recognizes the tort of defamation by implication.[587] Defamation by implication, being "a well-recognized species of defamation," comes with a substantial body of law and First Amendment protections.[588] The tort of false light invasion of privacy is lacking in this regard.[589]

Of particular interest in *Rapp II* is the Court's adoption of comment e to section 559 of the Restatement (Second) of Torts as "stating the appropriate 'community' standard for analyzing a defamation claim."[590] Specifically, "a communication is defamatory if it prejudiced the plaintiff in the eyes of a 'substantial and respectable minority of the community.'"[591] The Court's adoption of the Restatement's "community" standard prompted an opinion from Justice Wells, dissenting in part, who found it "plainly too vague."[592]

XVI. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

A. *Garnishment*

> DOES AN ATTORNEY GARNISHEE HAVE A DUTY TO ISSUE A STOP PAYMENT ORDER FOR A CHECK DRAWN ON HIS OR HER TRUST ACCOUNT AND DELIVERED TO THE PAYEE PRIOR TO THE RECEIPT OF A WRIT OF GARNISHMENT IF THE SERVICE OF THAT WRIT OCCURS PRIOR TO THE PRESENTMENT OF THAT CHECK FOR PAYMENT TO THE ATTORNEY'S BANK?[593]

That was the question certified to the Supreme Court of Florida by the Second District Court of Appeal as being "of great public importance" in *Arnold, Matheny & Eagan, P.A. v. First American Holdings, Inc.*[594] As a matter of first impression, the Court answered in the affirmative.[595] Arnold, Matheny and Eagan, P.A. (the law firm) represented Preclude, Inc. (Preclude) in an action against Greenleaf Products, Inc. (Greenleaf).[596] A $50,000

586. 440 So. 2d 588 (Fla. 1st Dist. Ct. App. 1983).
587. *Rapp II*, 33 Fla. L. Weekly at S852.
588. *Id.*
589. *Id.* at S849.
590. *Id.* at S855.
591. *Rapp II*, 33 Fla. L. Weekly at S850.
592. *Id.* at S855.
593. Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc., 982 So. 2d 628, 630 (Fla. 2008).
594. *Id.*
595. *Id.* at 630–31.
596. *Id.* at 631.

settlement was obtained by the law firm on behalf of Preclude.[597] Sometime before that settlement, a $26,000 judgment against Preclude had been obtained by First American Holding, Inc. (First American) in an action unrelated to the matter between Preclude and Greenleaf.[598] First American served the law firm with a writ of garnishment on June 19, 2002.[599] When served with the writ, the law firm had not yet received the $50,000 settlement check from Greenleaf.[600] The law firm responded to the writ by stating that it held no funds of Preclude.[601] On June 21, 2002, the Greenleaf settlement check was received and deposited to the law firm's trust account, and the law firm issued a net settlement check to Preclude.[602] "[O]n June 25, 2002, First American served a second writ of garnishment on [the law firm] . . . ."[603] The law firm again responded to the effect that it did not have "possession or control of any funds" belonging to Preclude.[604] However, the check the law firm had written from its trust account to Preclude on June 21 "was not presented to [the law firm's] bank for payment until June 28."[605] Focusing on the requirement of section 77.06(2) of the *Florida Statutes* that the garnishee be in "possession or control" of the judgment debtor's property, the Court held that the law firm retained control of the funds represented by the check until the check was presented for payment, and therefore, the law firm had a duty to request a stop payment order to the bank.[606] The law firm should have inquired of its bank on June 25, 2008, "as to whether its check had been presented for payment."[607] Next, the Court found "no reason" to distinguish between "bank and non-bank garnishees."[608] The fact that an attorney trust account was involved made no difference.[609] In response to the argument that the law firm was exposed to liability to its client for issuing a stop payment order or to a third party holder in due course to whom the check might have been negotiated, the Court said the "good faith" exception to a garnishee's liability in section 77.06(3) of the *Florida Statutes* would have to be

597. *Id.*
598. *Arnold, Matheny & Eagan, P.A.*, 982 So. 2d at 631.
599. *Id.*
600. *Id.*
601. *Id.*
602. *Id.*
603. *Arnold, Matheny & Eagan, P.A.*, 982 So. 2d at 631.
604. *Id.*
605. *Id.*
606. *Id.* at 632–35 (citing FLA. STAT. § 77.06(2) (2002)).
607. *Id.* at 641.
608. *Arnold, Matheny, & Eagan, P.A.*, 982 So. 2d at 637.
609. *Id.* at 640.

protection enough.[610] The law firm was liable to the garnishor, First American Holdings, Inc.[611]

B. *Homestead*

The Supreme Court of Florida in *Chames v. DeMayo*,[612] asked: "Should this Court recede from longstanding precedent holding that the Florida Constitution's exemption from forced sale of a homestead cannot be waived?"[613] The Court answered with a resounding "'no.'"[614] The case was based on a retainer agreement Mr. DeMayo made with the law firm of Heller & Chames, P.A.[615] The agreement read in part that "*the client hereby knowingly, voluntarily and intelligently waives his rights to assert his homestead exemption in the event a charging lien is obtained to secure the balance of attorney's fees and costs.*"[616] The day came when the law firm "obtained a charging lien and final judgment against DeMayo . . . [and the] trial court applied the lien to DeMayo's home."[617] The Third District Court of Appeal reversed the trial court on the waiver of homestead issue, and the Supreme Court of Florida upheld the District Court's decision.[618] Article X, section 4, subsection (a)(1) of the Florida Constitution sets out the Florida homestead exemption from forced sale.[619] There are well-known exceptions to the exemption for: 1) real estate taxes and assessments; 2) mortgages; and 3) mechanics and materialmen's liens.[620] The Court in *Chames*, which cited to *Carter's Administrators v. Carter* and *Sherbill v. Miller Manufacturing Co.*, noted that it has held for over a hundred years that the exemption from forced sale of the homestead "cannot be waived in an unsecured agreement."[621] The Court found no reason why this precedent should not be followed.[622] Acknowledging that personal constitutional rights can be waived, the Court held that the homestead exemption was more than personal to the

610. *Id.* at 641 (citing FLA. STAT. § 77.06(3)).
611. *Id.*
612. 972 So. 2d 850 (Fla. 2007).
613. *Id.* at 853.
614. *Id.*
615. *Id.* at 852.
616. *Id.*
617. *Chames*, 972 So. 2d at 852.
618. *Id.* at 852–53.
619. FLA. CONST. art. X, § 4(a)(1); *Chames*, 972 So. 2d at 852.
620. *See* FLA. CONST. art. X, § 4(a).
621. *Chames*, 972 So. 2d at 852 (citing Carter's Adm'rs v. Carter, 20 Fla. 558 (1884); Sherbill v. Miller Mfg. Co., 89 So. 2d 28 (Fla. 1956)).
622. *Chames*, 972 So. 2d at 860.

homestead owner.[623] The homestead exemption also protects the owner's family and the State of Florida.[624]

C. *Construction Lien*

Mary Niehaus (Niehaus) contacted Big Ben's Tree Service, Inc. (Big Ben's) and arrangements were made for Big Ben's to cut down and remove a damaged tree located on Niehaus's property.[625] The cost was set at $4800.[626] Although not stated explicitly, Big Ben's apparently did not take the remains of the tree off the property after cutting it down, and Niehaus did not pay Big Ben's.[627] It seems that Niehaus thought that "remove" meant hauling away the tree after it had been cut down.[628] Big Ben's thought that "remove" meant simply moving the tree which, according to Big Ben's, is what "remove" means in the tree trade.[629] The trial court found that this trade "parlance" was not explained to Niehaus and also found that her understanding of the word "remove" was reasonable.[630] The trial court, however, concluded that Big Ben's had a valid construction lien on Niehaus' land.[631] Niehaus appealed to the circuit court, and the circuit court affirmed.[632] She then filed a petition for a writ of certiorari, which the First District Court of Appeal granted, quashing the order of the circuit court.[633] The trial court determined that "removal" meant something different to each of the parties, and therefore, agreement on a material term of the contract was missing.[634] Thus, there was no contract entered into between the parties.[635] And without a valid express contract, there could be no imposition of a construction lien.[636] Even if an implied contract existed, an issue which the First District Court of

623. *Id.*
624. *Id.*
625. Niehaus v. Big Ben's Tree Serv., Inc., 982 So. 2d 1253, 1254 (Fla. 1st Dist. Ct. App. 2008).
626. *Id.*
627. *See id.*
628. *Id.*
629. *Id.*
630. *Niehaus*, 982 So. 2d at 1254.
631. *Id.*
632. *Id.*
633. *Id.* at 1254–55.
634. *Id.*
635. *Niehaus*, 982 So. 2d at 1255.
636. *Id.*

Appeal did not decide,[637] an implied contract is a "legal fiction" to prevent unjust enrichment, and "not a contract at all."[638]

D. *Bank Deposit Agreement v. UCC*

The Deposit Agreement between Bank of America, N.A. (Bank) and its customer, Putnal Seed and Grain, Inc. (Putnal), required Putnal to notify the Bank of any "'problems or unauthorized transactions'" taking place during a bank account statement period within sixty days, as a condition to asserting liability against the Bank for negligence.[639] Under section 674.406(6) of the *Florida Statutes*, described by the trial court as the default rule, a bank customer has to notify the bank of "an unauthorized signature or alteration within one year of the [pertinent bank] statement being sent to the customer."[640] Putnal's bookkeeper made deposits for Putnal and somehow managed to *fraudulently obtain*, in thirteen transactions, over $51,000 in cash from the Putnal deposits made by her.[641] When Putnal found out about the bookkeeper's actions, it obtained copies of bank statements.[642] Putnal then demanded that the Bank replace the funds in its account.[643] The Bank refused on the ground "that Putnal failed to notify it of [the] 'problems or unauthorized transactions' within 60 days, as required [by] the Deposit Agreement."[644] Putnal sued the Bank for negligence and won on summary judgment.[645] The trial court determined that chapter 674 of the *Florida Statutes* applied and that the Deposit Agreement was void, finding that the effect of the agreement was an invalid disclaimer of the Bank's liability.[646] The First District Court of Appeal reversed.[647] The Bank was permitted to reduce the statutory notification time from one year to sixty days.[648] This provision did not amount to

637. *Id.* at 1255 n.1.
638. *Id.*
639. Bank of Am., N.A. v. Putnal Seed & Grain, Inc., 965 So. 2d 300, 300–01 (Fla. 1st Dist. Ct. App. 2007) (per curiam).
640. *Id.* at 301 (citing FLA. STAT. § 674.406(6) (2002)). It is not disclosed in the opinion when, under the terms of the parties' agreement, the sixty-day period began to run, but that was not an issue on appeal. *Id.*
641. *Id.* at 300 (emphasis added).
642. *Id.* It is not stated in the opinion as to how Putnal found out about the fraud. *See Bank of Am., N.A.*, 965 So. 2d at 300.
643. *Id.*
644. *Id.*
645. *Id.*
646. *Id.* at 301.
647. *Bank of Am., N.A.*, 965 So. 2d. at 302.
648. *See id.* at 301.

a forbidden disclaimer of responsibility on the part of the Bank under section 674.103(1) of the *Florida Statutes*.[649]

E. *Exempt Property*

The Florida Legislature amended section 222.25(4) of the *Florida Statutes*, and that statute now reads, in part

> [t]he following property is exempt from attachment, garnishment, or other legal process:
>
> . . .
>
> (4) A debtor's interest in personal property, not to exceed $4000, if the debtor does not claim . . . the benefits of a homestead exemption under s. 4, Art. X of the State Constitution

—the real estate homestead exemption.[650] Article X, section 4, subsection (a)(2) of the Florida Constitution also grants a $1000 personal property exemption, and has for some time.[651] The United States Bankruptcy Court for the Middle District of Florida was called upon to decide if section 222.25(4) increases the personal property exemption by $3000 to $4000, or by $4000 to $5000, for Floridians not claiming the real estate homestead exemption.[652] The court stated that the legislative history of the amendment to section 222.25(4) clearly shows a legislative intention to increase by $3000 to $4000.[653] However, the court, adopting the debtor's argument, ruled that a maximum $4000, rather than $5000, interpretation of the section would amount to the legislature impermissibly altering or amending a constitutional provision, that is, article X, section 4, subsection (a)(2).[654] The total maximum personal property exemption under the constitution and the statute was held to be $5000 for "a person who does not own homestead [real estate] or claim a homestead [real estate] exemption."[655]

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649. *Id.*
650. *In re* Bezares, 377 B.R. 413, 414 (Bankr. M.D. Fla. 2007) (quoting FLA. STAT. § 222.25(4) (2007)).
651. *See id.*
652. *Id.*
653. *Id.*
654. *Id.* at 415.
655. *In re Bezares*, 377 B.R. at 415.