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NOVA LAW REVIEW



THE 2000 SURVEY OF FLORIDA LAW

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Criminal Law: 2000 Survey of Florida Law

William E. Adams, Jr.* and Mark M. Dobson**

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I. INTRODUCTION

This article discusses Supreme Court of Florida decisions in the area of substantive criminal law handed down between January 1, 1999 and May 1, 2000.¹ Cases discussing substantive criminal procedure issues, e.g., search and seizure, are not the subject of this survey, although they obviously are important to the criminal law practitioner. As with past criminal law survey articles, cases discussing the death penalty and sentencing guidelines are omitted, as these are specialized areas beyond the scope of what actions (or inactions) may constitute a crime. Cases from Florida's district courts of appeal are mentioned in footnotes to the extent that their inclusion

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1. The authors have chosen as their beginning and ending points decisions reported in volumes 723 through 760 of the Southern Second Reporter.

supplements the textual discussion. Otherwise, Florida district court decisions are not the subject of this article.

Even after cases involving the death penalty and sentencing are eliminated, this survey does not discuss every Supreme Court of Florida substantive criminal law decision. Those cases that merely address the application of standard fact situations to a well-settled rule of law have also been eliminated. Thus, this survey focuses on decisions which “broke ground” in some way and thus contributed significantly to the dynamic growth of Florida’s substantive criminal law.

This survey is divided into two main parts. The first part discusses Supreme Court of Florida cases concerning major or novel questions of substantive criminal law that do not involve constitutional questions. The second part discusses Supreme Court of Florida cases concerning constitutional challenges to some of Florida’s substantive criminal law statutes.

II. BURGLARY

At common law, burglary was the breaking and entering of the dwelling house of another during the nighttime in order to commit a felony therein.² Like other states’ statutes, Florida’s definition of burglary has significantly broadened this definition.³ Section 810.02 of the *Florida Statutes* defines “burglary” as “entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.”⁴ This definition expands the common law definition of burglary to protect structures and conveyances as well as dwellings⁵ and

2. See, e.g., *State v. Hicks*, 421 So. 2d 510, 511 (Fla. 1982).

3. See *id.* at 512.

4. FLA. STAT. § 810.02(1) (2000).

5. The burglary statute’s definitions of “structure” (subsection 810.011(1)) and “dwelling” (subsection 810.011(2)) also include the “curtilage” of these two places. See § 810.011(1)–(2). Both subsections specifically contain the language “together with the curtilage thereof” in their definitions. *Id.* The term “curtilage” itself is not defined in the *Florida Statutes*. *Hamilton* defined the term “curtilage” to require an enclosed area, not just any area connected with a dwelling or structure. *State v. Hamilton*, 660 So. 2d 1038, 1044 (Fla. 1995). For a detailed discussion of *Hamilton*, see Mark M. Dobson, *Criminal Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 101, 117–22 (1996). The enclosure requirement also applies to Florida’s trespass statute. See FLA. STAT. § 810.08 (2000); *L.K.B. v. State*, 677 So. 2d 925, 926 (Fla. 5th Dist. Ct. App. 1996).

For a recent case discussing the meaning of “curtilage,” see *Mejias*, where the court found that a common parking area of an industrial park where several businesses were located within two separate buildings could not be considered within the curtilage of one of the businesses even

eliminates the requirement of a “breaking.”⁶ The intruder also does not have to intend to commit a felony; the intent to commit any offense inside the protected area will do.⁷ Finally, the unlawful entry with criminal intent can occur anytime, not just at night.⁸

The language in the second part of the definition of burglary in section 810.02 of the *Florida Statutes* has been labeled the “consent clause.”⁹ The courts have construed the language “unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain” as constituting an affirmative defense to a burglary charge rather than an element of the offense which the State must allege and subsequently

though the entire industrial park was enclosed. *Mejias v. State*, 731 So. 2d 728, 729 (Fla. 3d Dist. Ct. App. 1999). Additionally, in *Freeman*, the court explained that an unenclosed area in front of an abandoned apartment building was not within the “curtilage” for purposes of the trespass in a structure statute. *Freeman v. State*, 743 So. 2d 603, 603 (Fla. 4th Dist. Ct. App. 1999).

For a recent case discussing what is a “structure” within the definition of section 810.011(1) of the *Florida Statutes*, see *Bean*, where the court found that an attached garage within a wing of a house that shared a common roof and three walls with the rest of the building was a structure under the burglary statute, even though it did not have a door. *Bean v. State*, 728 So. 2d 781, 782 (Fla. 4th Dist. Ct. App. 1999).

If the structure that is burglarized or trespassed upon is “occupied,” then a higher degree of burglary or trespass is committed. Section 810.02(2)(c) of the *Florida Statutes* makes burglary of an occupied structure a first-degree felony, and section 810.08(2)(b) makes trespass in an occupied structure a first-degree misdemeanor. FLA. STAT. § 810.02(2)(c), .08(2)(b) (2000). In *D.E.*, the court recently found that when the only other persons in the place involved are the defendant’s confederates, that place is not occupied for purposes of the trespass statute. *D.E. v. State*, 725 So. 2d 1269 (Fla. 4th Dist. Ct. App. 1999). As chapter 810 does not define when a place should be considered “occupied” and does not make a distinction between burglary and trespass for purposes of this term, the same result should occur if the charge involved is a burglary.

6. See *State v. Hicks*, 421 So. 2d 510, 511 (Fla. 1982).

7. Although intent to commit a felony is no longer required for a burglary offense, the specific intent to commit a crime within the protected area is an essential element of burglary. *Id.* at 512. Thus, a jury instruction that omits the requirement that the jury find an accused intended to commit a crime after the unlawful entry constitutes reversible error even without an objection at trial, as failure to adequately instruct the jury on an element of an offense is fundamental error. *Davis v. State*, 736 So. 2d 27, 28 (Fla. 4th Dist. Ct. App. 1999). However, it is not necessary to instruct the jury on any specific crime that the accused purportedly intended to commit. *Puskac v. State*, 735 So. 2d 522, 523 (Fla. 4th Dist. Ct. App. 1999). The requirement that a jury be instructed that it must find the defendant intended to commit an offense within a protected area cannot be satisfied by instructing the jury that it must find the defendant intended to commit “burglary.” *Viveros v. State*, 699 So. 2d 822, 824–25 (Fla. 4th Dist. Ct. App. 1997); *Puskac*, 735 So. 2d at 523.

8. *Hicks*, 421 So. 2d at 511.

9. *Id.*

disprove.¹⁰ In actuality, this clause contains two separate affirmative defenses. An accused can either claim that the entry into or remaining in even a private protected area was with the legal occupant's explicit consent, or allege that the entry was impliedly consensual by virtue of the premises being open to all members of the public.

As to the first of these affirmative defenses, explicit consent to enter or remain, the defense has the burden of offering evidence to raise this argument.¹¹ Once this occurs, the State has the burden to disprove the presence of explicit consent beyond a reasonable doubt.¹² As to the second of these two affirmative defenses, the Supreme Court of Florida recently clarified the respective burdens in the "open to the public" affirmative defense in *Miller v. State*.¹³

In *Miller*, the State charged Miller with multiple offenses stemming from the holdup of a grocery store, committed with the aid of his juvenile

10. *Id.*

11. *Jones v. State*, 745 So. 2d 403, 404 (Fla. 3d Dist. Ct. App. 1999). As consent is an affirmative defense, an accused who pleads guilty or nolo contendere to a burglary charge waives this defense. *Id.*

12. For a recent case discussing this in detail, see *D.R.*, where a trailer owner had given the defendant permission to stay in the trailer several nights before the owner locked the trailer up and moved his family elsewhere. *D.R. v. State*, 734 So. 2d 455 (Fla. 1st Dist. Ct. App. 1999). The defendant admitted going inside the trailer while the owner was away but claimed he believed he had the owner's permission to do so. *Id.* at 458. At trial, the owner testified that it was his understanding that D.R. could not go inside until the owner returned. *Id.* at 457-58. However, this testimony was insufficient to prove revocation of consent to enter, as it only went to the owner's state of mind, not the accused's knowledge of the consent's revocation. *Id.* at 460. As "[n]othing in the record suggests that consent to enter, once given to D.R., was ever withdrawn expressly or by implication and communicated to him," the State failed to meet its burden. *Id.*

For another recent case on this point, see *Medina*, where the court found that after permission to enter is given, the mere fact that the accused subsequently commits a crime inside a protected place does not automatically require a finding that consent to remain was revoked. *Medina v. State*, 743 So. 2d 116, 117 (Fla. 3d Dist. Ct. App. 1999).

Any alleged consent to enter that has been obtained by trick or fraud will not be considered valid or lawful consent for purposes of avoiding a conviction. For a recent case on this issue, see *Gordon*, where initial entry was gained through a ruse in which the defendant pretended to have a toothache. *Gordon v. State*, 745 So. 2d 1016, 1018 (Fla. 4th Dist. Ct. App. 1999).

However, the lawful occupant does not have to explicitly tell an accused to leave. *Ray v. State*, 522 So. 2d 963, 966 (Fla. 3d Dist. Ct. App. 1988) (holding that a defendant who entered another's apartment with consent had unlawfully remained there for purposes of a burglary when the occupant fought with the defendant when he tried to sexually assault her). Consent to remain after a lawful entry can be revoked implicitly. *Id.*

13. 733 So. 2d 955 (Fla. 1998).

nephew.¹⁴ The two entered the store in the late afternoon armed with a rifle.¹⁵ They disarmed the store's security guard, shot both the guard and the store's operator, took money from the cash register, and fled.¹⁶ The operator recovered, but the guard died from injuries caused by his wounds.¹⁷ Miller was subsequently arrested and found guilty on all the charges against him: first-degree murder; attempted first-degree murder with use of a firearm; armed robbery with a firearm; robbery with a firearm; and burglary.¹⁸ The judge followed the jury's unanimous recommendation and sentenced Miller to death.¹⁹

On appeal, Miller raised no issue regarding the guilt phase of his trial, but raised six issues regarding the penalty phase.²⁰ However, upon an independent review of the record, the Supreme Court of Florida reversed his burglary conviction and remanded the case to the trial court for a new penalty phase hearing.²¹ The court believed that there had been some confusion regarding the "open to the public" affirmative defense, as opposed to the licensee or invitee affirmative defense in the "consent clause" of section 810.02(1) of the *Florida Statutes*.²² The court subsequently held that "if a defendant can establish that the premises were open to the public, then this is a complete defense."²³ Thus, even if an accused enters an area publicly open, and the lawful occupants subsequently withdraw consent, this will still not make the accused guilty of burglary.²⁴ A finding otherwise was considered not only to be in direct conflict with explicit language in the

14. *Id.* at 955. The nephew was a prosecution witness against Miller at trial. *Id.* at 956. The opinion does not indicate what charges were brought against the nephew or what ultimately happened to him. *See id.*

15. *Id.*

16. *Miller*, 733 So. 2d at 956. Three other people were also inside the store at the time, including two children. *Id.* The nephew, who shot the store's operator, claimed that the shooting was accidental. *Id.* The opinion contains no facts as to why the guard was shot after being disarmed or why the two did not shoot any of the other four occupants. *See id.* at 955.

17. *Id.* at 956.

18. *Miller*, 733 So. 2d at 955.

19. *Id.*

20. *Id.* at 956.

21. *Id.* at 957. The court found a new sentencing hearing was needed, as its decision invalidated the "committed during the course of a burglary" aggravating factor in Miller's case. *Id.* The court declined to find that use of this improper factor was harmless error. *Miller*, 733 So. 2d at 957.

22. *Id.*; *see* FLA. STAT. § 810.01(1) (2000).

23. *Miller*, 733 So. 2d at 957.

24. *See, e.g., Franklin v. State*, 750 So. 2d 63, 65 (Fla. 4th Dist. Ct. App. 1999) (rejecting the argument that once an accused entered a 24-hour convenience store and demanded money, consent for him to be there was implicitly revoked as the employees knew he was only there to commit a crime).

consent clause of section 810.02(1),²⁵ but also would produce absurd results. For example, a thief would automatically be guilty of burglary whenever entering a store to secretly steal an item, no matter how open to the public the premises would be.²⁶ As the State conceded that the store Miller robbed was open to the public, his burglary conviction was reversed.²⁷

Several subsequent cases show that the principle established in *Miller* could be extended too far. Business areas may have a dual nature or character; that is, part of them may, by virtue of the business engaged in, be open to the public, and part of them may be closed to the public. When defendants go beyond the publicly open areas with the intent to commit a crime, they may easily find themselves being charged and convicted of burglary. Thus, a defendant who gained access through deception to a hotel manager's private office even though his entry into the hotel's lobby had been to a public area,²⁸ a defendant who dove head first through a restaurant's drive-up window to take cash,²⁹ and a defendant who entered a locked, gated employee area of a cellular telephone store,³⁰ all were found guilty of burglary.

III. POSSESSION OF BURGLARY TOOLS

The Supreme Court of Florida also recently decided an important case concerning possession of burglary tools. Section 810.06 of the *Florida Statutes* states that "[w]hoever has in his or her possession any tool, machine, or implement with intent to use the same, or allow the same to be used, to commit any burglary or trespass" commits a crime.³¹ In *Calliar v. State*,³² a teacher saw Calliar on school property trying to break a bicycle's chain with wire cutters and a screwdriver.³³ Calliar had entered the property through an open gate in a fence and was trying to get the bicycle unchained from a rack in the school's fenced area.³⁴ Calliar was subsequently

25. *Miller*, 733 So. 2d at 957.

26. *Ray v. State*, 522 So. 2d 963, 967 n.6 (Fla. 3d Dist. Ct. App. 1999) (citing a similar factual situation it deemed ridiculous in *State v. Shult*, 380 N.W.2d 352 (S.D. 1985), where a pizza thief was convicted of burglary for entering a store with intent to shoplift).

27. *Miller*, 733 So. 2d at 957.

28. *Thomas v. State*, 742 So. 2d 326 (Fla. 3d Dist. Ct. App. 1999).

29. *Fine v. State*, 758 So. 2d 1246 (Fla. 5th Dist. Ct. App. 2000).

30. *Millian v. State*, 758 So. 2d 1271 (Fla. 4th Dist. Ct. App. 2000).

31. FLA. STAT. § 810.06 (2000). This section makes the crime a third-degree felony. *Id.*

32. 760 So. 2d 885 (Fla. 1999).

33. *Id.* at 885.

34. *Id.*

convicted of possession of burglary tools, burglary of an occupied structure, and resisting an officer without violence.³⁵

Calliar appealed his conviction for possession of burglary tools, claiming that section 810.06 only criminalizes possession of tools with intent to use them to commit burglary or trespass, not theft.³⁶ The First District Court of Appeal affirmed his conviction³⁷ and rejected the contrary reasoning of the Third District in *Hierro v. State*.³⁸ The First District criticized the *Hierro* court as having “ignored . . . that the intent to commit the theft at the time of the illegal entry is an element of the crime of burglary. The two charges should not be treated as separate incidents, but rather as one criminal episode with a unified intent.”³⁹

The Supreme Court of Florida, in a short, well-reasoned opinion, quashed the district court’s opinion.⁴⁰ The court cited with approval, *Hierro’s* reasoning that the explicit statutory language of section 810.06 required “not merely that the accused intended to commit a burglary or trespass while those tools were in his possession, but that the accused actually intended to use those tools to perpetrate the crime.”⁴¹ The court thus held that “the crime of possession of burglary tools is just what it appears to be: possession of tools used or intended to be used to unlawfully enter the premises of another.”⁴² Several reasons supported this interpretation. First, under the plain meaning rule, a court must give words in a statute their plain meaning.⁴³ Here, that meant “burglary tools” should only be considered as those tools actually used or intended for use in a burglary or trespass, and not merely tools that were intended to commit another crime once the trespass or burglary was accomplished.⁴⁴ Under section 810.02(1), all Calliar needed to commit a burglary was an unlawful entry of a statutorily protected place “with the intent to commit an additional offense.”⁴⁵ Second, the court found that a contrary construction would lead to absurd results, since as long as an accused possessed something that was intended to commit any other crime after an illegal entry, the accused would

35. *Id.*

36. *Id.*

37. *Calliar v. State*, 714 So. 2d 1134, 1134 (Fla. 1st Dist. Ct. App. 1998).

38. 608 So. 2d 912 (Fla. 3d Dist. Ct. App. 1992).

39. *Calliar*, 714 So. 2d at 1135.

40. *Calliar v. State*, 760 So. 2d 885, 887–88 (Fla. 1999).

41. *Id.* at 886 (quoting *Thomas v. State*, 531 So. 2d 708, 709 (Fla. 1988)) (emphasis omitted).

42. *Id.* at 887.

43. *Id.*

44. *Id.*

45. *Calliar*, 760 So. 2d at 887 (discussing FLA. STAT. § 810.02(1) (1995)). For a more detailed discussion of burglary see *supra* notes 2–30 and accompanying text.

be guilty of possession of burglary tools.⁴⁶ Instead, the court found that the tools possessed must be used to commit a burglary or trespass for section 810.06 to be violated.⁴⁷ In this case, since there was no evidence that the wirecutters or screwdriver had been used to help Calliar burglarize or trespass on school grounds, his burglary conviction was reversed.⁴⁸

IV. POSSESSION OF CONCEALED WEAPONS OR FIREARMS

Florida's substantive criminal law makes the possession of a weapon or firearm a crime in a variety of circumstances. The possession may be criminal depending on the status of the possessor,⁴⁹ the nature of the weapon

46. *Callier*, 760 So. 2d at 887.

47. *Id.* The court could have possibly cited to a third rationale to support its decision. Assuming the court found ambiguity in the statutory language of section 810.06, the court could have then relied on the rule of leniency, which requires a court to strictly construe criminal statutes in favor of the accused.

48. *Id.*

49. FLA. STAT. § 790.23(1) (2000) (making possession of a firearm, electric weapon, or concealed weapon illegal if the possessor is a convicted felon or has been found delinquent of an offense that would have been a felony for an adult, and the possessor is under 24 years of age). Until 1999, if the possessor had been adjudicated delinquent, but the juvenile court's jurisdiction over him or her had expired or been relinquished, then the accused would not have been a delinquent in possession. § 790.23(2). The 1999 Legislature amended section 790.23 to extend the applicable age of former delinquents from 18, when juvenile court jurisdiction over them expires, until 24. Ch. 99-284, § 39, 1999 Fla. Laws 3133, 3133 (codified at FLA. STAT. § 790.23(1) (2000)).

For a recent case involving offenses under this subsection, see *Adkins*, where the court found that the felon defendant could not be convicted of possession of a firearm where the firearm was found in the trunk of his girlfriend's car that he happened to be driving, and there was no proof he knew of its presence. *Adkins v. State*, 738 So. 2d 961 (Fla. 2d Dist. Ct. App. 1999). Further, in *Bullis*, the court found that the accused could be convicted of a felony charge for possession of firearm based upon the testimony of a deputy sheriff placing the accused inside a motor home where weapons were found scattered about in the open. *Bullis v. State*, 734 So. 2d 463 (Fla. 5th Dist. Ct. App. 1999).

For an important recent decision holding that voluntary intoxication is not an available defense to violations of section 790.23 of the *Florida Statutes*, as these are general, rather than specific, intent crimes, see *Goodwin v. State*, 734 So. 2d 1057 (Fla. 1st Dist. Ct. App. 1998).

Section 790.235(1) of the *Florida Statutes* makes it a crime for a violent career criminal to "own[] or ha[ve] in his or her care, custody, possession, or control any firearm or electric weapon . . . or carr[y] a concealed weapon." In *Jackson*, the court recently rejected due process, equal protection, and ex post facto attacks on the statutory predecessor to section 790.235. *Jackson v. State*, 729 So. 2d 947, 949-50 (Fla. 1st Dist. Ct. App. 1998).

For another recent case involving this subsection, see *Jacobs*, where the court found that the accused was properly convicted of being a violent career criminal in possession of a firearm

or firearm possessed,⁵⁰ how the weapon or firearm is possessed,⁵¹ or the geographical area where the weapon or firearm is possessed.⁵² Recently, the Supreme Court of Florida decided an important case clarifying the test to be used and factors to be considered in determining whether a weapon or firearm was possessed in a "concealed" fashion.⁵³

In *Dorelus v. State*,⁵⁴ the defendant and a co-defendant, Presume, were in a car stopped for a traffic violation.⁵⁵ The defendant was the driver, and the co-defendant was a passenger.⁵⁶ While standing outside the car, the officer who stopped them claimed, according to his probable cause affidavit, that he saw "the shiny silver butt of a handgun . . . located underneath the

when a handgun was found partially hidden under the driver's seat of the car he was seen driving, and the car's owner testified it was not hers. *Jacobs v. State*, 742 So. 2d 333 (Fla. 3d Dist. Ct. App. 1999).

50. See, e.g., FLA. STAT. § 790.221 (2000) (making it a crime to possess a short-barreled rifle, short-barreled shotgun, or a machine gun); § 790.225 (making possession of self-propelled knives illegal).

51. Sections 790.01(1) and (2) of the *Florida Statutes* make it a crime to possess concealed or electric weapons or concealed firearms. § 790.01(1), (2). However, a person may be licensed to carry a concealed weapon or firearm pursuant to section 790.06, or lawfully carry such concealed weapons even without a license if the weapon or firearm is in a "private conveyance . . . [and] is securely encased or is otherwise not readily accessible for immediate use" pursuant to section 790.25(5). § 790.25(5). Section 790.053 makes it a crime to openly carry a firearm or device. § 790.053.

52. See, e.g., § 790.115(1)-(2) (making it a crime to possess firearms or weapons on school property or at school-sponsored events). *But see* *R.L.S. v. State*, 732 So. 2d 39 (Fla. 2d Dist. Ct. App. 1999) (finding that the accused could not be convicted of possessing a weapon on school property when the knife he had was so short-bladed that it fell within the "common pocketknife" exception to the definition of a weapon under section 790.001(13)).

For another recent case discussing this exception, see *Walls*, where the court found that a knife approximately nine inches long and carried with the blade locked open could be considered a weapon for purposes of a conviction. *Walls v. State*, 730 So. 2d 294 (Fla. 1st Dist. Ct. App. 1999).

For detailed discussion of the "common pocketknife" exception, see *L.B. v. State*, 700 So. 2d 370 (Fla. 1997).

53. *Dorelus v. State*, 747 So. 2d 368 (Fla. 1999). The case only involved a charge of carrying a concealed firearm. *Id.* at 370. However, the supreme court noted that since the critical statutory language concerning what constitutes concealment was the same for both concealed firearms and concealed weapons, its decision should be applicable to both offenses. *Id.*

54. 747 So. 2d 368 (Fla. 1999).

55. *Id.* at 369.

56. These facts come from the district court's opinion in the co-defendant's case. *State v. Presume*, 710 So. 2d 604, 604 (Fla. 4th Dist. Ct. App. 1998). The opinions in both the defendant's and the co-defendant's cases are silent as to where the co-defendant, Presume, was sitting when the car was stopped; however, the facts imply that he was in the front seat. *See id.* at 605.

radio.”⁵⁷ The officer arrested both men for carrying a concealed weapon.⁵⁸ Before trial, both Presume and Dorelus separately filed sworn motions to dismiss.⁵⁹ The State filed a traverse to Presume’s motion, denying its material allegations.⁶⁰ At the hearing on the motion, the State argued unsuccessfully that it needed to present the arresting officer’s testimony to show how the gun was concealed.⁶¹ The prosecution additionally argued that the question of concealment was a matter of fact for the jury and thus not the proper subject of a motion to dismiss.⁶² However, after examining the officer’s probable cause affidavit, the trial court rejected these arguments and granted Presume’s motion.⁶³ Dorelus’ motion was filed after his co-defendant’s successful hearing.⁶⁴ Dorelus’ motion asked the court to judicially notice the order granting his co-defendant’s motion to dismiss.⁶⁵ The State did not traverse this time but instead relied on its arguments in the previous case.⁶⁶ Once again, the motion to dismiss was granted.⁶⁷

The State appealed both orders dismissing the charges.⁶⁸ In both cases, the district court of appeal reversed.⁶⁹ Both opinions found that the trial court had erred by granting the motions based on the appellate court’s findings that whether a weapon is concealed is a question for the trier of fact and never a question of law,⁷⁰ relying on the supreme court’s decision in *Ensor v. State*.⁷¹ Dorelus subsequently appealed the decision in his case to the supreme court.⁷²

57. *Dorelus*, 747 So. 2d at 370. The Fourth District’s opinion in *Presume* noted that the affidavit also alleged the gun was “‘easily accessible to both the defendant & co-defendant.’” *Presume*, 710 So. 2d at 604.

58. *Dorelus*, 747 So. 2d at 370.

59. *Id.* Both motions were filed pursuant to FLA. R. CRIM. P. 3.190(c)(4).

60. *Presume*, 710 So. 2d at 604–05.

61. *Id.* at 605.

62. *Id.*

63. *Id.*

64. *Dorelus*, 747 So. 2d at 370.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; *Presume*, 710 So. 2d at 604.

69. *Dorelus*, 720 So. 2d at 543; *Presume*, 710 So. 2d at 606.

70. *Dorelus*, 720 So. 2d at 543; *Presume*, 710 So. 2d at 606. The *Presume* opinion also found that the State’s traverse, along with the statements in the arresting officer’s probable cause affidavit, created an issue of material fact for a jury. *Id.* at 605.

71. 403 So. 2d 349 (Fla. 1981). The court in *Ensor* held that a firearm may be within a police officer’s sight for purposes of invoking the “plain view” doctrine to support a warrantless seizure under the Fourth Amendment and still be found to be a “concealed firearm” under section 790.001(2). *Id.* at 351.

72. *Dorelus*, 747 So. 2d at 370.

In an important, well-organized opinion, the Supreme Court of Florida quashed the appellate court's decision.⁷³ The court noted that section 790.001(2) of the *Florida Statutes* defined a concealed firearm as one "carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person."⁷⁴ It agreed with the Fourth District's characterization of *Ensor* as the seminal case discussing when a weapon or firearm is considered "concealed" under section 790.001.⁷⁵ The court in *Ensor* found that a firearm does not have to be totally out of sight to be considered concealed.⁷⁶ Rather, the test for concealment was whether the firearm was "hidden from the ordinary sight of another person."⁷⁷ "Ordinary sight of another person" was in turn defined as "the casual and ordinary observation of another in the normal associations of life."⁷⁸ The court declared that this would depend "on whether an individual, standing near a person with a firearm or beside a vehicle in which a person with a firearm is seated, may by ordinary observation know the questioned object to be a firearm."⁷⁹ According to *Ensor*, this question "must rest upon the trier of fact under the circumstances of each case."⁸⁰

The supreme court in *Dorelus* noted that *Ensor* has been interpreted as standing for the proposition that concealment is always a question of fact and never a question of law which could be decided on a motion to dismiss.⁸¹ *Dorelus* rejected this broad interpretation of *Ensor* and clarified that what the court in that case meant to say was that "the issue of concealment is *ordinarily* an issue for the trier of fact."⁸² The court also noted that *Ensor* may have been misleading in another respect, *viz.*, the extent to which its discussion focused on the observer's viewpoint.⁸³ Instead, to be consistent with the statutory definition of "concealed firearm," the *Dorelus* court declared that the emphasis should be on "the manner," that is, *how* someone

73. *Id.*

74. *Id.* (quoting FLA. STAT. § 790.001(2) (1995)). This language is the same as that currently found in that section. See FLA. STAT. § 790.001(2) (2000). The same language is also found in the statutory definition of a "concealed weapon." § 790.001(3)(a).

75. *Dorelus*, 747 So. 2d at 370.

76. *Ensor*, 403 So. 2d at 354.

77. *Id.*

78. *Id.*

79. *Id.* at 355.

80. *Id.*

81. *Dorelus*, 747 So. 2d at 371.

82. *Id.* (emphasis added).

83. *Id.* at 372.

carries the firearm.⁸⁴ This manner of carrying would again focus on whether the firearm involved was out of “the ordinary sight of another person.”⁸⁵

The supreme court’s opinion, besides clarifying earlier statements in *Ensor*, is especially helpful because the court also discussed in some detail what factors are and are not relevant in determining if the manner in which the firearm is carried means it should be considered concealed.⁸⁶ Factors which *Dorelus* deemed relevant to whether the manner of carrying the firearm made it concealed included where it was inside a vehicle,⁸⁷ how much or how little it was covered by another object,⁸⁸ whether an accused used his/her body to conceal what would otherwise be ordinarily visible,⁸⁹ and “the nature and type of weapon involved.”⁹⁰ Finally, as to relevant factors, the court said that the police officers’ observations are important.⁹¹ Thus, a statement that the officer could “immediately recognize” an object as a weapon may conclusively show it was not concealed.⁹² However, just because an officer cannot or did not immediately make such a recognition would not automatically mean a jury could find that an object was concealed.⁹³ This contrary result is rational, since a weapon may be immediately visible in the open if viewed from one position but not from another one. Likewise, someone may not see a firearm or weapon that is in the open just because the person does not happen to be looking in that direction or may be just careless in his or her observation. An observer’s viewpoint or lack of attention should not determine if how an object is carried makes it concealed, as this would make the issue depend on factors totally beyond the control of the person accused of carrying it in a concealed fashion.⁹⁴

84. *Id.*

85. *Id.* at 371.

86. *Dorelus*, 747 So. 2d at 370–72.

87. *Id.* at 371. Places specifically mentioned in this regard included “the floorboard, the seat, a seat pocket, or an open console.” *Id.*

88. *Id.* The objects mentioned as examples were “a sheet or a towel.” *Id.*

89. *Dorelus*, 747 So. 2d at 371–72. The court gave as an example a Second District case where a driver leaned over a weapon located between the seats and tried to put one arm over the weapon’s butt to prevent a police officer from seeing it. *Id.* (discussing *State v. Hankerson*, 430 So. 2d 517 (Fla. 2d Dist. Ct. App. 1983)).

90. *Id.* at 372. The court noted that rifles are more difficult to conceal than handguns, and that obviously smaller firearms can be concealed more easily than larger ones. *Id.*

91. *Id.*

92. *Dorelus*, 747 So. 2d at 372.

93. *Id.* at 371.

94. *Id.* at 372. The court rejected the First District’s reasoning which found that a firearm carried in a stopped car could be concealed even though the officer looking through a passenger side window could readily see it but the officer looking through the driver’s side

The court rejected the State's argument that other factors extraneous to how the weapon involved was carried may be relevant to whether it was concealed or not.⁹⁵ Thus, time of day and whether a vehicle's window is open or closed should not be considered in making this determination. The court felt that using such factors would create the risk that the concealed weapons and firearm law would be unconstitutionally vague.⁹⁶

Looking at the actual facts in *Dorelus* and applying the appropriate factors as to how the firearm was carried, the supreme court agreed with the trial court's determination that, as a matter of law, it was not concealed.⁹⁷ There was no dispute it was in an open console with the butt of the handgun sticking out.⁹⁸ The handgun was not covered, and the defendant made no attempt at all to use his body to shield the gun from the officer's view.⁹⁹ Finally, the officer had no difficulty recognizing it as a firearm.¹⁰⁰

When the court's reasoning is examined in light of some of criminal law's basic principles, the correctness of this decision becomes even more evident. One of the basic principles of criminal law in a free, democratic society is that citizens should be able to govern their conduct to avoid the potentially coercive effects that criminal law can impose on them through charging, conviction, and ultimately punishment. Before citizens can govern their conduct so as to avoid the possibility of conviction and punishment, they must know what conduct will violate the law. A second basic principle is that citizens should only be punished for factors, usually action or inaction, within their own control, not someone else's. The court furthered both of these principles by elaborating on those factors that may make a weapon or firearm concealed. First, it provided better notice to citizens, as well as to the courts, regarding what conduct to avoid so as not to run the risk of being charged and convicted of carrying a concealed item. Second, the conduct to avoid is limited to factors that citizens who might be charged with carrying a concealed weapon can avoid, because it is their own conduct,

window could not. *Id.* (discussing *McGraw v. State*, 404 So. 2d 817 (Fla. 1st Dist. Ct. App. 1981)). As the *Dorelus* court said, "[w]hether a crime has occurred should not depend on whether the officer's initial vantage point is the driver's rather than the passenger's side of the automobile." *Id.*

95. *Dorelus*, 747 So. 2d at 373. One extraneous factor the court did not mention is the weather. This, too, should be considered irrelevant, as it is outside the accused possessor's control. Why should a weapon resting uncovered on the back seat of a car be considered concealed because it cannot be readily seen through a rain-fogged window but would be readily seen in the exact same spot on a clear, sunny day?

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Dorelus*, 747 So. 2d at 373.

and not someone else's, on which a charge would be brought. Citizens may not always be able to control how observant an officer is, but they can control how secluded a weapon is by where it is placed, what covers it, and what actions are taken or not taken to try or not try to hide it with the body.

At the conclusion of its opinion, the supreme court suggested that the legislature should consider amending the law "to set forth the exact parameters for carrying a weapon [or firearm] in a vehicle in this state."¹⁰¹ The court cited three groups that would benefit from such a statutory clarification.¹⁰² First, police would benefit because they would better know when to arrest for a concealed weapon violation.¹⁰³ Second, citizens would benefit because, as mentioned above, they would better know how to transport certain items legally.¹⁰⁴ Finally, courts would benefit because it is they who must decide whether a weapon has been carried in a prohibited manner.¹⁰⁵

At least through the 1999 session, the Florida legislature has not acted on the court's suggestion. However, the *Dorelus* opinion will still be useful to all three groups, especially the trial courts. When called upon to make the initial judgment as to whether a person has unlawfully carried a concealed firearm or weapon, trial judges should look to *Dorelus* for guidance. Furthermore, unless and until the legislature acts upon the supreme court's suggestion, trial judges may wish to consider instructing juries on those factors *Dorelus* has explicitly declared relevant and irrelevant when a jury trial is involved. Finally, strong consideration should be given to amending the *Florida Standard Jury Instructions* in criminal cases to incorporate these factors for charges related to carrying concealed weapons or firearms.¹⁰⁶

V. MANSLAUGHTER: OMISSIONS, CAUSATION, AND CULPABLE NEGLIGENCE

Substantive criminal law sometimes, but not always, requires that there be a harmful result for there to be a crime. When such a harmful result

101. *Id.* at 374.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Dorelus*, 747 So. 2d at 374.

106. For another recent case involving carrying concealed firearms, see *Walker*. *Walker v. State*, 733 So. 2d 564 (Fla. 2d Dist. Ct. App. 1999). In *Walker*, there was no question that firearms carried in a car Walker drove and shared with a passenger were concealed. *See id.* at 564. However, there was no direct or even circumstantial evidence, such as Walker's fingerprints on any of the guns, to show he knew of their presence. *Id.* at 564-65. Thus, Walker could not even be convicted on a theory of constructive possession with a joint occupant. *Id.* at 564.

occurs, criminal law further requires that it be the result of an accused's act. This second requirement is the requirement of causation. Usually, when a harmful result occurs, causation is self-evident. However, occasionally cases arise where the issue of causation raises serious problems. These issues almost always arise in the context of homicide prosecutions. A homicide prosecution requires proof of a harmful result, the killing of a human being, as well as proof of causation, by another human being. Where the killing stems solely from a voluntary act of the accused, both elements are easily satisfied. For instance, if one person pulls a gun and shoots another person, killing the second person instantly, both the killing and the causation through human agency are obvious. However, when the killing occurs through the alleged omission, rather than commission, of another, then serious questions of causation can arise. The Supreme Court of Florida recently addressed the issues of causation and omissions in *Eversley v. State*.¹⁰⁷ This case also gave the court an opportunity to discuss culpable negligence and Florida's felony child abuse statute.¹⁰⁸

Eversley was charged with manslaughter and felony child abuse stemming from the death of her infant son, Isaiah.¹⁰⁹ When Isaiah was born, the defendant contracted with another woman to keep and to care for him as Eversley felt she could not do so because of her work.¹¹⁰ Two months later, Eversley decided to care for Isaiah herself, showed up at the woman's home, and took him with her.¹¹¹ The next day, Isaiah began to act as if he were sick.¹¹² Eversley took him to a clinic where medical staff, including a doctor, repeatedly told her that he might have pneumonia and that she needed to take him to a hospital for immediate testing.¹¹³ Eversley took the baby to a hospital emergency room but left without having him examined because she became impatient while waiting for doctors to see several people ahead of her.¹¹⁴ That evening, Isaiah continued to show signs of labored breathing.¹¹⁵ Eversley went to sleep with him lying next to her.¹¹⁶ When she woke up in the early morning hours the next day, she noticed he

107. 748 So. 2d 963 (Fla. 1999).

108. *Id.* at 968-70.

109. *Id.* at 964.

110. *Id.*

111. *Id.*

112. *Eversley*, 748 So. 2d at 964.

113. *Id.*

114. *Id.* at 965.

115. *Id.*

116. *Id.*

was not breathing.¹¹⁷ Paramedics were summoned and found that Isaiah had been dead for some time.¹¹⁸

At trial, cause of death was a major issue.¹¹⁹ Eversley claimed the baby was sick when she first picked him up at the other woman's home.¹²⁰ However, both the woman and Eversley's aunt, who had also seen Isaiah that day, said he was not sick when Eversley picked him up.¹²¹ Nurses and the doctor at the clinic testified about the repeated admonitions they had given Eversley concerning the need for the baby to receive testing at a hospital.¹²² Eversley herself admitted that she knew if she had told the hospital emergency room staff she had been sent there by a doctor, Isaiah would have been seen ahead of the people who were there before her.¹²³ She claimed she believed the baby only had a cold, but this testimony was countered by the clinic staff who testified they specifically told her he might have pneumonia.¹²⁴ At trial, medical experts for both sides differed in their estimates of Isaiah's chances for survival had he been given prompt medical care.¹²⁵ The defense's expert estimated that the mortality rate for the type of pneumonia the baby had was twenty-five percent, thus giving him only a seventy-five percent chance of survival even with adequate care.¹²⁶ The State's expert put the mortality rate at only one percent, assuming adequate medical care.¹²⁷

The jury convicted Eversley of manslaughter and felony child abuse, but the trial court, in ruling on the defense's post trial motion for judgment of acquittal, overturned the manslaughter conviction and reduced the child abuse conviction to a misdemeanor.¹²⁸ The trial court based its ruling on the supreme court's early decision in *Bradley v. State*,¹²⁹ which it read as finding that a parent's failure to provide medical care for a sick child can never be considered the legal cause of the child's death.¹³⁰ The State appealed and the district court reinstated both the manslaughter and felony child abuse

117. *Eversley*, 748 So. 2d at 965.

118. *Id.*

119. *Id.*

120. *Id.* at 964.

121. *Id.*

122. *Eversley*, 748 So. 2d at 964.

123. *State v. Eversley*, 706 So. 2d 1363, 1365–66 (Fla. 2d Dist. Ct. App. 1998).

124. *Id.* at 1366.

125. *See Eversley*, 748 So. 2d at 967.

126. *Id.*

127. *Id.*

128. *Id.* at 964.

129. 84 So. 677 (Fla. 1920).

130. *Eversley*, 748 So. 2d at 965.

convictions.¹³¹ The defense subsequently appealed this decision to the supreme court.¹³²

As both the district court and the supreme court's opinions discussed *Bradley*, an examination of that decision is helpful. In *Bradley*, the defendant's epileptic daughter fell into a fire during a seizure and was severely burned.¹³³ This occurred on April 26.¹³⁴ From then until May 30, the defendant repeatedly refused to have her seen by a doctor, although relatives and even a justice of the peace urged him to do so.¹³⁵ *Bradley* apparently could have paid for the medical attention and turned down offers from others to pay for a doctor to examine his daughter.¹³⁶ The father told anyone who urged him to seek medical treatment for his daughter that he was relying on the will of God, and that "the greatest physician was God himself."¹³⁷ Finally, the daughter was taken to a state hospital where she died on June 22.¹³⁸ *Bradley* was charged with manslaughter by culpable negligence.¹³⁹ At trial, the doctors who treated his daughter testified she would have recovered from the burns if prompt medical care had been given, and that the burns were the cause of her death.¹⁴⁰

On appeal, the supreme court reversed.¹⁴¹ The statute under which the State charged *Bradley* defined manslaughter as "[t]he killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder."¹⁴² Justice Whitfield, in his majority opinion, first invoked as the basis for reversal the principle of legality, that is, that no act can be a crime unless the legislature has made it so.¹⁴³ According to Justice Whitfield, "statutes creating and defining crimes cannot be extended by intentment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms."¹⁴⁴ Justice Whitfield found that there was no state law "specifically making the failure or refusal of a father to provide medical attention for his child a felony, and [that] the general [statutory]

131. *Id.*

132. *See id.* at 964.

133. *Bradley*, 84 So. at 679 (West, J., dissenting).

134. *Id.*

135. *Id.* at 679–80.

136. *Id.* at 680.

137. *Id.* at 681.

138. *Bradley*, 84 So. at 680.

139. *Id.* at 681.

140. *Id.* at 680.

141. *Id.* at 679.

142. *Id.* at 678 (quoting FLA. STAT. § 3209 (1906)).

143. *See Bradley*, 84 So. at 678–79.

144. *Id.* at 679.

definition of ‘manslaughter’ . . . does not appear to cover a case of this nature.”¹⁴⁵ Looking at both the indictment’s allegations and the evidence at trial, the justice then found no proof the girl had been killed “by the [defendant’s] act, procurement or culpable negligence.”¹⁴⁶ Justice Whitfield concluded by asserting that even if the girl would have recovered, the cause of her death was accidentally being burned, not her father’s failure to get prompt care.¹⁴⁷ Thus, “even if the failure or refusal of the father to provide medical attention was ‘culpable negligence’ within the intent of the statute,” this culpable negligence would not have caused the daughter’s death.¹⁴⁸

In a brief concurring opinion, Chief Justice Browne agreed that the conviction should be reversed.¹⁴⁹ Although his concurrence purports to address a number of different questions, all of them seem to be directed to the issue of causation.¹⁵⁰ Browne believed that whatever the State’s claims factually and legally, it had not met its burden of proof as to causation.¹⁵¹ Thus, he claimed that “it was not proven, and was not capable of being proven that if the child had had medical attention it would have recovered.”¹⁵²

Justice West wrote an extensive dissent.¹⁵³ He began by asserting that “[a]ll the essential elements of the offense charged in the indictment . . . were proved.”¹⁵⁴ That being so, he found only two questions that needed to be addressed: did the facts proven “make a case of manslaughter within the terms of the statute,” and, if so, did the defendant’s religious beliefs provide a “sufficient justification or excuse for his failure to secure any medical treatment for his daughter?”¹⁵⁵ The first question addressed Justice Whitfield’s principle of legality argument.¹⁵⁶ Justice West noted that a father owes a legal duty to his minor children to provide the necessities of life, if possible.¹⁵⁷ Thus, a father must provide his children

145. *Id.*

146. *Id.*

147. *Id.*

148. *Bradley*, 84 So. at 679.

149. *Id.* (Browne, J., concurring).

150. *See id.*

151. *Id.*

152. *Id.* Justice Browne believed that the State could never factually prove causation in a case like this “until the practice of medicine becomes an exact science so that it can be established beyond the peradventure of a doubt that death would not have ensued if a physician had been in attendance.” *Bradley*, 84 So. at 679.

153. *Id.* at 679–83 (West, J., dissenting).

154. *Id.* at 680.

155. *Id.*

156. *Id.*

157. *Bradley*, 84 So. at 681.

with food, clothing, shelter, and medical care if he can.¹⁵⁸ Failure to do so could be culpable negligence in West's opinion, thus coming within the prohibition of the manslaughter statute.¹⁵⁹ Having answered the first question affirmatively, the dissent cited a number of cases from other jurisdictions all concluding that defendants' personal religious beliefs will not exonerate them when their actions otherwise break the law.¹⁶⁰ Thus, Justice West found Bradley's religious belief in leaving the matter of his daughter's recovery solely in God's hands neither a justification nor an excuse for failing to get her prompt medical care.¹⁶¹

The *Bradley* majority opinion is a confusing combination of legal and factual justifications for reversal. The first basis, the principle of legality, would mean that the accused could never be convicted of manslaughter under the law at the time, as his omissions did not fall within the statute's prohibition. This could be so either because Justice Whitfield believed that an omission could never give rise to criminal liability unless there was a statute specifically declaring that such liability existed, or because even if omissions could sometimes give rise to criminal liability under the manslaughter statute, the father's omissions did not do so here as a matter of law. Justice Whitfield's comments regarding "no proof" provided at least two additional bases for reversal.¹⁶² First, the Justice may have believed that the State had not presented sufficient medical testimony to prove causation. Second, even if the State had proved causation, it had not offered enough evidence to prove the accused was culpably negligent here. Unfortunately,

158. *Id.*

159. *Id.*

160. *Id.* at 681-83.

161. *Id.* at 683. Neither the majority nor concurring opinions directly discuss whether Bradley's beliefs could have been a reason to exonerate him. Reading both of these opinions, one cannot help but feel that possibly the justices silently felt that maybe Bradley was a good man who had "suffered enough," but the justices were at the same time hesitant to endorse the notion that a person's religious beliefs can be a reason not to hold someone criminally responsible. Justice Whitfield's opinion refers to "[w]hatever motive may have prompted the father" and notes that the father was not charged with willfully depriving the daughter of medical attention. *Bradley*, 84 So. at 679. To an extent, this is a true statement, as Bradley was not charged with violating an existing statute making it a crime to "willfully deprive his child of necessary medical attention." *Id.* at 678 (citing FLA. STAT. § 3238 (1906)). Certainly, though, as the word "willfully" is commonly understood, Bradley's inaction was willful; his child needed medical help, and he made the decision not to provide it promptly because of his religious beliefs.

Chief Justice Browne asked whether a father "who belongs to that exemplary band of Christians who have no faith in the efficacy of medicine as a curative agency," should be convicted when he does not provide necessary medical care to a child who dies. *Id.* at 679.

Of course, there is no way of knowing whether these two justices did indeed silently cast their votes to overturn the conviction on this basis.

162. *Id.*

Justice Whitfield's opinion never clarifies which one or ones of these three grounds he relies upon in reversing the conviction.¹⁶³

In *Eversley*, the district court of appeal reversed the trial court's order overturning the manslaughter conviction and reducing the child abuse conviction to a misdemeanor.¹⁶⁴ The district court noted that the trial court had read *Bradley* to mean that a parent's failure to provide needed medical care could never be the legal cause of death.¹⁶⁵ The district court believed that continued reliance on *Bradley* for this proposition was inconsistent with the development of Florida's laws regarding the protection of children.¹⁶⁶ Unlike the state of the law in 1906, Florida law in effect when *Eversley* was decided provided extensive protection for children and explicitly made parental failure to obtain medical care for a sick child a serious crime.¹⁶⁷ Thus, parents who willfully failed to provide medical care to their child could be prosecuted for manslaughter provided three elements were proven.¹⁶⁸ The defendant had to: 1) cause the child's death; 2) do so by culpable negligence; and 3) have no lawful justification for doing so.¹⁶⁹ Culpable negligence would exist "when a defendant recklessly or wantonly disregards the safety of another."¹⁷⁰ As for causation, the district court believed that this concept had been significantly liberalized in modern manslaughter cases.¹⁷¹ No longer did the State have to prove that "but for" an accused's acts or omissions, the death would not have occurred.¹⁷² Instead, causation would lie "when a defendant's action is a material contributing factor in the victim's death."¹⁷³

Applying these two standards, the district court first concluded that a jury could find *Eversley* culpably negligent.¹⁷⁴ Her actions in leaving the

163. *Id.* at 678–79. Unfortunately, Justice Whitfield also mentions all three grounds in the same paragraph, thus adding to the difficulty of determining his grounds for reversal. *Bradley*, 84 So. at 678.

164. *State v. Eversley*, 706 So. 2d 1363, 1364 (Fla. 2d Dist. Ct. App. 1998).

165. *Id.* at 1365.

166. *Id.*

167. FLA. STAT. § 827.04(1) (1995). This section was subsequently changed and incorporated into section 827.03 of the *Florida Statutes*. For a brief discussion of the changes, see *infra* notes 226–29 and accompanying text.

Florida criminal law when *Bradley* was decided in 1906 made depriving a child of needed medical care a crime; however, it was only a misdemeanor. FLA. STAT. § 3238 (1906).

168. *Eversley*, 706 So. 2d at 1365.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Eversley*, 706 So. 2d at 1365.

174. *Id.* at 1366.

hospital emergency room without having her child treated or even examined, after having been advised by doctors of the baby's potentially serious medical situation, "epitomize[d] willful and wanton recklessness."¹⁷⁵ As to causation, the medical testimony established that "[t]here was a significant chance that, given medical aid, Isaiah could have survived his bout of pneumonia."¹⁷⁶ Since the defendant's failure to get him that aid deprived the baby of that chance for life, there was enough evidence for a reasonable jury to conclude the mother's actions and omissions contributed to his death.¹⁷⁷

Finally, the district court reinstated the felony child abuse conviction.¹⁷⁸ The 1995 statute under which Eversley was charged with criminal child abuse made it a third-degree felony to "willfully or by culpable negligence, depriv[e] a child of . . . necessary . . . medical treatment . . . and in so doing caus[e] great bodily harm . . . to such child."¹⁷⁹ The district court's opinion does not even discuss culpable negligence as far as a conviction under this law.¹⁸⁰ Instead, "Eversley's capricious decision to leave the emergency room, despite her knowledge that she could obtain immediate assistance, evidence[d] a specific and willful intent to deny Isaiah medical services."¹⁸¹

The Supreme Court of Florida, in an extensive discussion of causation and culpable negligence, reversed the district court's finding that Eversley could be convicted of manslaughter, but upheld the court's finding that she was guilty of felony child abuse.¹⁸² The supreme court first noted that the language of the two manslaughter statutes under which Bradley¹⁸³ and

175. *Id.*

176. *Id.*

177. *Id.* Once again, the district court found that *Bradley* presented an antiquated view which should no longer be followed. *Eversley*, 706 So. 2d at 1365. The court rejected Justice Browne's reasoning in his concurring opinion that causation was factually incapable of being proved in these types of cases. *Id.* at 1366. "Medical science has progressed significantly since the days when 'it was not capable of being proven that if the child had had medical attention it would have recovered.'" *Id.* (quoting *Bradley v. State*, 84 So. 2d 677 (Fla. 1920)).

178. *Id.*

179. FLA. STAT. § 827.04(1) (1995).

180. See *Eversley*, 706 So. 2d at 1363-66.

181. *Id.* at 1366. The district court's opinion does not discuss whether culpable negligence for purposes of a manslaughter conviction is the same as for a child abuse conviction. Presumably the definitions would be the same, as the same term is used in both statutes and thus should be given the same meaning unless an explicit legislative intent to do otherwise is shown. As the district court found Eversley guilty of willful child abuse, one can assume it also would alternatively have found her guilty of child abuse by culpable negligence.

182. *Eversley v. State*, 748 So. 2d 963, 970 (Fla. 1999).

183. FLA. STAT. § 3209 (1906). See *supra* note 142 and accompanying text for the language of this statute.

Eversley¹⁸⁴ were prosecuted is substantially the same.¹⁸⁵ The supreme court agreed with the district court as to the three elements needed to prove manslaughter under these statutes.¹⁸⁶ However, the supreme court disagreed with the district court's opinion in its analysis of causation and culpable negligence.¹⁸⁷

Eversley examined the majority's opinion in *Bradley* and found it "rather ambiguous," especially on the issue of causation.¹⁸⁸ The supreme court disagreed with the district court's finding that the "but for" test for cause-in-fact causation need no longer be satisfied, and that instead cause-in-fact causation could be established by using a "material contributing factor" test.¹⁸⁹ As *Eversley* correctly recognized, causation in criminal law consists of two parts.¹⁹⁰ First, "but for" causation must be found before an accused can be potentially criminally liable.¹⁹¹ However, this alone is not enough for criminal responsibility to be imposed.¹⁹² There must be a second category of causation, usually called legal causation.¹⁹³ Only when both types of causation exist can criminal responsibility be found.¹⁹⁴ As to "but for" causation, in *Eversley* the supreme court noted that "the State usually must demonstrate that 'but for' the defendant's conduct, the harm would not have occurred."¹⁹⁵ If a harm would have occurred anyway despite the accused's conduct, then "but for" causation is not satisfied, and there should be no criminal responsibility for the harm.¹⁹⁶ When "but for" causation has been

184. FLA. STAT. § 782.07 (1995) (defining manslaughter in part as "[t]he killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification... and in cases in which such killing shall not be excusable homicide or murder...").

185. *Eversley*, 748 So. 2d at 965–66.

186. *Id.* at 966.

187. *Id.* at 966–70.

188. *Id.* at 966. The *Eversley* court found that the concurring and dissenting opinions in *Bradley* only contributed to this ambiguity. *Id.* Chief Justice Browne's concurrence was described as only begging the question posed in the majority opinion, "[W]as the majority holding that the State failed to prove causation in this case or that the State could never prove causation in this case or any other case with similar facts?" *Eversley*, 748 So. 2d at 966 n.3.

189. *Id.* at 966.

190. *Id.* at 966–67.

191. *Id.* at 967. "But for" causation is also sometimes called "factual" or "actual" causation. All three terms stand for the same concept.

192. *Id.*

193. *Eversley*, 748 So. 2d at 966–67. This type of causation can also go by other names such as "proximate cause." *Id.*

194. *Id.*

195. *Id.* at 967.

196. For example, assume baby Isaiah had a rare, untreatable disease that would have killed him before or by the time he eventually died, then "but for" causation would not have been

established, then legal causation becomes an issue.¹⁹⁷ The Supreme Court of Florida declared that two questions must be answered positively before this type of causation exists.¹⁹⁸ The first question is “whether the prohibited result of the defendant’s conduct is beyond the scope of any fair assessment of the danger created by the defendant’s conduct.”¹⁹⁹ The second question is, “whether it would be otherwise unjust, based on fairness and policy considerations, to hold the defendant criminally responsible for the prohibited result.”²⁰⁰

The court noted that the issue in *Eversley* involved “but for” causation and not legal causation.²⁰¹ That being so, the district court erred by using the “substantial factor” or “material contributing factor” test.²⁰² These types of tests may be appropriate for the issue of legal causation but not for factual causation.²⁰³ However, the supreme court in *Eversley* agreed with the district court’s conclusion that the evidence at trial was sufficient to prove causation here and rejected Chief Justice Browne’s statements in *Bradley* that “medical testimony cannot be the basis for establishing causation.”²⁰⁴ Advancements in medicine since *Bradley* were such that “it is common to uphold convictions on the basis of medical testimony advancing reasonable theories of causation when such testimony has been supplemented by other

proven. His mother may still have been culpably negligent for not getting him prompt examination or treatment, but her negligence would not have been the factual cause of his death.

197. *Id.*

198. *Eversley*, 748 So. 2d at 967.

199. *Id.*

200. *Id.* Neither of these two questions can be answered with precision. Instead, in any case where the fact finder must explicitly address the question of legal causation, the fact finder is really being asked to make a policy decision that, given the circumstances of the case, criminal responsibility should or should not be imposed on the accused. Only where the imposition of criminal responsibility seems beyond the bounds of all fairness is an appellate court likely to reverse a conviction for lack of legal causation.

As stated by one writer, “The decision to attach causal responsibility for social harm to one rather than to another actual cause is one made [by the fact finder] by use of common sense and moral intuitions.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 163 (1987). Dressler clearly believes that unlike “but for” causation which can be reduced to answering precise, fact based inquiries, legal causation is incapable of being found through using a formulaic process. Instead, he suggests that courts can only consider a number of factors in making the intuitive judgment they must make on legal causation. His discussion of both “but for” causation and legal causation is among the best on these subjects and is highly recommended for readers desiring more about these topics.

201. *Eversley*, 748 So. 2d at 967.

202. *Id.* at 966.

203. *See id.* at 967.

204. *Id.*

evidence supporting the causal relation at issue.”²⁰⁵ This medical testimony “does *not* have to be expressed in terms of a reasonable medical certainty” but instead could be stated as probabilities.²⁰⁶ Thus, the State’s expert testimony that there was a ninety-nine percent chance of survival had the accused obtained prompt medical care for the child was sufficient to show “but for” causation.²⁰⁷ The court recognized that Eversley had offered contrary medical testimony but found that it was up to the jury to resolve the differences between the two, as juries must with all questions of fact.²⁰⁸

After rejecting both *Bradley’s* and the district court’s treatment of “but for” causation, the Supreme Court of Florida turned its attention to the issue of culpable negligence.²⁰⁹ Here the *Eversley* court found that the *Bradley* opinion resolved the issue.²¹⁰ *Eversley* used the principle of legality to resolve the question of whether the defendant could be convicted under the manslaughter statute she was charged with violating.²¹¹ The court focused on Justice Whitfield’s language from the majority in *Bradley* that “*the general definition of ‘manslaughter’ contained in the statute does not appear to cover a case of this nature.*”²¹² As the manslaughter statute in that case was virtually the same as in *Eversley*, *Bradley’s* reasoning was still controlling.²¹³ Thus, *Eversley* held “that under the statute in effect at the time of the crime . . . the failure to provide medical care does not satisfy the culpable negligence element of manslaughter,” so the mother’s conviction for this had to be overturned.²¹⁴

The State fared better on the argument that Eversley had committed felony child abuse.²¹⁵ The felony child abuse statute in effect when Isaiah died specifically provided that “[w]hoever, willfully or by culpable negligence, deprives a child of . . . necessary . . . medical treatment . . . and in so doing causes great bodily harm” was guilty of a third-degree felony.²¹⁶ Unlike the manslaughter statute, “culpable negligence” for purposes of a child abuse conviction had been interpreted several times to include

205. *Id.* at 968.

206. *Eversley*, 748 So. 2d at 968 (quoting *Delap v. State*, 440 So. 2d 1242, 1253 (Fla. 1983)) (emphasis added).

207. *Id.* at 967.

208. *Id.* at 968.

209. *Id.*

210. *Id.*

211. *Eversley*, 748 So. 2d at 968–70.

212. *Id.* at 968 (quoting *Bradley v. State*, 84 So. 677, 679 (Fla. 1920)) (emphasis added).

213. *Id.*

214. *Id.*

215. *Id.* at 970.

216. *Eversley*, 748 So. 2d at 970.

purposeful omissions which caused harm.²¹⁷ The supreme court noted that the trial court's reduction of Eversley's child abuse conviction rested on its erroneous finding that there was insufficient evidence to believe she caused the baby "great bodily harm."²¹⁸ As the only difference between felony and misdemeanor child abuse was causing great bodily harm versus "the infliction of physical or mental injury,"²¹⁹ and the supreme court had found the causation element met, it reinstated the *Eversley* jury's felony child abuse verdict.²²⁰ Thus, the supreme court did not have to address the district court's finding that the defendant's actions had amounted to willfulness under the statute.

There is certainly an ironic bent to the supreme court's rulings in *Eversley*. The mother was statutorily unable as a matter of law to commit "culpable negligence" for purposes of a manslaughter charge but was not only able, but explicitly found guilty of committing "culpable negligence" for purposes of felony child abuse.²²¹ Unless one believes that the supreme court intended "culpable negligence" to mean factually one thing for one offense and something completely different for the other offense, there initially seems to be an unresolvable conflict between the two rulings in the same opinion. However, when the court's reasoning is examined closely, no such inconsistency exists. Indeed, the *Eversley* holding is completely consistent with basic notions of stare decisis, statutory construction, and even constitutional law.

The bedrock for *Eversley's* different rulings on culpable negligence is the principle of legality. Justice Whitfield in *Bradley's* majority had relied on one aspect of this principle to find Bradley not guilty of manslaughter.²²² This aspect of the principle requires that before an act can be criminal, the legislature must make it such by law.²²³ Thus, Whitfield's opinion rested on his statement that "[t]here is no statute in this state specifically making the failure or refusal of a father to provide medical attention for his child a felony," and therefore Whitfield found that the general definition of manslaughter did not extend to such inaction.²²⁴ Another aspect of the principle of legality is that a legislature cannot judicially amend a statute to make criminal, acts or omissions that were not previously considered to be

217. See, e.g., *Nicholson v. State*, 600 So. 2d 1101, 1104 (Fla. 1992) (finding that "a willful 'omission . . . whereby unnecessary or unjustifiable pain or suffering is caused' constitutes aggravated child abuse under section 827.03(1)").

218. *Eversley*, 748 So. 2d at 970.

219. FLA. STAT. § 827.04(2) (1995).

220. *Eversley*, 748 So. 2d at 970.

221. See *id.*

222. *Bradley v. State*, 84 So. 677, 678 (Fla. 1920).

223. *Id.* at 678-79.

224. *Id.* at 679 (emphasis added).

prohibited by the statute. Thus, even though failure to provide a child necessary medical aid had been made legislatively a felony when Isaiah died, the legislature had not amended the general definition of manslaughter beyond that in *Bradley*. As a result, the principles of legality and of stare decisis forced the supreme court in *Eversley* to follow the *Bradley* holding, whether the justices personally wanted to or not. If the court had not done so, it would not only have violated the principle of legality and the concept of stare decisis, but would also have possibly raised constitutional issues. Judicial amendment of the manslaughter statute would have violated the due process principle that people are entitled to fair notice of what constitutes a crime. It would also have violated the prohibition against ex post facto laws²²⁵ by retroactively making criminal what was previously not considered criminal, that is, Eversley's failure to get care for her child. When examined in light of these considerations, one certainly may not like the result that Eversley could not be convicted of manslaughter but still must respect the supreme court's ruling for sticking to higher principles of law.

Fortunately, *Eversley's* ruling on manslaughter has become an aberration and should not occur again. As the court itself noted, shortly after Isaiah's death, the Florida Legislature amended section 782.07 of the *Florida Statutes* to add a third subsection explicitly stating that "[a] person who causes the death of any person under the age of 18 by culpable negligence under [section] 827.03(3) commits aggravated manslaughter of a child," a first-degree felony.²²⁶ The 1996 Legislature also amended section 827.03 to include two new subsections explicitly defining what constitutes "aggravated child abuse"²²⁷ and "neglect of a child."²²⁸ Thus, "it is clear that the Legislature now intends to include the failure to provide medical care within the definition of manslaughter."²²⁹ This legislative amendment also

225. U.S. CONST. art. I, § 9, cl. 3.

226. Ch. 96-322, § 12, 1996 Fla. Laws 1761, 1774 (codified at FLA. STAT. § 782.07(3) (2000)).

227. *Id.* § 8, 1996 Fla. Laws 1761, 1770 (codified at FLA. STAT. § 827.03(2)(a)-(c) (2000)).

228. *Id.*

229. *Eversley v. State*, 748 So. 2d 963, 969 (Fla. 1999). The court also explicitly declared that "[h]ad the amended statutes been in effect at the time of the alleged crime in this case, Eversley's conduct would have been punishable as manslaughter." *Id.*

Eversley noted in its discussion that at least one previous Florida decision had concluded that the failure to provide medical care when one would be considered to have a legal duty to do so could not result in a manslaughter conviction. *Id.* at 965 (citing *Neveils v. State*, 145 So. 2d 883 (Fla. 1st Dist. Ct. App. 1962)) (finding that a husband's failure to provide medical care for his wife who died could not constitute manslaughter). Failure to provide necessary medical aid to a child for whom one had assumed the duty of care had also been declared a proper basis for a manslaughter conviction in other jurisdictions. See *Jones v. United States*, 308 F.2d 307 (D.C.

demonstrates an additional argument that *Eversley* was correct in overturning the manslaughter conviction. Legislatures, when enacting or amending statutes, are presumed to not engage in useless acts.²³⁰ Thus, if the previous definition of manslaughter had been meant to include those acts or omissions included in the new amendments, these would have been mere redundancies. Since statutes should not be construed in a way that makes them totally or even partially redundant, the previous manslaughter statute could not have included culpable negligence through failure to furnish needed medical care to a child.

VI. SELF-DEFENSE, DUTY TO RETREAT, AND THE "CASTLE DOCTRINE"

Florida statutory law recognizes that one may use force to defend oneself from an attack.²³¹ This use of force may even extend to the use of deadly force when one "reasonably believes that such [deadly] force is necessary to prevent imminent death or great bodily harm to himself."²³² However, the person threatened cannot use deadly force without first doing everything possible to avoid doing so, including retreating, even though the other person is the wrongful aggressor.²³³ Common law has recognized one exception to this duty to retreat whenever possible, known as the "castle doctrine."²³⁴ Under this doctrine, Florida courts have recognized that persons attacked at home do not have to retreat or try to retreat from their home before using deadly force in self-defense, so long as the deadly force is necessary to prevent death or great bodily harm.²³⁵ Unfortunately, Florida case law has also crafted exceptions to this exception, leaving the state of the law in this area confusing and irrational.²³⁶

Cir. 1962). Thus, the Florida Legislature's amendment of section 782.07 is not surprising; what is surprising is how long it took for this to be done after *Bradley*.

230. *Beach v. Great W. Bank*, 692 So. 2d 146, 152 (Fla. 1997).

231. FLA. STAT. § 776.012 (2000).

232. *Id.* The remainder of this section justifies deadly force if one reasonably believes it necessary to prevent the same bodily harm to "another or to prevent the imminent commission of a forcible felony." *Id.*

Use of deadly force to defend another or prevent the commission of a forcible felony is beyond the scope of this article's discussion. For the statutory definition of what constitutes a "forcible felony," see § 776.08.

233. *See State v. Bobbitt*, 415 So. 2d 724, 725 (Fla. 1982) (quoting the trial court's jury instructions on the legal duty to retreat).

234. *Weiand v. State*, 732 So. 2d 1044, 1049 (Fla. 1999).

235. *Id.*

236. *Id.* at 1049-51.

In *Weiland v. State*,²³⁷ the Supreme Court of Florida recently eliminated these irrational exceptions and helped bring clarity to the “castle doctrine’s” application. In *Weiland*, the defendant was charged with the first-degree murder of her husband.²³⁸ During a violent argument, Weiland shot her husband in the apartment where they lived with their newborn child.²³⁹ She claimed the killing was in self-defense and presented expert testimony about battered woman’s syndrome to support her argument.²⁴⁰ Weiland herself claimed her husband had choked, beaten, and threatened her with more violence if she ever tried to leave him.²⁴¹ Two experts testified that she suffered from battered woman’s syndrome.²⁴² One of these experts, based on her examination of Weiland and the expert’s own studies, concluded that “when Weiland shot her husband she believed that he was going to seriously hurt or kill her.”²⁴³ This expert also explained that Weiland did not leave her home during the fatal argument for several reasons despite her apparent opportunities to do so.²⁴⁴ The defense requested that the trial court give the standard jury instruction on the “castle doctrine.”²⁴⁵ However, the court refused and instead gave the instruction regarding the general duty to retreat in a case of self-defense.²⁴⁶ The jurors were told that “[t]he fact that the defendant was wrongfully attacked cannot justify her use of force likely to cause death or great bodily harm if by retreating she could have avoided the

237. 732 So. 2d 1044, 1044 (Fla. 1999).

238. *Id.* at 1048.

239. *Id.*

240. *Id.* In *Hickson*, the court held that expert testimony about the battered spouse syndrome should be admissible to support a self-defense claim, provided that the expert witness is properly qualified to testify on this subject. *State v. Hickson*, 630 So. 2d 172, 176 (Fla. 1993). The syndrome itself is not a defense but only a way of explaining to the fact finder why a battered spouse would have acted the way the spouse did in certain circumstances.

241. *Weiland*, 732 So. 2d at 1048.

242. *Id.*

243. *Id.*

244. *Id.* The expert believed that Weiland did not flee, because she felt unable to do so as she had recently given birth, she was paralyzed with fear, she had been choked unconscious (although when this occurred in relation to the killing is not clear), and past experience had shown her that threatening to leave only increased her husband’s violence. *Id.*

245. *Weiland*, 732 So. 2d at 1048. This instruction would have told the jurors that: If the defendant was attacked in [his][her] own home or on [his][her] own premises, [he][she] had no duty to retreat and had the lawful right to stand [his][her] ground and meet force with force, even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent either death or great bodily harm.

Id.

246. *Id.*

need to use that force."²⁴⁷ In the prosecutor's closing argument, the State stressed that in order for her actions to be considered justifiable self-defense, Weiland must have used all possible means to avoid the killing, including leaving the couple's home.²⁴⁸ Weiland was convicted of second-degree murder and sentenced to eighteen years in prison.²⁴⁹ The Second District Court of Appeal initially affirmed Weiland's conviction.²⁵⁰ On rehearing, the appellate court certified the question of the jury instruction concerning the duty of retreat to the Supreme Court of Florida as one of great public importance.²⁵¹ The supreme court accepted and rephrased the certified question to address the correctness of the jury instructions on retreat and self-defense in a case like this.²⁵²

According to the supreme court, the trial court's instruction was technically correct as the instruction followed the supreme court's opinion in *State v. Bobbitt*.²⁵³ Prior to *Bobbitt*, the supreme court held that a lawful resident had the privilege of nonretreat from her home when the resident was attacked by her lover who was lawfully in the home as an invitee at the time of the killing.²⁵⁴ *Bobbitt* examined whether the privilege should apply when the person killed is not only lawfully present but is also a co-occupant of the home.²⁵⁵ *Bobbitt* and her husband were living together when she killed him during his unprovoked attack on her.²⁵⁶ The *Bobbitt* trial court failed to instruct the jury that as the attack was unlawful and happened in her home,

247. *Id.*

248. *Id.*

249. *Weiland*, 732 So. 2d at 1049.

250. *Weiland v. State*, 701 So. 2d 562, 563 (Fla. 2d Dist. Ct. App. 1997). This opinion concerned issues not pertinent to the "castle doctrine" and the duty to retreat.

251. The original question certified by the Second District was:

SHOULD THE RULE OF *STATE V. BOBBITT*, 415 So. 2d 724 (Fla. 1982), BE CHANGED TO ALLOW THE CASTLE DOCTRINE INSTRUCTION IN CASES WHERE THE DEFENDANT RELIES ON BATTERED-SPOUSE SYNDROME EVIDENCE (AS NOW AUTHORIZED BY *STATE V. HICKSON*, 630 So. 2d 172 (Fla. 1994)] TO SUPPORT A CLAIM OF SELF-DEFENSE AGAINST AN AGGRESSOR WHO WAS A COHABITANT OF THE RESIDENCE WHERE THE INCIDENT OCCURRED?

Weiland, 732 So. 2d at 1046-47.

252. *Id.* at 1047.

253. 415 So. 2d 724 (Fla. 1982), *receded from by* *Weiland v. State*, 732 So. 2d 1044 (Fla. 1999).

254. *Hedges v. State*, 172 So. 2d 824, 827 (Fla. 1965). The court rejected the argument that the "castle doctrine" only applied when the person killed was a trespasser as was the case in *Pell v. State*. *Id.* (discussing *Pell v. State*, 122 So. 110 (Fla. 1929)).

255. *Bobbitt*, 415 So. 2d at 724.

256. *Id.* at 725.

the defendant had no duty to retreat to the maximum extent possible.²⁵⁷ Instead, the jury was instructed about the defendant's general duty to retreat when attacked before a killing could be considered self-defense.²⁵⁸ The supreme court approved this instruction and also approved the failure to further instruct the jurors on the "castle doctrine."²⁵⁹ The court noted its earlier decision finding that the doctrine applied when one is attacked at home by an invitee who is lawfully present but not living in the home as well.²⁶⁰ However, the court felt the *Bobbitt* situation was distinguishable.²⁶¹ Thus, the *Bobbitt* court held that:

[T]he privilege not to retreat, premised on the maxim that every man's home is his castle which he is entitled to protect from invasion, does not apply here where both *Bobbitt* and her husband had equal rights to be in the "castle" and neither had the legal right to eject the other.²⁶²

Implicit in this decision was the distinction between trespassers, invitees, and co-occupants. Trespassers have no legal right to be in an occupant's home while invitees do, by virtue of the lawful occupant's invitation. However, the supreme court evidently considered this invitation implicitly revoked because of the invitee's unprovoked attack, thus reducing the invitee's status to that of a trespasser. The same could not be said of co-occupants who had equal legal rights to be on the premises when the attack began. Ironically, one result of *Bobbitt* was that it functionally changed this equality of the right to remain. The attacker was considered legally on the premises, but the attacked victim's right to remain was reduced by the

257. *Id.* The trial court declined to give the requested jury instruction which was: One unlawfully attacked in his own home or on his own premises has no duty to retreat and may lawfully stand his ground and meet force with force, including deadly force, if necessary to prevent imminent death or great bodily harm to himself or another, or to prevent the commission of a forcible felony.

Id.

258. *Id.*

259. *Bobbitt*, 415 So. 2d at 726.

260. *Id.*

261. *Id.*

262. *Id.* In so doing, the court approved language from *Conner* that a mother attacked in her home by a son living there also had the general duty to retreat and could not claim the benefit of the "castle doctrine." *Id.* at 726 (reviewing *Connor v. State*, 361 So. 2d 774 (Fla. 4th Dist. Ct. App. 1978)). The *Conner* court claimed this did not make the mother defenseless as she could still use deadly force if retreating from the home would increase her chances of death or great bodily harm. *Connor v. State*, 361 So. 2d 774, 776 (Fla. 4th Dist. Ct. App. 1978).

victim's obligation to retreat fully if, by doing so, the victim could avoid using deadly force without endangering the victim.

Justice Overton dissented from the majority's opinion in *Bobbitt*.²⁶³ His dissent criticized the artificial distinctions made based solely upon the status of the attacker.²⁶⁴ One result of *Bobbitt* that he correctly pointed out was that it "places the wife in the same position as if the altercation had occurred in a public place."²⁶⁵ He criticized the different applications of the duty to retreat between an attack by one family member on another member when both live in the home and when only one member lives in the home.²⁶⁶ Justice Overton claimed that "the majority's rule is in fact a minority position which does not recognize the realities of life."²⁶⁷ Instead of the State or defense's positions, Justice Overton argued for the establishment of a limited duty to retreat rule when the victim is attacked by one legally in the home regardless of the attacker's status.²⁶⁸ This rule would place upon the victim attacked a duty to retreat within the home, if possible, but not require the victim to actually leave the home.²⁶⁹ Victims could meet force with equal force, even deadly force, if such force were needed to prevent their death or great bodily harm.²⁷⁰

In *Weiland*, the supreme court receded from its position in *Bobbitt* and adopted Justice Overton's suggestion to adopt a limited duty to retreat when both the person attacked and the attacker are lawfully in the home.²⁷¹ The court did so for two reasons. First, *Bobbitt* was found to rely on considerations of "property law and possessory rights" that are inconsistent with the "castle doctrine."²⁷² That doctrine is grounded, not in a notion of

263. *Bobbitt*, 415 So. 2d at 726 (Overton, J., dissenting).

264. *Id.* at 729.

265. *Id.* at 727.

266. *Id.* at 728.

267. *Id.*

268. *Bobbitt*, 415 So. 2d at 728. This limited rule would apply "when the assailant in one's home is an invitee, a cotenant, or a family member." *Id.* Thus, by implication it would not change the "castle doctrine" when the attacker is a trespasser.

269. *See id.*

270. *Id.* Justice Overton proposed the following instruction on this limited duty: If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a cotenant, family member, or invitee, [he/she] has a duty to retreat to the extent reasonably possible but is not required to flee [his/her] home and has the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself] or another.

Id.

271. *Weiland v. State*, 732 So. 2d 1044, 1051 (Fla. 1999).

272. *Id.*

superior property rights of one against another, but in the realistic, “time-honored principle that the home is the ultimate sanctuary.”²⁷³ Second, increased awareness and understanding of domestic violence showed that there were sound policy reasons to recede from *Bobbitt*.²⁷⁴ The court noted that studies showed that “[d]omestic violence is the single major cause of injury to women.”²⁷⁵ Other studies showed that attempted retreat by a battered spouse can actually increase the chances of the spouse being killed or seriously harmed, as the retreat often served to further provoke the attacker.²⁷⁶ The court also believed that an instruction requiring the battered spouse to leave the home (as opposed to retreating in it, if possible) perpetuated the “common myth that the victims of domestic violence are free to leave the battering relationship any time they wish to do so.”²⁷⁷

Weiland recognized the argument that eliminating a duty to retreat from the home when the parties involved are co-occupants could ultimately increase the number of violent encounters, as more violence in the home is likely to occur between co-occupants than between occupants and trespassers or invitees.²⁷⁸ However, the court found that this argument was not supported by any empirical studies.²⁷⁹ Instead, the court determined that forcing complete retreat, when possible, could actually increase the number of domestic violence incidents.²⁸⁰ Furthermore, the court noted that even when an attacked co-occupant does not have to completely retreat from the home, that occupant is not absolutely privileged to use deadly force.²⁸¹ The general rule that defensive force must be proportionate to the offensive force still exists under the limited duty rule.²⁸² Thus, attacked occupants cannot kill unless they reasonably use all means to avoid doing so. The limited duty to retreat rule merely recognizes that one of the means the law of self-defense cannot reasonably expect people to use is to leave their homes when attacked. *Weiland* thus approved of Justice Overton’s suggested jury instruction, with some minor changes in language.²⁸³

273. *Id.* at 1052.

274. *Id.* at 1051.

275. *Id.* at 1053.

276. *Weiland*, 732 So. 2d at 1054.

277. *Id.*

278. *Id.* at 1056.

279. *Id.*

280. *Id.*

281. *Weiland*, 732 So. 2d at 1056.

282. *See id.*

283. *Id.* The exact instruction approved in *Weiland* is as follows:

If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a co-occupant [or any other person lawfully on the premises] [he/she] had a duty to retreat to the extent reasonably possible without

Weiland brings Florida in line with the majority of courts that have considered this question.²⁸⁴ Moreover, it eliminates irrational outcomes based on minor distinctions in how an attacker is lawfully in the home. While the court's decision spends much time discussing domestic violence against women, its rule is equally applicable when the husband/male lover is the one attacked.²⁸⁵ Additionally, at least one commentator has argued that even though Florida recognized the battered spouse syndrome as part of the law of self-defense "as a matter of law, self-defense was still nearly impossible for a battered spouse to prove because of the [*Bobbitt*] duty to retreat."²⁸⁶ After *Weiland*, this should certainly be a different case.

VII. CONSTITUTIONAL ISSUES

A. Separation of Powers

During the past year, the Supreme Court of Florida addressed a problem that has drawn frequent public attention and criticism: the efficiency and fairness of Florida's death penalty appellate process. During a special legislative session, the Florida Legislature attempted to expedite the process through the Death Penalty Reform Act of 2000 ("DPRA").²⁸⁷ The DRPA attempted to significantly alter the state's post conviction process in capital cases with several specific revisions, particularly with its creation of a "dual-track" process in which post conviction claims could be filed almost contemporaneously with a direct appeal.²⁸⁸

While expressing sympathy with the legislature's desire to improve the efficiency and speed of the process, the Supreme Court of Florida asserted its prerogative under the Florida Constitution to exclusively control the power to adopt judicial rules of practice and procedure in *Allen v.*

increasing [his/her] own danger of death or great bodily harm. However, the defendant was not required to flee [his/her] home and had the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself].

Id. at 1057.

284. *Id.* at 1051.

285. The rule would presumably also be applicable in same-sex domestic relationships.

286. Douglas A. Orr, *Weiland v. State and Battered Spouse Syndrome: The Toothless Tigress Can Now Roar*, 74 FLA. B.J. 14, 16 (2000). This article provides a good, concise discussion of the battered spouse syndrome and the duty to retreat in Florida before and after *Weiland*.

287. Ch. 2000-3, §§ 1-22, 2000 Fla. Laws 4, 4-23.

288. *Allen v. Butterworth*, 756 So. 2d 52, 55 (Fla. 2000).

Butterworth,²⁸⁹ where it found that most sections of the DPRA violated the provisions of the Florida Constitution that guarantee separation of powers of the branches of state government.²⁹⁰ Using its mandamus authority,²⁹¹ the court held that the statute interfered with its power to “adopt rules for the practice and procedure in all courts,” including the time for seeking appellate review.²⁹² The court rejected the State’s contention that the law’s deadlines for filing post conviction motions were statutes of limitations that would have fallen within the legislature’s substantive lawmaking powers.²⁹³ While recognizing that habeas corpus petitions are technically civil in nature, the court declared that they were actually quasi-criminal because they are heard and disposed of in criminal courts.²⁹⁴ The fact that the writ of habeas corpus is explicitly provided for in the text of the Florida Constitution²⁹⁵ was also deemed significant by the court.²⁹⁶ The court also distinguished an Eleventh Circuit decision that permitted Congress to impose a deadline on filing habeas corpus actions in federal courts.²⁹⁷ The court noted that unlike the federal Constitution, which provides that the United States Supreme Court derives its appellate jurisdiction from congressional authority,²⁹⁸ the authority for original and appellate jurisdiction in Florida courts is entirely derived from Article V of the Florida Constitution.²⁹⁹ Despite the DPRA’s severability provision, the court also found most of the sections so “inextricably intertwined” as to preclude severance.³⁰⁰

Nevertheless, the court’s shared concern for efficiency prompted it to propose amendments to Rules 3.851 and 3.852 of the *Florida Rules of Criminal Procedure*.³⁰¹ The court noted that the amendments were meant to balance the need to carry out a sentence of death “in a manner that is fair, just, and humane and that conforms to constitutional requirements” with the

289. 756 So. 2d 52 (Fla. 2000).

290. *Id.* at 52; see FLA. CONST. art. II, § 3. The court did not strike sections 11, 14, 15, and 16 of the DPRA. *Allen*, 756 So. 2d at 65. Although the court also found that some provisions violated equal protection and due process doctrines, its holding was based on its separation of powers analysis. *Id.* at 58.

291. *Id.* at 54 (relying on FLA. CONST. art. V, § 3(b)(8)).

292. *Id.* (citing FLA. CONST. art. V, § 2(a)).

293. *Id.* at 62.

294. *Allen*, 756 So. 2d at 61.

295. FLA. CONST. art. I, § 13.

296. *Allen*, 756 So. 2d at 61.

297. *Weekley v. Moore*, 204 F.3d 1083 (11th Cir. 2000).

298. U.S. CONST. art. III, § 2.

299. *Allen*, 756 So. 2d at 63.

300. *Id.* at 65.

301. *Id.*; see also Amendments to Fla. R. Crim. P. 3.851, 3.852, 3.993, 25 Fla. L. Weekly S285 (Fla. Apr. 14, 2000).

need for promptness and efficiency in administering justice.³⁰² Arguably, the timing of these amendments may also reflect an attempt by the court to circumvent more attempts by the state legislature to interfere with the court's powers.

The court also informed the legislature in its opinion that Florida's public records laws³⁰³ had to be amended in order for the dual-track system to work.³⁰⁴ Because Florida statutes currently exempt criminal intelligence and investigation information from disclosure during appeals, defendants could not pursue all potential remedies until such exemptions end. The court noted that the dual-track system could not work until these exemptions are removed by the legislature.³⁰⁵

Finally, in this clash between the judicial and legislative branches, the court also seized the opportunity to plead for more funding.³⁰⁶ In its conclusion, the court noted that a reliable justice system requires funding at all levels.³⁰⁷ The court argued that funding was needed for the attorneys litigating death penalty cases as well as for the courts.³⁰⁸ This case probably correctly reflects the appropriate roles for the legislative and judicial branches to undertake in this politically sensitive area. With new public attention focused on cases in other states where wrongly accused defendants have proven their innocence through DNA evidence, the need to proceed cautiously in reviewing cases where the death penalty has been imposed seems even more critical. In addition, the court's decision underlines the importance of maintaining an independent judiciary that retains control over its practice and procedures. In an area where the state decides to end someone's life, it is arguably important that the process be deliberate and cautious. Nevertheless, if the court's proposed procedural reforms do not actually reduce delays in the process, one can expect further attempts from the other two branches to continue to change the process. This case seems to indicate, however, that the court will be diligent in protecting its authority from encroachment by the other branches.

B. *Due Process*

The Supreme Court of Florida also had the opportunity to consider due process challenges to a pair of criminal statutes during the past year. In *State*

302. *Allen*, 756 So. 2d at 65.

303. FLA. STAT. § 119 (1999).

304. *Allen*, 756 So. 2d at 65.

305. *Id.* at 65-66 (discussing FLA. STAT. § 119.07(3)(b), (3)(l), .011(3)(d)(2) (2000)).

306. *Id.* at 67.

307. *Id.*

308. *Id.*

v. O.C.,³⁰⁹ a juvenile defendant challenged the constitutionality of section 874.04 of the *Florida Statutes*, a provision that enhanced criminal penalties for members of criminal street gangs.³¹⁰ O.C., a juvenile, was found guilty of attempted aggravated battery and misdemeanor battery.³¹¹ The State then moved for a penalty enhancement pursuant to the aforementioned statutory section.³¹² On appeal, the Fifth District Court of Appeal concluded that the law was unconstitutional because it enhanced punishment for “mere association.”³¹³ The problematic language of the challenged section permitted enhancement for belonging to a criminal street gang.³¹⁴ The Supreme Court of Florida first noted that both the Fourteenth Amendment to the United States Constitution and Article I, section 9 of the Florida Constitution provide that citizens have the right to be protected from deprivations of their legally protected interests without due process of law.³¹⁵ The clauses permit legitimate interference with one’s legal rights, but only if the means chosen “shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary or capricious.”³¹⁶ The court reviewed previous decisions³¹⁷ that overturned statutes criminalizing otherwise innocent activities without a showing of criminal intent or behavior.³¹⁸ Because this statute made simple association with others who may not even be criminals a ground for penalty enhancement, without also requiring a showing that there was a nexus between the criminal act committed by the defendant and his membership in the organization, it seems that the court was correct. To permit a penalty enhancement for merely belonging to an organization, the definition of which is relatively broad in the statute, raises a number of constitutional

309. 748 So. 2d 945 (Fla. 1999).

310. *Id.* at 945.

311. *Id.* at 946.

312. *Id.*

313. *Id.* at 947.

314. Section 874.04 of the *Florida Statutes* states as follows:

Upon a finding by the court at sentencing that the defendant is a member of a criminal street gang, the penalty for any felony or misdemeanor, or any delinquent act or violation of law which would be a felony or misdemeanor if committed by an adult, may be enhanced if the offender was a member of a criminal street gang at the time of the commission of such offense.

FLA. STAT. § 874.04 (2000).

315. O.C., 748 So. 2d at 948.

316. *Id.* (emphasis omitted).

317. *Wyche v. State*, 619 So. 2d 231 (Fla. 1993); *State v. Walker*, 461 So. 2d 108 (Fla. 1984).

318. O.C., 748 So. 2d at 949.

questions.³¹⁹ The court distinguished a decision by the Supreme Court of California³²⁰ that rejected a challenge to a criminal gang statute permitting enhancement where the defendant committed the crime, “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.”³²¹ This decision seems correct in striking a statute that was too broad in its sweep at addressing a perceived societal harm.

The court also considered a due process challenge to the criminal statute that punishes neglect of the elderly and disabled³²² in *Sieniarecki v. State*.³²³ Patricia Sieniarecki lived in an apartment with her boyfriend and mother.³²⁴ Although in her fifties, the elder Sieniarecki became despondent and disoriented after the combination of her husband’s death and a surgery on her hip.³²⁵ Mrs. Sieniarecki was found dead on a mattress soiled with

319. Section 874.03(2)(a)–(h) of the *Florida Statutes* lists eight criteria for classifying a person as being a member of a “Criminal Street Gang” as follows:

(2) “Criminal street gang member” is a person who is a member of a criminal street gang as defined in subsection (1) and who meets two or more of the following criteria:

(a) Admits to criminal street gang membership.

(b) Is identified as a criminal street gang member by a parent or guardian.

(c) Is identified as a criminal street gang member by a documented reliable informant.

(d) Resides in or frequents a particular criminal street gang’s area and adopts their style of dress, their use of hand signs, or their tattoos, and associates with known criminal street gang members.

(e) Is identified as a criminal street gang member by an informant of previously untested reliability and such identification is corroborated by independent information.

(f) Has been arrested more than once in the company of identified criminal street gang members for offenses which are consistent with usual criminal street gang activity.

(g) Is identified as a criminal street gang member by physical evidence such as photographs or other documentation.

(h) Has been stopped in the company of known criminal street gang members four or more times.

§ 874.03(2)(a)–(h).

320. *People v. Gardeley*, 927 P.2d 713 (Cal. 1996).

321. *O.C.*, 748 So. 2d at 950 (quoting *Gardeley*, 927 P.2d at 720). The court did not reach the First Amendment challenge to the statute. *Id.*

322. *FLA. STAT.* § 825.102(3) (1997).

323. 756 So. 2d 68 (Fla. 2000).

324. *Id.* at 70.

325. *Id.*

urine and feces wearing only a polo shirt and one tennis shoe.³²⁶ She weighed only sixty-eight pounds.³²⁷ The cause of death was septicemia, caused by decubitus ulcers as well as bladder and vaginal infections.³²⁸ Dehydration and malnutrition also contributed to the cause of death.³²⁹ Found guilty of neglect, the defendant argued on appeal that the statute violated her due process rights by imposing an affirmative duty upon her while penalizing a failure to comply, and that the statute was unconstitutionally vague and interfered with her mother's right to privacy.³³⁰

The due process challenge included an argument that the statute failed to contain a specific intent requirement.³³¹ The court compared this challenge to similar ones previously decided by the court in regard to the state's child protection statutes.³³² Although the court had struck child neglect statutes that penalized persons for mere negligence, it had also upheld a statutory provision in the child neglect area that required willfulness or culpable negligence.³³³ Similarly, because section 825.102(3) of the *Florida Statutes* also requires willfulness or culpable negligence by the caregiver, it was therefore found to pass constitutional muster.³³⁴

In response to the vagueness challenge, the court noted that the test for vagueness in Florida is "whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct."³³⁵ The court held that pursuant to the facts of this case, the victim was sufficiently impaired to be considered disabled under the statute.³³⁶ It also felt that the

326. *Id.* at 71.

327. *Id.* at 70.

328. *Sieniarecki*, 756 So. 2d at 71.

329. *Id.*

330. *Id.* at 72.

331. *Id.* at 73.

332. *Id.* at 73–74 (citing *State v. Mincey*, 672 So. 2d 524 (Fla. 1996) and invalidating FLA. STAT. § 827.05 (1991) because the amended statute continued to criminalize simple negligence); *State v. Winters*, 346 So. 2d 991 (Fla. 1977) (overturning FLA. STAT. § 827.05 (1975) for vagueness and overbreadth). For a discussion of the *Mincey* decision, see Dobson, *supra* note 5, at 127–31.

333. *Sieniarecki*, 756 So. 2d at 74 (citing *State v. Joyce*, 361 So. 2d 406 (Fla. 1978)).

334. *Id.*

335. *Id.* (citing *Brown v. State*, 629 So. 2d 841, 842–43 (Fla. 1994)).

336. *Id.* at 75. Section 825.101(4) of the *Florida Statutes* defines "Disabled Adult" as: [A] person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living.

FLA. STAT. § 825.101(4) (2000).

facts were sufficient so that the defendant had adequate notice of the fact that she could be deemed a caregiver as defined by the statute.³³⁷

The court also found that the defendant lacked standing to raise a facial vagueness challenge or the victim's alleged privacy rights.³³⁸ This decision clearly seems consistent with the court's prior decisions on the child neglect statute.³³⁹ In addition, the facts of this case did make it very difficult for this defendant to plausibly argue that she did not understand that her mother's physical and mental state fit within the definition of disability³⁴⁰ or that the defendant's conduct satisfied the definition of caregiver.³⁴¹ In addition, the state of the victim indicated that the care provided fell below that of mere inattentiveness.³⁴² It is not difficult to find a culpable state of mind by the defendant in this case. Whether the statute is sufficiently clear could be tested in other cases where the neglect is less egregious. Arguably, the heightened *mens rea* imposed by the court may save the statute in those cases as well.

C. Federalism

The Supreme Court of Florida also rejected a variety of federalism challenges to criminal charges brought against a defendant for acts that occurred on a cruise ship in waters beyond the state's territorial boundaries in *State v. Stepansky*.³⁴³ Matthew Stepansky was charged in Brevard County with burglary and attempted sexual battery of a thirteen-year-old on a cruise ship.³⁴⁴ Although both the victim and defendant were United States citizens,

337. *Sierniarecki*, 756 So. 2d at 75.

338. *Id.* at 76.

339. Some other states have even upheld constitutional attacks against statutes that provided criminal penalties for "mere" negligence. Dobson, *supra* note 5, at n.141.

340. *Sierniarecki*, 756 So. 2d at 70-71. The evidence indicated that the victim would not walk, required adult diapers, and generally refused to eat. *Id.* In addition, the defendant's boyfriend told the apartment manager, who inquired about the victim's ability to reach the upstairs apartment into which the family was moving, that the victim "would not ever be coming back down the stairs anymore." *Id.* at 70. The boyfriend carried the victim into the apartment when the family moved in. *Id.* at 70-71.

341. *Id.* at 70. The evidence indicated that when the children of the victim discussed with which child the mother would live, the family agreed she would live with the defendant because she did not work and would be able to take care of her mother unlike her two brothers who worked long hours and would not have as much time to spend with her. *Sierniarecki*, 756 So. 2d at 70.

342. *Id.* at 75.

343. 761 So. 2d 1027 (Fla. 2000).

344. *Id.* at 1029.

neither was a Florida resident at the time of the alleged attack.³⁴⁵ No other jurisdiction had attempted to prosecute the crime.³⁴⁶ The special maritime criminal jurisdiction statute that was challenged in this case extended the state's jurisdiction to acts committed on ships outside the state's territorial waters, if the "act or omission occurs during a voyage on which over half of the revenue passengers on board the ship originally embarked and plan to finally disembark" in Florida.³⁴⁷ Stepansky moved to dismiss the action on the basis that Florida lacked jurisdiction.³⁴⁸ Upon denial of the motion, he sought a writ of prohibition from the Fifth District Court of Appeal, which issued the writ.³⁴⁹

A number of issues were raised by this case. First, the state's jurisdiction over criminal acts generally extends to those committed wholly or partly within its geographical boundaries. Florida's boundary extends three miles from its coast.³⁵⁰ From an international law perspective, a vessel on the high seas is generally regarded as part of the territory of the nation of its owners.³⁵¹ In this case, the alleged acts occurred 100 nautical miles from the Atlantic coastline of Florida.³⁵² The ship was registered in Liberia and belonged to a cruise line from the British West Indies.³⁵³ In addition, although the states are generally responsible for defining and prosecuting crimes, they are precluded in some circumstances from asserting authority where the federal government has primary authority and has preempted that area of law.³⁵⁴ The Supreme Court of Florida first considered Article I, section 8, clause 10 of the United States Constitution, which grants Congress the right to define piracies and felonies on the high seas.³⁵⁵ The court held that this provision did not preclude the state from criminalizing the same act.³⁵⁶

Next, the court considered whether the prosecution violated the "flag state rule" of the Geneva Convention on the High Seas, and therefore interfered with the national government's treaty powers.³⁵⁷ The "flag state rule" states that a ship shall sail under the flag of one state and that state

345. *Id.*

346. *Id.* at 1030.

347. FLA. STAT. § 910.006(3)(d) (1995).

348. *Stepansky*, 761 So. 2d at 1030.

349. *Id.*

350. FLA. CONST. art. II, § 1(a).

351. 21 AM. JUR. 2D *Criminal Law* § 491 (1998).

352. *Stepansky*, 761 So. 2d at 1029.

353. *Id.* at 1030.

354. *Id.* at 1030–31.

355. *Id.* at 1031.

356. *Id.*

357. *Stepansky*, 761 So. 2d at 1032.

shall have exclusive jurisdiction over the ship absent exceptional cases expressly provided for in international treaties.³⁵⁸ The defendant conceded that he “lack[ed] standing to raise a violation of an international treaty that is not self-executing.”³⁵⁹ The court held that the treaty was not self-executing and did not limit the jurisdiction asserted by the United States over foreign vessels.³⁶⁰

The defendant also conceded that the United States could prosecute him for his conduct.³⁶¹ In 1994, the federal government, by statute, did assert maritime jurisdiction over offenses committed on the high seas by or against United States nationals on board foreign vessels scheduled to depart from or arrive in the United States.³⁶² The court held that this federal statute did not preclude the state from exercising concurrent jurisdiction over the activity.³⁶³

Having held that the statute did not interfere with the aforementioned provisions of the United States Constitution or federal statutes, the court next considered whether the State could exercise jurisdiction over an act committed outside its territory.³⁶⁴ The court cited the “effects” doctrine that permits jurisdiction over acts “intended to produce and producing detrimental effects” within the state.³⁶⁵ The court accepted the State’s argument that its tourism industry would suffer a significant adverse effect if it could not prosecute crimes on cruise ships where neither the federal or foreign governments prosecute.³⁶⁶ Justice Wells filed a dissenting opinion arguing that the legislature lacked authority to extend jurisdiction conducted outside the territorial boundaries of the state over the acts of nonresidents.³⁶⁷ He argued that jurisdiction over this act could only be properly asserted by the United States or other relevant foreign governments.³⁶⁸

Arguably the dissent and the Fifth District Court of Appeal have more correctly analyzed the issues in this case. Even if the 1994 legislation did not preempt the field of maritime law, it does not therefore follow that the State of Florida retains the authority to extend its criminal jurisdiction over acts occurring in a location that a valid treaty entered into by the national

358. Geneva Convention on the High Seas, Apr. 29, 1958, art. VI, 13 U.S.T. 2313, 2315, 450 U.N.T.S. 82, 86.

359. *Stepansky*, 761 So. 2d at 1032.

360. *Id.* at 1037.

361. *Id.* at 1033.

362. 18 U.S.C. § 7(8) (1994).

363. *Stepansky*, 761 So. 2d at 1033–34.

364. *Id.* at 1035.

365. *Id.*

366. *Id.* at 1036.

367. *Id.* at 1037 (Wells, J., dissenting).

368. *Stepansky*, 761 So. 2d at 1037.

government has deemed to be under the jurisdiction of a foreign government. As stated by the district court of appeal:

Although there is authority for the United States to assert extraterritorial jurisdiction over its nationals, there simply is no basis for such an extension by a political subdivision of the United States in regard to the territory of a foreign country—and the flagship of another country is just that. The State of Florida is constitutionally prohibited from entering into a treaty with Liberia in respect to jurisdiction of crimes on the high seas.³⁶⁹

The Supreme Court of Florida's broad interpretation of its "effects" doctrine causes one to ponder how far it would be willing to extend its jurisdiction to acts occurring outside of its boundaries. As noted by the concurring opinion of Judge Harris of the Fifth District Court of Appeal, the statute would seemingly permit the State to prosecute a person who commits a criminal act against another even if both persons are nationals of the ship's flag State and have physically entered Florida soil so long as the ship stopped at a Florida port and picked up over half of its revenue passengers there with an intent to return them to Florida.³⁷⁰ Contrary to the conclusions of the majority opinion of the Supreme Court of Florida, this statutory scheme does not appear to be narrowly drawn or consistent with the federal Constitution, which specifically grants the power to make treaties to the President and the Senate.³⁷¹ In addition, the Constitution makes properly executed treaties the supreme law of the land, binding upon the states.³⁷² The power of the national government in this area has been considered to be so unquestioned as to raise debate about whether a treaty was even subject to constitutional limitations.³⁷³ The United States Supreme Court has rejected attempts by the states to impose Tenth Amendment limits upon the national government's treaty power.³⁷⁴ This assertion of jurisdiction by Florida seems to contravene the Geneva Convention on the High Seas, and therefore constitutional limitations as well.

369. *Stepansky v. State*, 707 So. 2d 877, 879 (Fla. 5th Dist. Ct. App. 1995), *rev'd*, 761 So. 2d 1027 (Fla. 2000).

370. *Id.* at 880.

371. U.S. CONST. art. II, § 2, cl. 1.

372. U.S. CONST. art. VI, cl. 2.

373. See discussion in NOWAK & ROTUNDA, CONSTITUTIONAL LAW §6.6 (5th ed. 1995).

374. *Missouri v. Holland*, 252 U.S. 416 (1920); *Hauenstein v. Lynham*, 100 U.S. 483 (1879).

A Survey of Florida's Recent District Court of Appeal and Administrative Decisions Involving Bid Protests: Challenging the Government's Conduct Regarding a Public Procurement

Joseph M. Goldstein* and Vanessa L. Prieto**

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I. INTRODUCTION

This article is a survey of recent Florida decisions of the district courts of appeal and the Division of Administrative Hearings¹ involving government bid protests. Because there have been few, if any, recent articles on this topic, this article briefly discusses or cites to older, leading cases that are necessary to place certain issues in context.²

1. Many of the citations to decisions of the Division of Administrative Hearings (“DOAH”) are to Recommended Orders, rather than Final Orders, and are thus not published in any reporter. These decisions, however, are available at the DOAH’S website, www.doah.state.fl.us/internet.

2. For an excellent historical discussion of bid protests and public contracting in Florida in general, see J. Rex Farrow, Jr. & John H. Rains, III, *Public Sector Competitive Bidding in Florida*, 11 STETSON L. REV. 428 (1982) and John H. Rains, III, *An Update on Public Sector Competitive Bidding in Florida*, 14 STETSON L. REV. 771 (1990). See also F. Alan Cummings & Mary M. Piccard, *Section 10: Bid Dispute Resolution in Florida Administrative Practice* (Florida Bar Continuing Legal Education) (5th ed. March 1997); John W. Bakas, Jr., *Section 7: Bids, Bid Disputes, and Competitive Negotiations Involving Public Entities in Florida Construction Law and Practice* (Florida Bar Continuing Legal Education

A bid protest is a legal challenge to an action of a public entity relating to the procurement of goods or services.³ All state agencies⁴ and most local agencies must select contractors to provide goods or services through a competitive process.⁵ If a potential contractor objects to the process that a public entity uses to select the contractor or objects to the result of the process, then it may file a lawsuit challenging the public entity's action. With regard to state agencies, there is a comprehensive administrative process that must be followed.⁶ Local entities may elect either an administrative process, or an aggrieved potential contractor can file suit in circuit court.

II. STANDING TO COMMENCE A BID PROTEST

Like traditional lawsuits, to commence a bid protest the contractor must have standing.⁷ Under Florida statutory law, and most local government entity procurement codes, a contractor may commence a bid protest only if the contractor's "significant interests" have been affected by the public entity's conduct.⁸ This section of the survey reviews the circumstances under which a contractor's "significant interests" are affected, enabling it to have standing to file a bid protest.

(3d ed. May 1997); Larry R. Leiby, *Florida Construction Law Manual, Section 5: Bids* (4th ed. 1999).

3. See Farrior & Rains, *supra* note 2, at 443.

4. "Agency" means any of the various state officers, departments, boards, commissions, divisions, bureaus, councils, and any other unit of organization, however designated, of the executive branch of state government. "Agency" does not include the Board of Regents or the State University System. FLA. STAT. § 287.012(1) (2000).

5. See, e.g., FLA. STAT. § 255.20 (2000) (requiring competitive awarding of construction contracts by counties, municipalities, and other political subdivisions of the state); § 255.29 (requiring procedures for competitively awarding state construction contracts); § 287.057 (requiring the use of competitive sealed bidding for the purchase of all goods and services in excess of \$25,000); § 287.055 (discussing competitive selection of contractors for the acquisition of professional architectural, engineering, landscape architectural, or surveying and mapping services, including design-build contractors); BROWARD COUNTY PROCUREMENT CODE § 21.6, .29; MIAMI DADE COUNTY CODE § 2-8.1.

6. See FLA. STAT. § 120.57(3) (2000).

7. *Id.*

8. See § 120.57(3)(b) (restricting standing to persons "adversely affected by the agency decision or intended decision"); see also BROWARD COUNTY PROCUREMENT CODE § 21.118 (restricting standing to "[a]ny actual or prospective bidder or offeror who has a substantial interest in and is aggrieved in connection with the solicitation or proposed award of a contract").

A. *Generally Only Bidders or Prospective Bidders Have Standing*

Generally, only bidders or prospective bidders challenging the specifications or other procurement documents have standing to commence a bid protest. Accordingly, it has long been established that a bidder who fails to submit a proposal lacks standing to pursue a protest.⁹ Likewise, in *Fort Howard Co. v. Department of Management Services*,¹⁰ the appellate court confirmed that subcontractors and suppliers lack standing to commence a protest in which they are not bidders.¹¹ Even a joint venturer who lacks the consent of the other joint venturers to bring a bid protest lacks standing to commence a bid protest.¹² This nonbidder rule was recently followed in *More Financial Services, Inc. v. Broward County School Board*,¹³ where the administrative law judge granted the agency's motion to dismiss the bid protest where the protester lacked standing because it was a subcontractor, rather than a bidder.¹⁴

B. *Under Extraordinary Circumstances a Nonbidder May Commence a Bid Protest*

Despite the general rule that only bidders or prospective bidders have standing to commence a bid protest, one case created an exception, holding that in "extraordinary circumstances" other parties may have standing.¹⁵ In *Fairbanks, Inc. v. Department of Transportation*,¹⁶ a supplier that manufactured truck-weighing scales was permitted to maintain a bid protest even though it was not a bidder or prospective bidder.¹⁷ The intended

9. *E.g.*, *Westinghouse Elec. Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238, 1240-41 (Fla. 1st Dist. Ct. App. 1986) (affirming denial of bid protest and finding that Westinghouse lacked standing because it did not submit a price proposal).

10. 624 So. 2d 783 (Fla. 1st Dist. Ct. App. 1993).

11. *Id.* at 785 (affirming finding that a manufacturer of paper towels who was a supplier to potential bidders, but not a bidder itself, lacked standing).

12. *See* *Brasfield & Gorrie Gen. Contractor, Inc. v. Ajax Const. Co. of Tallahassee*, 627 So. 2d 1200, 1203 (Fla. 1st Dist. Ct. App. 1993).

13. No. 00-2311BID (Fla. Div. Admin. Hr'gs June 26, 2000).

14. *Id.* at 4 (relying on *Sys., Controls & Servs., Inc. v. St. Johns Water River Mgmt. Dist.*, No. 92-3385BID (Fla. Div. Admin. Hr'gs June 15, 1992)).

15. *Advocacy Ctr. for Persons with Disabilities, Inc. v. Dep't of Children & Family Servs.*, 721 So. 2d 753 (Fla. 1st Dist. Ct. App. 1998); *see also* *Fairbanks, Inc. v. Dep't of Transp.*, 635 So. 2d 58 (Fla. 1st Dist. Ct. App. 1994).

16. 635 So. 2d 58 (Fla. 1st Dist. Ct. App. 1994).

17. *Id.* at 61.

awardee of the public contract proposed using the scales manufactured by Fairbanks.¹⁸ The appellate court concluded that the supplier established standing by alleging the Department of Transportation (“DOT”) intended to construct numerous weigh stations in Florida in the future using the same specifications, and it was impeding the competitive procurement of scales for weigh stations by permitting only one manufacturer’s model.¹⁹

The appellate court distinguished *Fort Howard* because in that case the issue was decided upon whether the protester could file a bid protest.²⁰ In *Fairbanks*, the court focused on whether the protester was entitled to a formal hearing.²¹ The appellate court also found that the bidders in *Fort Howard* had no interest in rebidding the procurement.²² These distinctions, along with allegations that the government intended to use the same challenged specifications in future procurements, sufficiently established such exceptional circumstances, although the court commented that generally most nonbidders would not have standing.²³

Despite the appellate court’s creation of this exception, no other decisions have ever found similar exceptional circumstances justifying standing for a nonbidder. For instance, the court in *Advocacy Center for Persons With Disabilities, Inc. v. Department of Children & Family Services*,²⁴ involving a privatized state psychiatric hospital, held that neither two involuntarily confined patients nor a nonprofit advocacy organization for the disabled had standing to challenge the public agency’s request for proposals.²⁵ The appellate court reasoned that in order to have standing to commence a bid protest, one must have some potential stake in the contract to be awarded.²⁶ The court also noted that such standing is limited to potential bidders and perhaps suppliers to those bidders.²⁷

C. *A Bidder Must Also be Likely to Obtain Award if Protest is Granted*

The mere fact that someone is a bidder, however, is not enough to have standing to commence a bid protest. In order to have standing, a bidder must

18. *Id.* at 59.

19. *Id.*

20. *Id.* at 61.

21. *Fairbanks*, 635 So. 2d at 61.

22. *Id.*

23. *See id.*

24. 721 So. 2d 753 (Fla. 1st Dist. Ct. App. 1998).

25. *Id.* at 755–56.

26. *Id.* at 755.

27. *Id.*

also have a reasonable likelihood of obtaining the contract if its bid protest is successful.²⁸ Generally, this means the bidder must be either the highest ranked offeror, the lowest priced bidder, or the next bidder in line for an award.²⁹ For instance, previous cases have found that a fourth ranked bidder had standing to file a protest,³⁰ but have questioned whether the seventh ranked bidder had such standing.³¹

In contrast, in *Rovel Construction, Inc. v. Department of Health*,³² the Division applied an analysis that permits any bidder to file a bid protest.³³ The fourth ranked bidder challenged the agency's \$1.6 million intended award for the procurement of the rehabilitation of the Gato Cigar Factory, an existing historic structure in Key West, and construction of internal office and clinic space for the Department of Health.³⁴ The protester in *Rovel Construction, Inc.* did not challenge the second and third bidders.³⁵ Nonetheless, the administrative law judge rejected the argument of the agency and the intervenor/awardee that the protester lacked standing as the fourth ranked bidder.³⁶ The administrative law judge found standing decisions before the 1996 amendments to chapter 120 of the *Florida Statutes* were not applicable because, among other things, the amendments added language that a bid protest proceeding was de novo.³⁷ Thus, the judge reasoned that because the second and third ranked bidders did not participate

28. *Id.*

29. *E.g.*, *Mid-Am. Waste Sys. of Fla., Inc. v. City of Jacksonville*, 596 So. 2d 1187, 1189 (Fla. 1st Dist. Ct. App. 1992) (reversing dismissal of bid protest lawsuit and holding that second most responsible bidder had standing to seek injunctive and declaratory relief against awarding contract to sister corporation of waste hauler that had been convicted of price fixing); *Preston Carroll Co. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d Dist. Ct. App. 1981) (holding that the third lowest bidder lacked standing).

30. *E.g.*, *Capeletti Bros., Inc. v. Fla. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1362 (Fla. 1st Dist. Ct. App. 1983) (affirming denial of protest by the fourth ranked bidder).

31. *See Brasfield & Gorrie Gen. Contractor, Inc. v. Ajax Const. Co. of Tallahassee*, 627 So. 2d 1200, 1203 n.1 (Fla. 1st Dist. Ct. App. 1993) (questioning whether seventh ranked bidder would have standing).

32. No. 99-0596BID (Fla. Div. Admin. Hr'gs Apr. 27, 1999) (denying protest of fourth ranked proposal, and although finding standing, determining proposal nonresponsive and rejecting challenge to evaluation of awardee).

33. *See id.* ¶ 18.

34. *Id.* ¶¶ 1-13.

35. *Id.*

36. *Id.* ¶ 23.

37. *Rovel Constr.*, No. 99-596BID ¶¶ 9-10.

in the protest, the only possible outcome was that either the protester or the intervenor/awardee would receive the award.³⁸

Because the standing analysis in *Rovel Construction, Inc.* is not persuasive, a potential protester should pause before relying on the decision to determine whether it has standing. Instead, a bidder, other than one who is next in line, should contend one or all of the following: 1) that all bidders in line for award are not eligible; 2) that the agency should reject all bids for some reason; or 3) that some reason prevents the procuring agency from selecting the higher ranked proposals. For instance, in *Empower, Inc. v. Tampa Bay Water*,³⁹ the fourth ranked bidder challenged the evaluation of the two highest ranked proposals, but not that of the third.⁴⁰ However, the administrative law judge found the protester had standing because it contended that the agency should not be able to select the third ranked proposal without retaining an independent consultant, one not affiliated with the agency, to select between its proposal and the third ranked proposal.⁴¹

Not only must a bidder be in line for an award to have standing, but as noted in *Intercontinental Properties, Inc. v. Department of Health & Rehabilitative Services*,⁴² its bid or proposal must be responsive to the procurement requirements to challenge an award to another contractor.⁴³ In *Intercontinental Properties, Inc.*, the appellate court held that the responsiveness of the protestor's bid was an issue that could be determined by the administrative law judge.⁴⁴ However, the issue of responsiveness regarded the same procurement requirement for both the protester and the intended awardee.⁴⁵ At least one agency has attempted to restrict the decision in *Intercontinental Properties, Inc.* to its specific facts.⁴⁶ In

38. *Id.* ¶ 23.

39. No. 99-3398BID (Fla. Div. Admin. Hr'gs Oct. 25, 1999).

40. *See id.* ¶¶ 177-78 (denying protest challenging evaluation of intended awardee and others).

41. *Id.* ¶¶ 178-84.

42. 606 So. 2d 380 (Fla. 3d Dist. Ct. App. 1992) (affirming rejection of bid as nonresponsive).

43. *Id.* at 385.

44. *Id.* at 384.

45. *Id.* at 381.

46. In a recent case in which this author is counsel to the protester, the Broward County School Board argued that it was premature for the intervenor to challenge the responsiveness of the protester, and the administrative law judge agreed. *Padula & Wadsworth Constr., Inc. v. Broward County Sch. Bd.*, No. 00-2408BID (Fla. Div. Admin. Hr'gs Aug. 21, 2000) (deferring issue challenging standing of protester until resolution of issue in underlying protest).

Wharton Investment Group, Ltd. v. Department of Juvenile Justice,⁴⁷ however, the administrative law judge reviewed the protester's responsiveness as to its failure to submit a Public Entity Crime Addendum, which was not the basis for nonresponsiveness raised by the protester against the intended awardee.⁴⁸ Thus, it is likely that future courts will permit intervenors and agencies to challenge the responsiveness of protesters for their failure to comply with *any* procurement requirement.

III. TIMELINESS ISSUES

A. *Submission of Bids*

Bidders must be very careful to ensure their bids are timely received by the procuring entity. Untimely delivery, even if caused by third persons, such as a delivery service, is an appropriate basis for the procuring entity to reject the bid. For instance, in *Nationwide Credit, Inc. v. Department of Education*,⁴⁹ the administrative law judge denied the protest of a bidder who challenged the agency's refusal to consider its late-filed proposal.⁵⁰ The bidder, who had been the incumbent contractor for the previous nine years, provided its proposal to Federal Express on January 19, 2000, at 1:20 p.m., with instructions to deliver it to the agency by 10:00 a.m. on January 20, 2000.⁵¹ The Request for Proposal ("RFP") informed offerors that proposals were due by January 20, 1999, at 3:00 p.m., and that the agency could reject untimely proposals.⁵² Due to an error in the Federal Express distribution system, however, the agency did not receive the proposal until January 21, 1999.⁵³ At that time, the agency had not completed any evaluations, but it refused to consider the proposal.⁵⁴ The agency also refused to consider another proposal that had been received thirty minutes late.⁵⁵ The administrative law judge held that, despite an agency's discretion to accept and review an untimely proposal, it was not improper to reject a proposal where the rejection was consistent with the agency's policy.⁵⁶ However, as

47. No. 98-4063BID (Fla. Div. Admin. Hr'gs Dec. 7, 1998).

48. *Id.* ¶¶ 12–16 (relying on *Intercontinental Props., Inc.*, 606 So. 2d at 380).

49. No. 99-1192BID (Fla. Div. Admin. Hr'gs June 14, 1999).

50. *Id.* ¶ 26.

51. *Id.* ¶¶ 9–10.

52. *Id.* ¶ 4.

53. *Id.* ¶ 10.

54. *Nationwide Credit, Inc.*, No. 99-1192BID ¶ 17.

55. *Id.* ¶ 16.

56. *Id.* ¶ 26.

the judge held, an exception would be made where the delay was caused by an act of God.⁵⁷

B. *Timeliness of Bid Protests Challenging the Specifications*

In addition to planning ahead regarding the delivery of a bid or proposal, prospective bidders must decide if they intend to challenge the terms of an invitation to bid (“ITB”)⁵⁸ or an RFP.⁵⁹ In a procurement subject to chapter 120 of the *Florida Statutes*, bidders must make any such challenges within seventy-two hours of publication of the RFP.⁶⁰ Thus, a protest challenging the assignment of evaluation points regarding race-based classifications as unconstitutional was untimely when the bidder failed to file the protest until after the evaluation of proposals.⁶¹

57. *Id.*

58. In general, the term “invitation to bid” means a written solicitation for competitive sealed bids. FLA. STAT. § 287.012(11) (2000). “The invitation to bid is used when the agency is capable of specifically defining the scope of work for which a contractual service is required or when the agency is capable of establishing precise specifications defining the actual commodity or group of commodities required.” *Id.*

59. In general, the term “request for proposals” means a written solicitation for competitive sealed proposals. § 287.012(15).

The request for proposals is used when the agency is incapable of specifically defining the scope of work for which the commodity, group of commodities, or contractual service is required and when the agency is requesting that a qualified offeror propose a commodity, group of commodities, or contractual service to meet the specifications of the solicitation document. A request for proposals includes, but is not limited to, general information, applicable laws and rules, functional or general specifications, statement of work, proposal instructions, and evaluation criteria. Requests for proposals shall state the relative importance of price and any other evaluation criteria.

Id.

60. Section 120.57(3)(b) of the *Florida Statutes* provides:

With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed.

§ 120.57(3)(b).

61. *Optiplan, Inc. v. Sch. Bd. of Broward County*, 710 So. 2d 569, 572–73 (Fla. 4th Dist. Ct. App. 1998) (citing *Capeletti Bros. v. Dep’t of Transp.*, 499 So. 2d 855, 857 (Fla. 1st Dist. Ct. App. 1986)) (affirming administrative law judge’s holding that challenge to rejection of bid based on failure to comply with woman-owned business enterprise goal was untimely because it was a challenge to the specifications).

On the other hand, in *E.L. Cole Photography v. Department of Highway Safety & Motor Vehicles*,⁶² the court stated a protest filed after the opening of bids contending that the agency should have purchased the goods from the protester's preexisting contract rather than solicit bids was timely, since it was not a challenge to the bid specifications, and the protester participated in the procurement "under protest."⁶³ In *E.L. Cole Photography*, the petitioner claimed that the award of the contract would breach its current contract because the photographic rolls were included in its already existing contract as "representative products."⁶⁴ The administrative law judge held that the protest did not challenge the specifications because it did not seek to clarify, correct, or refine them.⁶⁵ Instead, the protest sought to enjoin or cancel the bid solicitation and award altogether.⁶⁶

C. *Timeliness of Bid Protests Challenging the Award*

In procurements subject to chapter 120 of the *Florida Statutes*, protests must be filed "within 72 hours after the posting of the bid tabulation."⁶⁷ Often, because of this short time frame, a protester's failure to file its protest within seventy-two hours is excused if the delay was due to the agency's failure to comply with the statutory and regulatory requirements regarding notice of its decisions.⁶⁸ For instance, in *Bell Atlantic Business Systems Services, Inc. v. Department of Labor & Employment Security*,⁶⁹ the appellate court reversed the Department's order finding the protest was untimely, since the protest was filed within seventy-two hours of Bell Atlantic's actual receipt of the posting by facsimile.⁷⁰ The *Bell Atlantic*

62. No. 98-3471BID (Fla. Div. Admin. Hr'gs Oct. 2, 1998) (affirming denial of bid protest).

63. *Id.* ¶¶ 18–20.

64. *Id.* ¶ 2.

65. *Id.* ¶ 18.

66. *Id.* ¶¶ 9–12.

67. Section 120.57(3)(b) of the *Florida Statutes* provides:

Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after filing the notice of protest.

FLA. STAT. § 120.57(3)(b) (2000).

68. *See id.*

69. 677 So. 2d 989 (Fla. 1st Dist. Ct. App. 1996).

70. *Id.* at 992.

court reasoned that the statute emphasizes actual receipt of the intended decision.⁷¹ Also, in *Bell Atlantic*, the RFP was contradictory as to when results would be posted, and the last information that the Department provided to prospective offerors was that it would fax a copy of the decision to the offerors at the time of posting.⁷² Thus, because the protester filed within seventy-two hours of actual receipt of notice, the appellate court found that the protest was timely filed.⁷³ Similarly, otherwise untimely protests have been permitted when agencies have failed to properly notify bidders of the results of the procurement or of their administrative protest rights.⁷⁴

Notwithstanding that an untimely protest will be permitted where an agency has failed in its notice requirement, potential protesters may not rely on oral statements from agency personnel that a protest need not be filed by a certain time.⁷⁵ For instance, in *Xerox Corp. v. Florida Department of Professional Regulation*,⁷⁶ the protester timely filed a notice of protest, but then failed to file a formal protest within ten days as required by chapter 120 of the *Florida Statutes*.⁷⁷ The protester attempted to excuse its untimeliness by stating that it relied on statements by the agency indicating that it was going to resolve the protest.⁷⁸ The *Xerox* court held that the protester was not permitted to rely on such oral communications and that the protest was untimely.⁷⁹

71. *Id.*

72. *Id.*

73. *Id.*; see also *SWS P'ship v. Dep't of Corrs.*, 567 So. 2d 1048, 1050 (Fla. 5th Dist. Ct. App. 1990) (reversing Department's order finding protest untimely even though it was filed more than 72 hours after posting because it was disputed whether the bidders knew that the results would be posted).

74. *E.g.*, *Northrop & Northrop Bldg. P'ship v. Fla. Dep't of Corrs.*, 528 So. 2d 1249, 1250 (Fla. 1st Dist. Ct. App. 1988) (reversing Department's order finding protest untimely because Department had failed to properly inform bidders of its intended award); *Capital Copy, Inc. v. Univ. of Fla.*, 526 So. 2d 988, 988-89 (Fla. 1st Dist. Ct. App. 1988) (reversing agency's order finding protest untimely because posting did not include statutorily required notice informing bidders of the protest time requirements).

75. See *Xerox Corp. v. Fla. Dep't of Prof'l Regulation*, 489 So. 2d 1230 (Fla. 1st Dist. Ct. App. 1986).

76. 489 So. 2d 1230 (Fla. 1st Dist. Ct. App. 1986).

77. *Id.* at 1231.

78. *Id.*

79. *Id.*

D. *Equitable Tolling Doctrine*

While it is not clear whether the doctrine of equitable tolling should apply within the context of an administrative bid protest,⁸⁰ one recent case used the doctrine to reject an agency's argument that a technically untimely protest should be rejected. In *Gibbons & Co. v. Florida Board of Regents*,⁸¹ the Board contended that it lacked jurisdiction to hear the protest because the protester sent the protest to the correct address, but to the wrong person, arguably rendering the protest untimely.⁸² The administrative law judge, however, held that:

The time requirements for filing notices of protests and formal written protests prescribed by Section 120.57(3)(b), Florida Statutes . . . are "not jurisdictional in the sense that failure to comply is an absolute bar to [the agency's consideration of a protest] but [are] more analogous to statute[s] of limitations which are subject to equitable considerations such as tolling."⁸³

The administrative law judge noted that in *Machules v. Department of Administration*,⁸⁴ the court stated the following regarding the doctrine of equitable tolling:

Equitable tolling is a type of equitable modification which "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant." . . . Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been

80. See Ross Stafford Burnaman, *Equitable Tolling in Florida Administrative Proceedings*, 74 FLA. B.J. 60, 62–63 (Feb. 2000) (noting that 1996 amendments to the Administrative Procedure Act appear to make timeliness a jurisdictional requirement that would preclude equitable tolling, but appellate decisions continue to apply the doctrine); see Robert E. Korroch, *1999 Year in Review: Analysis of Significant Federal Circuit Government Contracts Decisions*, 29 PUB. CONT. L.J. 351, 354–60 (2000) (discussing whether equitable tolling applies under the Contract Disputes Act).

81. No. 99-0697BID (Fla. Div. Admin. Hr'gs Sept. 17, 1999) (holding that the protest was timely, but without merit).

82. *Id.* ¶ 270.

83. *Id.* ¶ 268 (citing *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1133 n.2 (Fla. 1988)).

84. 523 So. 2d 1132 (Fla. 1988).

prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.⁸⁵

The administrative law judge reasoned that sending the protest to the right address, but to the wrong person, was essentially similar to sending it to the wrong forum and should be considered timely.⁸⁶

IV. AUTOMATIC STAY OF CONTRACT AWARD

A. *Under Chapter 120 of the Florida Statutes, a Bid Protest Stays the Procurement*

In order to ensure a successful bidder an effective remedy, under chapter 120 of the *Florida Statutes*, consistent with federal law⁸⁷ and nearly all other jurisdictions,⁸⁸ an agency is required to stop the procurement process or contract award until the protest is resolved by final agency action.⁸⁹ Some reasons for the necessity of the automatic stay are: 1) the prevention of a wrongful award; 2) the preservation of rights of the protester; 3) the resolution of the dispute before performance commences on an improper award; 4) the preservation of the public treasury by ensuring that a contract is awarded to the lowest, responsible bidder; and 5) the orderly resolution of bid and contract protests.⁹⁰ Thus, compelling circumstances must exist to override the automatic stay.⁹¹

85. *Id.* at 1134.

86. *Gibbons & Co.*, No. 99-0697BID ¶¶ 267-271.

87. 31 U.S.C. §§ 3553(c), (d)(3)(A)(ii) (1998) (providing for stay of award and cessation of performance); *see also* FED. ACQUISITION REGULATION § 33.103(f) (providing for stay of award or performance pending the resolution of agency-level protests).

88. *E.g.*, The Model Procurement Code § 9-101(6)-101.05 (providing for stay). *But see* Cal. Code Regs. Tit. 1, § 1404 (1999) (California has enacted a pilot project eliminating the automatic stay). *Compare* Cal. Pub. Cont. Code §§ 10306, 10343, with 12102(h) (Deering 1999) (existing California statutes that provided for automatic stay in bid protests). This aspect, among others of the California pilot project, has been strongly criticised. *E.g.*, Brett E. Bacon, *The California Alternative Protest Pilot Project: Eviscerating the Protester's Due Process Rights and Remedies to Improve Administrative Efficiency and Reduce Costs*, 29 PUB. CONT. L.J. 511, 527-30 (2000).

89. "Upon receipt of the formal written protest which has been timely filed, the agency shall stop the bid solicitation process or the contract award process until the subject of the protest is resolved by final agency action . . ." FLA. STAT. § 120.57(3)(c) (2000).

90. *Cianbro Corp. v. Jacksonville Transp. Auth.*, 473 So. 2d 209, 212 (Fla. 1st Dist. Ct. App. 1985).

91. *Id.*

The automatic stay, however, is not absolute. An agency may override the stay “to avoid an immediate and serious danger to the public health, safety, or welfare.”⁹² Because of this high standard, agency overrides are rare and subject to appellate review. Only one such override has been sustained by an appellate court.⁹³ In *Global Water Conditioning v. Department of Agriculture & Consumer Services, Division of Forestry*,⁹⁴ the Department of Agriculture rejected all bids on a procurement for the installation and exchange of ethylene dibromide water filters.⁹⁵ These filters reduce exposure to a toxin that causes cancer.⁹⁶ A bidder challenged the rejection of all bids and appealed an order of the Commissioner of Agriculture declaring that there existed a state of emergency requiring immediate re-advertising for filters and the award of a temporary contract for a partial award of the filters.⁹⁷ The court sustained the agency’s determination that immediate and serious danger to public health was sufficient to override the automatic stay, accepting affidavits of the agency establishing that these filters were necessary to reduce human exposure to this harmful toxin.⁹⁸

The court in *NEC Business Communication Systems (East), Inc. v. Seminole County School Board*,⁹⁹ held that convenience and efficiency are not sufficient reasons to override the automatic stay, unlike the prevention of serious health risks.¹⁰⁰ In *NEC*, an unsuccessful bidder sought judicial review of the county school board’s decision to proceed with the contract award pending its protest.¹⁰¹ The basis for the override was that the school board needed an operating phone system, which was the item being purchased, so that it could transfer its personnel into a recently completed school building.¹⁰² The appellate court found that this rationale failed to

92. FLA. STAT. § 120.57(3)(c) (2000) (providing in full for an override if “the agency head sets forth in writing particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare”).

93. *Global Water Conditioning v. Dep’t of Agric. & Consumer Servs., Div. of Forestry*, 521 So. 2d 126 (Fla. 1st Dist. Ct. App. 1987).

94. *Id.* at 126.

95. *Id.* at 127–28.

96. *Id.* at 130.

97. *Id.* at 129–30.

98. *Global Water Conditioning*, 521 So. 2d at 130.

99. 668 So. 2d 338 (Fla. 5th Dist. Ct. App. 1996).

100. *Id.* at 339.

101. *Id.* at 338–39.

102. *Id.* at 339–40.

establish that the stay of the contract award process presented a serious and immediate danger to the public welfare, and therefore, ordered the stay.¹⁰³ Even if an agency has violated the automatic stay, however, relief may not be appropriate where an agency has not awarded a contract and where the protester continued to contract with the agency as the incumbent vendor.¹⁰⁴

B. Injunctions

In a nonchapter 120 bid protest where there is no automatic stay, or once an agency has denied a protest through final agency action, a party must seek a temporary injunction to stop the contract process.¹⁰⁵ Traditionally, a bid protestor's remedy of choice was to seek injunctive relief.¹⁰⁶ However, even before seeking such injunctive relief, a protester must first apply to the agency for stay of its order before it may request the same relief from an appellate court.¹⁰⁷ Additionally, the last, or fourth element of a preliminary injunction, substantial likelihood of success on the merits, is difficult to meet, since courts have been opposed to granting an injunction in instances where an agency has acted in good faith and has not violated a statute or ordinance.¹⁰⁸ Due to such procedural obstacles and the high standard to obtain injunctive relief, as demonstrated by the cases below, the benefit of the automatic stay is apparent.

One limitation on the injunctive relief against a public agency is the doctrine of "exhaustion of administrative remedies."¹⁰⁹ For instance, since it

103. *Id.*; see also *Cianbro Corp. v. Jacksonville Transp. Auth.*, 473 So. 2d 209, 212-14 (Fla. 1st Dist. Ct. App. 1985) (reversing override of stay because agency's reasons for alleged immediate danger to the public health were insufficient, especially where potential emergency caused in large part by agency's delay in starting procurement, which was not explained and emergency could be averted by requesting extension).

104. See *Humana Med. Plan, Inc. v. Sch. Bd. of Broward County*, No. 98-5086BID (Fla. Div. Admin. Hr'gs June 9, 1999) (rejecting Humana's protest and awarding the contract to intervenors, Foundation Health and HIP Health Plan of Fla., Inc.).

105. FLA. STAT. § 120.68(1)-(2)(a) (2000). A party who is adversely affected by final agency action is entitled to judicial review in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. *Id.*

106. *Farrior & Rains*, *supra* note 2, at 445.

107. *MSQ Props. v. Dep't of Health & Rehab. Servs.*, 626 So. 2d 292, 293 (Fla. 1st Dist. Ct. App. 1993) (denying stay where a landlord sought a stay of a final order of the Department of Health and Rehabilitative Services from awarding a lease contract to its competitor where the landlord had not first sought such a stay from the agency under section 120.68 of the *Florida Statutes*).

108. *Farrior & Rains*, *supra* note 2, at 446.

109. *Id.*

is required that administrative remedies be exhausted prior to going to the circuit court, in *Department of Transportation v. Anderson Columbia Co.*,¹¹⁰ the DOT petitioned for writs of prohibition challenging jurisdiction of the circuit court to enter orders enjoining the DOT from awarding road construction contracts to the lowest bidder.¹¹¹ The DOT's challenge came during the pendency of administrative proceedings initiated to protest bidding procedures on the basis that the lowest bidder was not the lowest responsible bidder.¹¹² The DOT also filed interlocutory appeals from the injunctive orders.¹¹³ The district court of appeal held that the corporation had adequate administrative remedies available to it, and thus, the circuit court lacked jurisdiction to enter injunctive relief.¹¹⁴

In *Miami-Dade County v. Church & Tower, Inc.*,¹¹⁵ the appellate court affirmed the denial of a temporary injunction holding that the protester did not have a substantial likelihood to prevail on the merits.¹¹⁶ In light of the deference given agency decisions, this is a common basis to deny such requests for temporary injunctions.¹¹⁷ *Church & Tower, Inc.* was a procurement involving the Dade County Procurement Code, rather than the automatic stay provision of chapter 120 of the *Florida Statutes*, where the appellate court determined that it was not likely that the protester would prevail on its challenge to the county's decision, since the court found that the contractor was not responsible based on its performance on other contracts.¹¹⁸ Although it denied the injunction, the court noted, contrary to

110. 651 So. 2d 1267 (Fla. 1st Dist. Ct. App. 1995) (reversing temporary injunction in favor of protester).

111. *Id.* at 1267.

112. *Id.*

113. *Id.*

114. *Id.*

115. 715 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1998).

116. *Id.* at 1090.

117. *E.g.*, *Cent. Fla. Equip. Rentals of Dade County, Inc. v. Lowell Dunn Co.*, 586 So. 2d 1171, 1172 (Fla. 3d Dist. Ct. App. 1991) (reversing entry of temporary injunction for failure to show a substantial likelihood of prevailing on the merits). In this case, the unsuccessful bidder on a landfill construction project sued to enjoin the county from awarding a contract to the next lowest bidder. *Id.* The trial court entered a preliminary injunction, and the defendants appealed. *Id.* The appellate court held that an unsuccessful bidder on a landfill construction project, whose bid had been rejected as materially irregular because of its failure to designate a single manufacturer and installer of landfill liner, was not entitled to a preliminary injunction to prevent the county from awarding a contract to the next lowest bidder because it was not substantially likely to prevail due to the wide discretion given to the county's award decision. *Id.* at 1172-73.

118. *Church & Tower, Inc.*, 715 So. 2d at 1090.

other decisions,¹¹⁹ that the protesting bidder ordinarily has no adequate remedy at law.¹²⁰

V. HEARING PROCEDURES

Little precedent exists as to prehearing procedures or the conduct of a bid protest hearing, but two cases confirm a protester's entitlement to amend its pleadings and to request a continuance of the hearing. In a significant decision, the Fourth District recently held that an administrative law judge abused his discretion, and thus committed reversible error, when he failed to permit a protester to amend its protest at the outset of the hearing based on information obtained during discovery, and where amendment would not prejudice the other party.¹²¹

In a case regarding a request for a continuance, the appellate court reversed an administrative law judge's dismissal of a protest where counsel for the protester failed to appear at the final hearing but had asked agency counsel for a continuance of the hearing.¹²² Counsel for the protester sought the continuance from the agency's counsel due to a previously scheduled pretrial conference.¹²³ At the hearing however, counsel for the agency told the administrative law judge that he did not know why counsel for the protester could not attend, allowing the judge to dismiss the protest.¹²⁴ The appellate court reversed the ruling based on the agency's counsel's failure to inform the administrative law judge of counsel's request for a continuance.¹²⁵

119. *Agency for Health Care Admin. v. Cont'l Car Servs., Inc.*, 650 So. 2d 173, 175 (Fla. 2d Dist. Ct. App. 1995) (reversing temporary injunction because if protester should have been awarded contract there were sufficient records to determine the monetary loss that protester would suffer, thus, protester had an adequate remedy at law).

120. *Church & Tower, Inc.*, 715 So. 2d at 1086 n.2; see also *S. Fla. Limousines, Inc. v. Broward County Aviation Dep't*, 512 So. 2d 1059 (Fla. 4th Dist. Ct. App. 1987). In *South Florida Limousines, Inc.*, the appellate court affirmed the trial court's denial of a temporary injunction, finding that no irreparable harm existed. *Id.* at 1060. The appellate court, however, should have based its decision on the delay of the protester to seek injunctive relief or the unlikelihood that the protester would prevail on the merits.

121. *Optiplan, Inc. v. Sch. Bd. of Broward County*, 710 So. 2d 569, 571-72 (Fla. 4th Dist. Ct. App. 1998) (reversing denial of amendment to protest in procurement for group vision care).

122. *Id.* at 571.

123. *Id.*

124. *Id.*

125. *Id.* at 572; see also *Ross v. Fla. Dep't of Corrs.*, 669 So. 2d 1060, 1062 (Fla. 5th Dist. Ct. App. 1996) (reversing dismissal of protest).

VI. CHALLENGES TO THE EVALUATION PROPOSALS

A. *Responsiveness*

One of the most common and successful type of protest is one challenging the responsiveness of the awardee's proposal to the requirements of the solicitation. The seminal responsiveness case is *Harry Pepper & Associates, Inc. v. City of Cape Coral*,¹²⁶ which reversed the trial court's denial of bid protest, challenging the responsiveness of the low bidder.¹²⁷

In *Harry Pepper*, the city required bidders to specify the manufacturer of the pumps they proposed to supply under the bid for construction of a water treatment plant.¹²⁸ The low bidder had identified pumps that were unacceptable to the city.¹²⁹ Rather than finding the low bidder nonresponsive, the city requested that the low bidder submit a letter stating that it would comply with the bid specifications as to the pumps.¹³⁰ After submitting the letter, the city awarded the contract to the low bidder.¹³¹ The next lowest bidder filed a lawsuit, and on appeal the court held that the award to the low bidder was improper, concluding that the city exceeded its authority by allowing the lowest bidder to bring its bid into conformity with the specifications after bid opening.¹³²

Under statute, in a competitive-procurement protest, an agency may not consider "submissions made after the bid or proposal opening amending or supplementing the bid or proposal . . ."¹³³ Despite this prohibition, in *Nippon Carbide Industries v. Department of Transportation*,¹³⁴ the court held that an agency may reasonably seek clarification of an offeror's

126. 352 So. 2d 1190 (Fla. 2d Dist. Ct. App. 1977).

127. *Id.* at 1193.

128. *Id.* at 1192.

129. *Id.*

130. *Id.*

131. *Harry Pepper & Assocs.*, 352 So. 2d at 1192.

132. *Id.*; see also *Harris/3M v. Office Sys. Consultants*, 533 So. 2d 833, 836 (Fla. 1st Dist. Ct. App. 1988) (affirming denial of protest finding bidder not responsive where competent and substantial evidence showed that required microfilm readers/printers were not available at time of bid); *E.M. Watkins & Co. v. Bd. of Regents*, 414 So. 2d 583, 589 (Fla. 1st Dist. Ct. App. 1982) (affirming rejection of protester's bid for failing to identify subcontractors).

133. FLA. STAT. § 120.57(3)(f) (2000).

134. No. 98-3594BID (Fla. Div. Admin. Hr'gs. Nov. 19, 1998) (denying protest of low bidder found nonresponsive and awarding bid to the intervenor, the second lowest bidder).

proposal.¹³⁵ In *Nippon Carbide*, the agency believed that the low bidder, Nippon Carbide Industries (“NCI”), was nonresponsive because the process inks used in its reflective sheeting for roadway signs did not meet the technical specifications.¹³⁶ The DOT postponed the bid award date so that it could resolve whether NCI’s process inks could be utilized.¹³⁷ After a telephone conversation with NCI’s director, where the mixing instructions were provided by NCI, the DOT confirmed that the NCI bid did not conform to the bid specifications.¹³⁸ The administrative law judge held that the DOT acted reasonably in seeking clarification, and such actions were not an “open door for NCI to change or amend the bid it submitted.”¹³⁹

An example of a post-bid submission that was an “open door to change or amend a bid” is found in *Miami Elevator Co. v. Manatee County School Board*,¹⁴⁰ where the intended awardee had supplemented its bid with a post-submission letter stating it had an office within the county, which was not disclosed in its bid.¹⁴¹ In *Miami Elevator Co.*, the school board issued a Request for Quotation for elevator and wheelchair lift maintenance services.¹⁴² The school board proposed to award the contract to General Elevator Company (“General”), and Miami Elevator protested, claiming that General was nonresponsive for failing to maintain a physical office in Manatee County, as required under the specifications.¹⁴³

In response, General stated that it had a Bradenton office in Manatee County.¹⁴⁴ The evaluation committee determined that General’s bid met the requirements based on an unscientific survey to test the response time of General, which had technicians and some minimal office equipment present in the office.¹⁴⁵ The administrative law judge found General’s bid nonresponsive, reasoning that the school board should not have considered the letter referencing the Bradenton office because it was sent after the deadline for submission of proposals.¹⁴⁶ Furthermore, the Bradenton office

135. *Id.* ¶ 20.

136. *Id.* ¶ 6.

137. *Id.* ¶ 8.

138. *Id.* ¶ 4.

139. *Nippon Carbide Indus.*, No. 98-3594BID ¶ 20.

140. No. 98-4474BID (Fla. Div. Admin. Hr’gs Nov. 23, 1998) (awarding the contract to the protestor, the second lowest bidder).

141. *Id.* ¶ 12.

142. *Id.* ¶ 1.

143. *Id.* ¶ 11.

144. *Id.* ¶ 12.

145. *Miami Elevator Co.*, No. 98-4474BID ¶¶ 15–16.

146. *Id.* ¶ 20.

was not a physical office within the county because no business was conducted there.¹⁴⁷ The administrative law judge reasoned that, “[t]o ignore the requirement . . . operates to disadvantage vendors who met the requirement and any potential vendors who did not submit proposals because they did not have a ‘physical office’ located within the county.”¹⁴⁸

In protests alleging an offeror is nonresponsive, the issue is usually whether a bid requirement is mandatory, rather than permissive, and whether the challenged proposal complies with the requirement.¹⁴⁹ For example, in *National Computer Systems, Inc. v. Department of Education* (“NCSF”),¹⁵⁰ the administrative law judge granted a protest challenging the evaluation of the intended awardee, but recommended rejection of all bids.¹⁵¹ This protest involved a procurement for the administration of the Florida Comprehensive Assessment Test (“FCAT”).¹⁵² The Department of Education received two proposals.¹⁵³ One of the evaluation criteria was corporate qualification.¹⁵⁴ The RFP established a minimum set of requirements for this criterion by stating that bidders “must demonstrate” that they have the “minimum threshold of experience.”¹⁵⁵ The requirements included that the bidders must have administered “a minimum of two assessment programs using image-based scoring that involved ‘at least 200,000 students annually.’”¹⁵⁶

The administrative law judge reasoned that these minimums were material requirements of the RFP, because they gave the Department some level of assurance that the awardee would be able to successfully perform a contract of such large magnitude.¹⁵⁷ The intended awardee did not have sufficient image-based testing experience, and the administrative law judge

147. *Id.* ¶ 22.

148. *Id.* ¶ 26.

149. *See* Lockheed Martin Info. Sys. v. Dep’t of Children & Family Servs., No. 98-2570BID ¶ 77 (Fla. Div. Admin. Hr’gs Mar. 30, 1999) (finding conditional language in bid waivable as a minor irregularity because it was boilerplate language, commonly used to provide an edge on future negotiations).

150. No. 99-1226BID (Fla. Div. Admin. Hr’gs May 25, 1999).

151. *Id.* ¶ 64.

152. *Id.* at Statement of Issues.

153. *Id.* ¶¶ 45, 52.

154. *Id.* ¶¶ 5–15.

155. *Nat’l Computer Servs., Inc.*, No. 99-1226BID ¶ 11.

156. *Id.* ¶ 21.

157. *Id.* ¶ 22.

found that the intended awardee should have been disqualified from further evaluation because it was a mandatory requirement.¹⁵⁸

In *NCSI*, the administrative law judge also held that the Department should have found the protester nonresponsive.¹⁵⁹ The administrative law judge noted that the Department improperly waived the protester's failure to have experience in a statewide procurement as a minor technicality.¹⁶⁰ Without this waiver, the protester also failed to meet the minimum requirement of having two statewide procurements.¹⁶¹ Thus, the administrative law judge recommended that the Department rebid because only 2.06 evaluation points out of 150 separated the proposals, and if other bidders knew that the Department was going to ignore these stated minimum requirements and evaluate the proposals "holistically," the Department could have received more than two proposals.¹⁶²

It is well-settled that an agency may not accept a bid or proposal that is materially at variance with the specifications set forth in an RFP.¹⁶³ Thus, offerors who failed to submit required audited financial statements and bidding and insurance costs were properly found to be nonresponsive.¹⁶⁴ A bidder will also be considered nonresponsive if it, or its designated subcontractors, fails to possess the licenses required by the solicitation.¹⁶⁵ Additionally, an offeror who fails to include a completed public entity crime certification is nonresponsive since such failure is considered a material deviation.¹⁶⁶ However, it has been held that offerors' identification of key

158. *Id.* ¶ 62 (citing *Jacobs Assoc., Inc. v. Dep't of Corrs.*, No. 96-5831BID (Fla. Div. Admin. Hr'gs Mar. 4, 1997)).

159. *Id.* ¶ 63.

160. *Nat'l Computer Servs., Inc.*, No. 99-1226BID ¶¶ 52-54.

161. *Id.* ¶ 54.

162. *Id.* ¶ 63 (citing *Marpan Supply Co. v. Dep't of Mgmt. Servs.*, No. 96-2777BID (Fla. Div. Admin. Hr'gs Sept. 26, 1996) (citing *Courtenay v. Dep't of Health & Rehab. Servs.*, 581 So. 2d 621, 623 (Fla. 5th Dist. Ct. App. 1991)).

163. *Air Support Servs. Int'l, Inc. v. Metro. Dade County*, 614 So. 2d 583, 584 (Fla. 3d Dist. Ct. App. 1993).

164. *Rattler Constr. Contractors, Inc. v. Dep't of Corrs.*, No. 98-5623BID ¶¶ 35-36 (Fla. Div. Admin. Hr'gs Mar. 4, 1999) (granting protest, but rejecting all bids rather than selecting protester since all bids were found nonresponsive).

165. *Rovel Constr., Inc. v. Dep't of Health*, No. 99-0596BID ¶¶ 14-18 (Fla. Div. Admin. Hr'gs Apr. 27, 1999) (finding standing but denying fourth ranked protestor's proposal as nonresponsive because it proposed the use of subcontractors without required speciality licenses and rejecting challenge to evaluation of awardee).

166. See *Wharton Inv. Group, Ltd. v. Dep't of Juvenile Justice*, No. 98-4063BID ¶¶ 9, 15-16 (Fla. Div. Admin. Hr'gs Dec. 7, 1998); *Cook v. Dep't of Juvenile Justice*, No. 98-1641BID ¶¶ 24-25, 28 (Fla. Div. Admin. Hr'gs Jun. 24, 1998); *Ctr. for Indep. Living v. Dep't*

personnel who were not current employees (all offerors submitted the same people) where they had agreed to work with whomever became the actual awardee complied with the RFP's requirement to include the names of qualified personnel to perform the work.¹⁶⁷

Offerors face a difficult obstacle establishing that a procuring agency's determination that it was nonresponsive was arbitrary or capricious, due to the extreme deference normally given to an agency's interpretations of the terms of the procurement.¹⁶⁸ In *Bobick v. Florida Keys Aqueduct Authority*, one of the most extreme examples of deference to agency discretion, Aqueduct Authority rejected a bid that contained three references, but not three letters supporting the bidder from those references.¹⁶⁹ The district court of appeal held that Aqueduct Authority's interpretation of the bid requirement for "references from three vendors" to mean that the bidder must include three "letters" of reference, not a list including three references, was not improper.¹⁷⁰ The court noted that although Aqueduct Authority had the power to waive the irregularity, it was not obliged to do so.¹⁷¹ This decision is an example of the tenet in bid protests that the agency is likely to prevail regardless of its decision. Here, if the agency had accepted the three references, rather than requiring three letters of reference, or had waived this failure as a minor irregularity, a challenge to this decision by the other bidder would likely have failed.

Similarly, in *Center Printing, Inc. v. University of North Florida*,¹⁷² appearing to give too much deference to an agency's determination than should have been due, an administrative law judge upheld an agency's

of Health & Rehab. Servs., No. 94-5627BID ¶¶ 23–25, 31 (Fla. Div. Admin. Hr'gs Jan. 17, 1995); *Jones Floor Covering, Inc. v. Dep't of Gen. Servs.*, No. 90-5032BID ¶¶ 19–20 (Fla. Div. Admin. Hr'gs Oct. 11, 1990). *But see* *Padula & Wadsworth Constr., Inc. v. Broward County Sch. Bd.*, No. 00-2408BID ¶¶ 5–6 (Fla. Div. Admin. Hr'gs Sept. 26, 2000); *J.D. Pirrotta, Co. v. Dist. Bd. of Trs. of Valencia Cmty. Coll.*, No. 90-7967BID ¶¶ 21–28 (Fla. Div. Admin. Hr'gs Feb. 25, 1991) (addressing minor deviation that is waivable).

167. *Old Tampa Bay Enter., Inc. v. Dep't of Transp.*, No. 99-0120BID ¶¶ 26, 44 (Fla. Div. Admin. Hr'gs June 22, 1999) (denying protest challenging evaluation of awardee in a procurement for bridge tending, maintenance, and repair services).

168. *Id.*

169. *Bobick v. Fla. Keys Aqueduct Auth.*, 648 So. 2d 1263, 1263 (Fla. 3d Dist. Ct. App. 1995) (affirming rejection of bid).

170. *Id.*

171. *Id.* (citing *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982)). *But see* *Advocacy Ctr. for Pers. with Disabilities, Inc. v. Dep't of Children & Family Servs.*, 721 So. 2d 759 (Fla. 1st Dist. Ct. App. 1990).

172. No. 99-2278BID (Fla. Div. Admin. Hr'gs Aug. 27, 1999).

determination that a bidder was nonresponsive because it did not demonstrate its ability to be able to perform the contract.¹⁷³ In *Center Printing, Inc.*, which involved a procurement for printing services, the invitation to bidders required that the bidders have a manufacturing plant capable of doing the work at the time of the bid opening.¹⁷⁴ The protester was a new company founded by the former owner of the incumbent contractor and the intended awardee.¹⁷⁵ The protester appeared to have underbid the contract, and the agency was concerned it would be unable to perform.¹⁷⁶ The agency conducted an inspection of the plants and determined that the protester did not have an adequate inventory system, storage space, and produced no samples; thus, the protester was found to be nonresponsive, and the contract was awarded to another bidder.¹⁷⁷ The administrative law judge held that the finding of nonresponsiveness was not clearly erroneous.¹⁷⁸ In view of the bid requirements, it appears that the administrative law judge gave too much deference to the agency (even though under the facts the protester did not deserve the award), because the ITB did not appear to actually require the bidder's ability to establish that it could perform as required. It appears that the agency did a responsibility determination without calling it as such. This decision demonstrates the difficulty that a new business can face in obtaining a government contract.

In *Humana Medical Plan, Inc. v. School Board*,¹⁷⁹ the issue was whether the school board's decision to reject the proposal of Humana and to award it to HIP Health Plan of Florida, Inc. ("HIP") and Foundation Health, was contrary to the school board's governing statutes and rules, policies, or the proposal specifications.¹⁸⁰ The RFP related to health coverage for school board employees.¹⁸¹ The school board announced its intent to award contracts to Foundation Health and HIP, and Humana protested.¹⁸² Humana responded to the RFP stating that it would "strive" to meet the requirements.¹⁸³ Humana testified that the statement meant that it would

173. *Id.* ¶ 54 (denying protest challenging protester's nonresponsiveness).

174. *Id.* ¶ 4.

175. *Id.* ¶¶ 16, 21.

176. *Id.* ¶ 34.

177. *Ctr. Printing, Inc.*, No. 99-2278BID ¶ 34.

178. *Id.* ¶ 54.

179. No. 98-5086BID (Fla. Div. Admin. Hr'gs Apr. 29, 1999).

180. *Id.* at Statement of Issues.

181. *Id.* at Prelim. Statement.

182. *Id.*

183. *Id.* ¶ 19.

“make a strong effort” to comply.¹⁸⁴ The administrative law judge held that this language was insufficient to indicate compliance with the requirements of the RFP that Humana could not correct this error by submission of a post-bid letter stating it would comply.

B. *Exceptions to the Specifications*

Any bidder whose proposal takes exception to the specifications or places conditions on its proposal is at high risk of being rejected by the agency. Thus, a protest by an offeror challenging the award of another offeror who took exception to the specifications is likely to be successful,¹⁸⁵ while a challenge to the agency’s rejection of a proposal that took exception to the specifications is likely to fail.¹⁸⁶

In *Ryan Inc. Eastern v. Peace River/Manasota Regional Water Supply Authority*,¹⁸⁷ involving a procurement for six miles of water pipeline that required forty-two inch pipe to specified standards, the low bidder included a letter from its pipe supplier with its bid indicating that it could not supply the required pipes.¹⁸⁸ The agency allowed the low bidder and its pipe supplier eight days after the bid opening to decide whether to withdraw the conditions and exceptions to the specifications, which rendered its bid nonresponsive.¹⁸⁹ Instead of withdrawing, the bidder stated that it could supply the required pipes.¹⁹⁰

The administrative law judge granted the protest, reasoning that the agency’s award of the contract to the low bidder was manifestly unfair to the other bidders and undermined the integrity of the bidding process.¹⁹¹ The administrative law judge noted that in the eight days following the bid opening, the bidder enjoyed the unfair advantage, not shared by other bidders, of analyzing the job and its bid, knowing that the absence of an enforceable contract would allow it to walk away from the job with

184. *Humana Med. Plan, Inc.*, No. 98-5086BID ¶ 23.

185. *Ryan Inc. E. v. Peace River/Manasota Reg’l Water Supply Auth.*, No. 00-0555BID (Fla. Div. Admin. Hr’gs Mar. 30, 2000) (granting protest). *But see* *Lockheed Martin Info. Sys. v. Dep’t of Children & Family Servs.*, No. 98-2570 (Fla. Div. Admin. Hr’gs Dec. 21, 1998) (adopted in part or modified).

186. *Bellsouth Communication Sys., Inc. v. Dep’t of the Lottery*, No. 99-3956BID (Fla. Div. Admin. Hr’gs Dec. 13, 1999) (denying protest of offeror found nonresponsive).

187. No. 00-0555BID (Fla. Div. Admin. Hr’gs Mar. 30, 2000).

188. *Id.* ¶ 21.

189. *Id.* ¶¶ 29–32.

190. *Id.* ¶ 34.

191. *Id.* ¶ 40.

impunity.¹⁹² The fact that the bidder did not walk away from the job meant only that its post-bidding analysis disclosed that the job would be profitable.¹⁹³ Thus, the administrative law judge found the bidder nonresponsive even though the solicitation contained a provision requiring the contractor to comply with the specifications without exception.¹⁹⁴

On the other hand, in *Bellsouth Communication Systems, Inc. v. Department of the Lottery*,¹⁹⁵ a procurement for the maintenance of telecommunications equipment and software, the agency received four proposals, but found only one responsive.¹⁹⁶ In its proposal, Bellsouth, who had held the incumbent contract for twelve years, had suggested several clarifications and modifications to the specifications, relating to its price, agency approval of subcontractors, agency ability to demand documentation, indemnification, and warranty.¹⁹⁷ Bellsouth believed that these clarifications and modifications were permissible due to the language of the RFP, but the Department of the Lottery found them to be “material deviations” from the specifications and eliminated Bellsouth as nonresponsive.¹⁹⁸ The administrative law judge agreed with the agency’s determination, noting that in the absence of anything in the proposal to indicate that Bellsouth intended to put forward these clarifications and modifications simply as negotiating points, the Department could reasonably interpret Bellsouth’s responses as conveying its refusal to accept the mandatory requirements of the RFP.¹⁹⁹ Further, the administrative law judge reasoned that it was of no legal significance in determining the materiality of the deviations that the clarifications and

192. *Ryan Inc. E.*, No. 00-0555BID ¶ 40.

193. *Id.*

194. *Id.* ¶ 41.

195. No. 99-3956BID (Fla. Div. Admin. Hr’gs Dec. 13, 1999) (denying protest of offeror found nonresponsive).

196. *Id.* ¶ 41. The administrative law judge also held that sections 287.057(3) and 287.012(5) of the *Florida Statutes*, when read together, meant that for a procurement in excess of \$25,000, an agency must receive at least two responsive proposals to go forward with the award. *Id.* ¶¶ 46, 51, 58. If not, then the agency must document the reasons that awarding the contract is in the best interest of the state rather than resoliciting. *Id.* ¶ 59. The administrative law judge found such reasons present here because the agency had tried twice to obtain the services and the current contract, which was to expire within 30 days, had already been extended. *Id.*; see also *E.L. Cole Photography, Inc. v. Dep’t of Law Enforcement*, No. 99-3401BID (Fla. Div. Admin. Hr’gs Oct. 2, 1998) (denying protest challenging evaluation of awardee). Although not addressed specifically, failure of all bidders, except one, to identify duplicates, was not a basis to resolicit when not a material deviation. See *id.*

197. *Bellsouth Communication Sys., Inc.*, No. 99-3956BID ¶¶ 15–19.

198. *Id.* ¶ 37.

199. *Id.* ¶¶ 56–57.

modifications were commercially reasonable and necessary to remedy ambiguities and potentially unenforceable terms in the RFP.²⁰⁰

C. *No Material Deviation in Bids*

Even when a bidder is nonresponsive, an agency may still accept a proposal if the bidder's deviation from the solicitation is not material. In *Tropabest Foods, Inc. v. Department of General Services*,²⁰¹ the court noted that "a minor irregularity [is] a variation [from the bid specifications that] 'does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders or does not adversely impact the interests of the agency.'"²⁰² In *Tropabest Foods, Inc.*, a case involving a procurement for specialty food, the solicitation sought, among other items, two items for beverage mixes, calling for "1 lb. yields approximately 1 gal[lon] . . ."²⁰³ The solicitation sought other similar items, but generally included the specified yield "or more."²⁰⁴ As to the two items at issue, the awardee's product yielded more than one gallon (it yielded 3.5 gallons).²⁰⁵ A bidder protested, claiming that the awardee's bid was nonresponsive because it did not yield approximately one gallon.²⁰⁶ The administrative law judge agreed that the awardee's bid was at variance with the specifications, but held that such deviation was a minor irregularity that could be waived by the agency because the variance did not give the awardee a substantial advantage or restrict competition.²⁰⁷

In *Robinson Electrical Co. v. Dade County*,²⁰⁸ the appellate court held that the low bidder's submission of a cashier's check instead of a bid bond, as required by the solicitation, did not constitute a material variance from the county's invitation for bids, and thus, the low bidder should have been awarded the contract.²⁰⁹ While this decision appears to support the proposition that the agency must waive a minor deviation if it would enable

200. *Id.* ¶ 56.

201. 493 So. 2d 50 (Fla. 1st Dist. Ct. App. 1986) (affirming denial of protest challenging responsiveness of awardee).

202. *Id.* at 52.

203. *Id.* at 50.

204. *Id.*

205. *Id.* at 51.

206. *Tropabest Foods, Inc.*, 493 So. 2d at 51.

207. *Id.* at 52.

208. 417 So. 2d 1032 (Fla. 3d Dist. Ct. App. 1982).

209. *Id.* at 1034.

it to select the otherwise lowest bid or best value,²¹⁰ other cases conclude that an agency may waive, but such is not required.²¹¹

Other examples of minor deviations include a bidder's failure to bid on alternative items,²¹² untimely and/or misdelivery of forms,²¹³ failure to provide an unemployment form,²¹⁴ and failure to price an item that was not to be used in price evaluation but was to be negotiated after the award.²¹⁵

210. See *J. Ruiz Sch. Bus Serv's., Inc. v. Sch. Bd. of Miami-Dade County*, No. 99-4021BID (Fla. Div. Admin. Hr'gs Mar. 24, 2000); *A. Oliveros Transp., Inc. v. Sch. Bd. of Miami-Dade County*, No. 99-4022BID (Fla. Div. Admin. Hr'gs Mar. 24, 2000) (joint decision granting protests that challenged agency's determination of their bids as nonresponsive).

211. *Bobick v. Fla. Keys Aqueduct Auth.*, 648 So. 2d 1263 (Fla. 3d Dist. Ct. App. 1995) (finding that although the Authority had the power to waive the irregularity, it was not obliged to do so and citing *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982)); see also *Padula & Wadsworth Constr., Inc. v. Broward County Sch. Bd.*, No. 00-2408BID ¶ 7 n.2 (Fla. Div. Admin. Hr'gs., Sept. 26, 2000) (suggesting that failure to waive nonsubmission of Public Entity Crime Statement would be arbitrary and capricious because it served no useful purpose).

212. *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 506-07 (Fla. 1982) (holding that failure to bid on an alternative item for procurement to resurface roads was a minor irregularity); *E.L. Cole Photography, Inc. v. Fla. Dep't of Law Enforcement*, No. 99-3401BID (Fla. Div. Admin. Hr'gs Oct. 28, 1998) (petitioner failed to prove that the awardee's bid which offered a price for a discontinued item, contrary to instructions, was a minor irregularity); *Rovel Constr., Inc. v. Dep't of Health*, No. 99-0596BID (Fla. Div. Admin. Hr'gs Apr. 27, 1999) (denying protest, holding that offering different amount for bids on similar items was not material and properly waived as a minor irregularity even though it affects price, and finding it did not give awardee an advantage, since several other bidders made similar mistake, and price submitted reflected actual cost to perform).

213. *Hewitt Contracting Co., Inc. v. Melbourne Reg'l Airport Auth.*, 528 So. 2d 122 (Fla. 5th Dist. Ct. App. 1988) (affirming denial of bid protest challenging award to bidder whose bid was 10 minutes late); *Gibbons & Co. v. Bd. of Regents*, No. 99-0697BID (Fla. Div. Admin. Hr'gs Sept. 17, 1999) (accepting protest delivered to right address, but wrong person); *D.A.B. Constructors, Inc. v. Dep't of Transp.*, No. 99-726BID (Fla. Div. Admin. Hr'gs Apr. 21, 1999) (excusing "untimely" filing of DBE form).

214. *J. Ruiz Sch. Bus Servs., Inc. v. Sch. Bd. of Miami-Dade County*, No. 99-4021BID (Fla. Div. Admin. Hr'gs Mar. 24, 2000); *A. Oliveros Transp., Inc. v. Sch. Bd. of Miami-Dade County*, No. 99-4022BID (Fla. Div. Admin. Hr'gs Mar. 24, 2000) (granting protests that challenged agency's determination of their bids as nonresponsive for failing to include the required UCT-6 Form, which is the Florida Division of Unemployment Quarterly Report, showing current employees and payroll amount, where other bidders committed similar errors).

215. *Con-Air Indus., Inc. v. Seminole County Sch. Bd.*, No. 98-4714BID (Fla. Div. Admin. Hr'gs Dec. 11, 1998) (adopting in toto, a finding that the contract was properly awarded to the intervenor, and denying protest). The school board issued a call for bids for air filter maintenance, service, and replacement to Filter Service and Installation Corporation

D. *Best Value*

One common type of bid protest is a challenge to the agency's evaluation of either the protester's proposal or the intended awardee's proposal, contending that if the agency had properly performed the evaluation, then the protester would have received the award. This type of challenge often arises within the context of a procurement where the agency is not necessarily selecting the lowest-priced, responsive offeror, but instead is selecting the best value to the agency, considering price and other factors.²¹⁶

If a procuring agency awards a contract to an offeror on the basis that the proposal is of better value to the agency because of its technical superiority, for instance, the award will be improper if there is no reasonable basis supporting the superiority.²¹⁷ In *Eagle Tire & Service Center v. Escambia County Utilities Authority*,²¹⁸ involving a procurement for new truck tires and retread services, the bidders' prices were essentially the same.²¹⁹ At the meeting to select the awardee, one of the commissioners spoke very highly of one contractor, who was a local company, and presented a letter of recommendation from another local agency praising the contractor.²²⁰ In addition, at the commission meeting, persons stated

("Filter"). *Id.* at Prelim. Statement. The second low bidder, Con-Air, protested, claiming that the school board staff did not follow its own policy in determining the low bid, that Filter's reference list was for a different company and unresponsive, and that Filter's bid was incomplete because it failed to list prices for certain filter frames at Item E on the bid proposal form. *Id.* The school board reserved the right to negotiate the unit price of the filter frames at Item E. *Id.* ¶ 28. Filter failed to attach a price sheet to its proposal and, instead, stated at Line F: "Per Price Sheet." *Id.* ¶ 16. Filter's failure to state a numeric price for filter frames afforded Filter a benefit or advantage not enjoyed by Con-Air. *Con-Air Indus., Inc.*, No. 98-4714BID ¶ 28. The instructions to bidders indicated that a bidder was not to include the cost as stated in lines E & F in the total. *Id.* ¶ 11. The total cost, Line D, determined the low bidder. *Id.* ¶ 14. The effect of the reservation of the right to negotiate prices was that the school board would determine what it would pay for the items despite the price submitted. *Id.* ¶ 29.

216. See Carl J. Peckinpaugh & Joseph M. Goldstein, *Best Value Source Selection*, 22 PUB. CONT. L. J. 275, 317 (1993).

217. *Eagle Tire & Serv. Ctr. v. Escambia County Utils. Auth.*, No. 00-0661BID (Fla. Div. Admin. Hr'gs June 14, 2000) (granting protest).

218. No. 00-0661BID (Fla. Div. Admin. Hr'gs June 14, 2000).

219. *Id.* ¶ 4.

220. *Id.* ¶¶ 8, 14.

generally that the local contractor's retread services were superior to those of the low bidder.²²¹

The administrative law judge noted "a public agency has no obligation to accept the 'lowest dollars and cents bid as being the 'lowest responsible bid' in every case, to the exclusion of all other pertinent facts which may well support a reasonable decision to award the contract to a contractor filing a higher bid."²²² In *Eagle Tire*, however, there was no reasonable basis to determine that the local contractor was a better value than the lower priced bid. Despite a recommendation from the staff to award the contract to the low (non-local) bidder, the commissioners split the award and gave the retread portion to the local contractor.²²³ At the administrative hearing, it was clear that the local contractor's product and services were not superior, but essentially equal to the low bidder's, and thus the decision to award to the local contractor based on its purported superiority was found arbitrary and capricious.²²⁴

Even if the protester establishes that the agency improperly evaluated proposals, not all such errors are significant enough to merit granting the protest.²²⁵ For instance, in *Youthtrack, Inc. v. Department of Juvenile Justice*,²²⁶ the administrative law judge denied a protest challenging the evaluation of the protester where correcting the evaluation error would not have changed the award.²²⁷ After conducting a detailed review of the evaluations, the administrative law judge found that the evaluators made some errors, but that even if the errors were corrected, the protester would not garner enough points to exceed the points awarded to the intended awardee.²²⁸ The administrative law judge rejected the argument that the

221. *Id.* ¶ 8.

222. *Id.* ¶ 36 (citing *Culpepper v. Moore*, 40 So. 2d 366, 370 (Fla. 1949)).

223. *Eagle Tire & Serv. Ctr.*, No. 00-0661BID at Recomm.

224. *Id.* ¶ 38. The administrative law judge noted that in a nonsection 120.57(3), referral by contract, where statute or code does not provide a standard, public agencies have the obligation to engage in contracting procedures in a manner that is not arbitrary and capricious. *Id.* ¶ 35. Also, where the local agency has adopted rules that mandate awarding contracts by competitive bids, the agency may not act arbitrarily to ignore those rules or select someone other than the lowest and best bidder. *Id.* ¶ 36.

225. *Youthtrack, Inc. v. Dep't of Juvenile Justice*, No. 99-4403BID (Fla. Div. Admin. Hr'gs Jan. 14, 2000).

226. No. 99-4403BID (Fla. Div. Admin. Hr'gs Jan 14, 2000).

227. *Id.* ¶¶ 47-51.

228. See also *Non-Secure Det. Home, Inc. v. Dep't of Juvenile Justice*, No. 99-2620BID (Fla. Div. Admin. Hr'gs Sept. 14, 1999) (finding the DJJ should have given both proposals zero points for their failure to include a financial statement or audit, but denying protest where such failure benefited the protester more than the awardee).

protester was harmed because two of three evaluators had failed to prepare a written narrative documenting their point scores, especially because the protester had an opportunity to depose the evaluators, but did not do so.²²⁹

E. *Evaluation Methodology*

Challenges to the evaluation methodology are rarely successful. In *Non-Secure Detention Home, Inc. v. Department of Juvenile Justice*,²³⁰ the administrative law judge denied a protest challenging the Department of Juvenile Justice's ("DJJ") scoring of past performance.²³¹ The RFP provided that where an offeror did not have past performance, it would receive the average score of the competing proposals for past performance.²³² Only two offerors submitted proposals.²³³ Rather than giving the intended awardee, which had no past performance, the same score as the protester, the DJJ gave the protester the average of the individual evaluator's score for the protester, which was one-third of the total score.²³⁴

A different result was reached in *Moore v. Department of Health & Rehabilitative Services*,²³⁵ where the evaluation was contrary to the agency's guidelines.²³⁶ The agency's manual required each committee member to evaluate the proposals independently.²³⁷ Nevertheless, three members provided their evaluations to the fourth evaluator, who then conducted an evaluation.²³⁸ The bidder recommended by the fourth evaluator, but not the other three, received the award.²³⁹ The appellate court held that the administrative law judge properly decided that the agency had acted arbitrarily by not following its own evaluation process, suggesting that a rebid or a proper reevaluation would be a permissible remedy.²⁴⁰

229. *Youthtrack, Inc.*, No. 99-4403BID ¶ 48.

230. No. 99-2620BID (Fla. Div. Admin. Hr'gs Aug. 27, 1999).

231. *Id.* ¶¶ 23–28.

232. *Id.* ¶ 8.

233. *Id.* ¶ 12.

234. *Id.*

235. 596 So. 2d 759 (Fla. 1st Dist. Ct. App. 1992) (reversing hearing officer's and agency's award of the contract).

236. *Id.* at 760.

237. *Id.*

238. *Id.*

239. *Id.* at 761.

240. *Moore*, 596 So. 2d at 761.

In *GTECH Corp. v. Department of the Lottery*,²⁴¹ an unsuccessful bidder appealed a decision by the Department of the Lottery awarding a contract to provide computerized gaming systems and related services for the state lottery.²⁴² The district court of appeal held that the Department did not violate the applicable procurement procedures or due process by referring the proposals back to the evaluation committee, some of whom testified at the bid protest hearing for the correction of its errors.²⁴³

F. *Qualifications or Bias of Evaluators*

An award based on evaluations performed by unqualified persons is considered arbitrary and capricious if it affects the outcome of the procurement.²⁴⁴ In *Knaus Systems, Inc. of Florida v. Department of Children & Family Services*,²⁴⁵ a point-scored procurement for a three-year maintenance service contract for computer equipment worth between three and three-and-a-half million dollars, one of the areas evaluated was the financial capability of the offerors.²⁴⁶ However, the evaluators had a limited financial background, and all testified that they did not have enough knowledge to properly evaluate the financial requirements of the RFP.²⁴⁷ Their inexperience was demonstrated by their evaluation of the intended awardee as having above average financial capability although its financial statements showed that it had suffered sizable losses.²⁴⁸ Thus, the administrative law judge held that lack of qualifications of the evaluators coupled with grave deficiencies in results of scoring of the financial aspects of one of the four criteria, which had a material impact on the outcome of the relative scoring (though not explained in the decision) rendered the evaluation process clearly erroneous, contrary to competition, arbitrary, and

241. 737 So. 2d 615 (Fla. 1st Dist. Ct. App. 1999) (affirming agency's acceptance of hearing officer's decision to have proposals reevaluated).

242. *Id.* at 616.

243. *Id.* at 622.

244. *Knaus Sys., Inc. of Florida v. Dep't of Children & Family Servs.*, No. 99-1230BID (Fla. Div. Admin. Hr'gs. Sept. 3, 1999) (granting protest of third ranked offeror and recommending rejection of all bids).

245. No. 99-1230BID (Fla. Div. Admin. Hr'gs. Sept. 3, 1999).

246. *Id.* ¶ 1.

247. *Id.* ¶ 20.

248. *Id.* ¶¶ 21-24.

capricious.²⁴⁹ Based on this error, the administrative law judge recommended the rejection of all bids.²⁵⁰

Another frequent type of challenge alleges that the evaluators were biased in favor of the intended awardee. Again, success in such challenges is rare. In *Non-Secure Detention Home, Inc.*, the administrative law judge denied a protest claiming that the evaluators were unfairly biased because two of the three evaluators knew a former employee of the awardee, who was now an employee of the DJJ.²⁵¹ The judge reasoned that the bias challenge was without merit because the evaluators did not know that the former employee had an interest in the property that was to be used for the contract and because she had no involvement with the procurement.²⁵²

G. Price Evaluation

Another area that protesters often challenge is the agency's price analysis of the bids or proposals. One recent administrative decision denied a protest challenging a bid that contained "unbalanced" items because the internal imbalance did not affect the order of bids.²⁵³ In *Anderson Columbia Co. v. Department of Transportation*,²⁵⁴ a procurement for road resurfacing, the intended awardee's bid price was \$2,271,354.81 and the protester's was \$2,278,263.07.²⁵⁵ The administrative law judge held that the agency properly determined that the awardee's bid was not materially unbalanced, noting that "[a] bid is . . . mathematically unbalanced if the prices quoted are significantly different from the approximate cost of the item to the contractor."²⁵⁶ The administrative law judge reasoned that a bid is materially

249. *Knaus Sys., Inc. of Fla.*, No. 99-1230BID ¶ 61.

250. *Id.* at Recomm.

251. *Non-Secure Det. Home, Inc. v. Dep't of Juvenile Justice*, No. 99-2620BID (Fla. Div. Admin. Hr'gs Aug. 27, 1999).

252. *See also Rattler Constr. Contractors, Inc. v. Dep't of Corrs.*, No. 98-5623BID (Fla. Div. Admin. Hr'gs Mar. 4, 1999) (rejecting claim of bias where the son of the protester's consulting engineer had previously made a complaint against one of the selection committee members reasoning that the engineer's evaluation scores were in line with other evaluators, and even if his scores were not used, ranking would not have changed).

253. *Anderson Columbia Co. v. Dep't of Transp.*, No. 99-0740BID (Fla. Div. Admin. Hr'gs May 7, 1999) (final order May 24, 1999) (denying protest challenging intended awardee's price proposal as unbalanced); *see also Dep't of Transp. v. Anderson Columbia Co.*, 651 So. 2d 1267 (Fla. 1st Dist. Ct. App. 1995).

254. No. 99-0740BID (Fla. Div. Admin. Hr'gs May 7, 1999).

255. *Id.* ¶ 2.

256. *Id.* ¶ 6.

unbalanced if there is reasonable doubt as to whether the bid will ultimately result in the lowest cost.²⁵⁷ Here, the intended awardee's front-loading of the mobilization item would result in a potential advantage of only \$434.84.²⁵⁸ This potential advantage did not materially unbalance the bid by changing the ranking, did not have a detrimental effect upon the competitive process, and would not cause contract administration problems.²⁵⁹ Thus, the administrative law judge denied the protest.²⁶⁰

In another decision, a protester challenged an agency's decision to award the contract to an offeror whose proposal exceeded the agency's estimated budgetary ceiling amount set forth in the RFP.²⁶¹ In *Old Tampa Bay Enterprises, Inc. v. Department of Transportation*,²⁶² the agency contended that it interpreted the ceiling as an estimate and not a maximum cap and could accept the awardee's price proposal even though it exceeded the ceiling.²⁶³ The administrative law judge agreed, holding that the "agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations."²⁶⁴

VII. REJECTION OF ALL BIDS

Rather than announce that it intends to award a procurement to one offeror, an agency sometimes decides to reject all of the bids and start over or cancel the procurement altogether. Because this type of agency action treats all bidders equally, the agency's decision to reject all bids is subject to less scrutiny than when an agency treats certain bidders differently, such as the rejection of a bidder as nonresponsive. Thus, an agency's decision to

257. *Id.* ¶ 7.

258. *Id.* ¶ 18.

259. *Anderson Columbia Co.*, No. 99-0740BID ¶ 20.

260. *Id.* ¶ 25.

261. *Old Tampa Bay Enters., Inc. v. Dep't of Transp.*, No. 99-120BID (Fla. Div. Admin. Hr'gs May 27, 1999) (denying protest challenging evaluation of awardee in a procurement for bridge tending, maintenance, and repair services).

262. No. 99-120BID (Fla. Div. Admin. Hr'gs May 27, 1999).

263. *Id.* ¶ 10.

264. *Id.* ¶ 51 (quoting *Orange Park Kennel Club, Inc. v. Dep't of Bus. & Prof'l Regulation*, 644 So. 2d 574, 576 (Fla. 1st Dist. Ct. App. 1994)).

reject all bids will only be overturned if it is arbitrary,²⁶⁵ illegal, dishonest, or fraudulent.²⁶⁶

In *Department of Transportation v. Groves-Watkins Constructors*,²⁶⁷ an early decision foreshadowing the lower statutory standard of review for decisions rejecting all bids, the appellate court quashed the administrative law judge's recommended decision granting a protest.²⁶⁸ The appellate court held that, at most, the administrative law judge found the DOT had made an honest mistake in its prebid estimate of the cost of the procurement, which does not establish that the DOT acted fraudulently, arbitrarily, illegally, or dishonestly.²⁶⁹ Thus, the court found that the DOT lawfully rejected all bids submitted on a highway construction project as too high and properly directed that the project be rebid where the protester's low bid was still twenty-nine percent higher than estimated.²⁷⁰

Examples abound of decisions rejecting challenges to an agency's decision to reject all bids. For instance, protests have been unsuccessful when an agency rejected all bids due to potentially restrictive specifications,²⁷¹

265. A decision is arbitrary if it is not supported by facts or logic, or is despotic. *E.g.*, *Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 365 So. 2d 759, 763 (Fla. 1st Dist. Ct. App. 1978).

266. "In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent." FLA. STAT. § 120.57(3)(f) (2000). On the other hand, in other bid protests:

[T]he administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

Id. Because of the use of "arbitrary" in both types of actions, the different standards are questionable to some extent.

267. 530 So. 2d 912 (Fla. 1988).

268. *Id.* at 913.

269. *Id.* at 914.

270. *Id.* at 915.

271. *Neel Mech. Contractors, Inc. v. Fla. Agric. & Mech. Univ.*, No. 99-3424BID (Fla. Div. Admin. Hr'gs Nov. 12, 1999) (reasoning that rebid was appropriate where the agency either intended to restrict the specifications to one product without complying with the requirements for a sole-source procurement or intended to permit more than one product, but such intent was frustrated by the specification); *see also Caber Sys., Inc. v. Dep't of Gen. Servs.*, 530 So. 2d 325 (Fla. 1st Dist. Ct. App. 1988) (affirming the denial of a bid protest when, based on information learned during a protest, the agency decided to reject all bids because the ITB was ambiguous and flawed due, in part, because it was based on unwritten specifications not known by some bidders).

unclear instructions to bidders,²⁷² receipt of only a few responses to the solicitation,²⁷³ the existence of only one responsive bidder,²⁷⁴ or a change in the agency's needs after the issuance of the solicitation.²⁷⁵ An agency's decisions not to reject all bids, however, will not be overturned where the agency received more than two bids, but only one responsive bid.²⁷⁶

Not all uncertainty in the specifications, however, demands a rebid. In *Capeletti Bros. v. Department of General Services*,²⁷⁷ which involved a procurement for site preparation and grading for a Dade County prison, the specifications showed a public road bordering the site, which was only an access road.²⁷⁸ Capeletti, however, actually privately owned the road.²⁷⁹ Capeletti brought the issue to the attention of the Department, but received no response, and no other bidders complained.²⁸⁰ The Department announced its intent to award another bidder, and Capeletti protested.²⁸¹ Initially, the Department decided to reject all of the bids, but after the

272. *Contemporary Constr. Southeast, Inc. v. Dep't of Transp.*, No. 98-5018BID (Fla. Div. Admin. Hr'gs Mar. 1, 1999) (affirming decision to reject all bids, despite the fact that petitioner submitted a responsive bid, where there were inconsistencies regarding the due date for a particular form and the agency failed to provide an addendum to all the bidders); *Felker v. Dep't of Bus. & Prof'l. Regulation*, No. 98-1985BID ¶ 15 (Fla. Div. Admin. Hr'gs Aug. 11, 1998) (holding that it was proper to reject all bids and readvertise because the RFP was unclear as to certain restroom requirements and it provided the current landlord with an unfair advantage).

273. *Atl. Inv. of Broward v. Dep't of Transp.*, No. 00-224BID (Fla. Div. Admin. Hr'gs Apr. 14, 2000) (denying protest where an agency only received one quotation regarding the leasing of real property).

274. *Cook v. Dep't of Juvenile Justice*, No. 98-1641BID (Fla. Div. Admin. Hr'gs June 24, 1998) (affirming dismissal of protest where there was only one responsive bidder); *M.H.M.S. Corp. v. Dep't of Mgmt. Servs.*, No. 98-4952BID (Fla. Div. Admin. Hr'gs Feb. 12, 1999) (denying protest and rejecting all bids).

275. *Gulf Real Props., Inc. v. Dep't of Health & Rehab. Servs.*, 687 So. 2d 1336, 1338 (Fla. 1st Dist. Ct. App. 1997) (affirming denial of protest where the agency rejected all bids because space became available that was owned by a local government).

276. *Satellite Television Eng'g, Inc. v. Dep't of Gen. Servs.*, 522 So. 2d 440 (Fla. 1st Dist. Ct. App. 1988) (affirming denial of protest where the Department refused to reject all bids and negotiated contract with the sole responsive bidder for purchase of satellite television network).

277. 432 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1983).

278. *Id.* at 1361.

279. *Id.*

280. *Id.*

281. *Id.*

hearing it changed its mind.²⁸² The court reasoned that the uncertainty in the specifications was not sufficiently material to require a rebid.²⁸³

The blurred line between the standard of review in the rejection of all bids and in a protest challenging one bidder's evaluation is demonstrated in *Knaus Systems, Inc.* which granted the protest of the third ranked offeror, but recommended rejection of all bids.²⁸⁴ In *Knaus Systems, Inc.*, the administrative law judge found that lack of qualifications of evaluators, along with grave deficiencies in results of scoring of one of the evaluation criteria, and the material impact on the outcome of the relative scoring, rendered the evaluation process clearly erroneous, contrary to competition, arbitrary, and capricious.²⁸⁵ While the administrative law judge referred to the standard of proof for protests other than the rejection of all bids, the judge recommended the rejection of all bids, rather than award the contract to the protestor or the revaluation of all bids.²⁸⁶

VIII. WOMAN-OWNED AND DISADVANTAGED BUSINESS ENTERPRISE ISSUES

Some procurements are set aside or contain goals for companies owned by women, minorities, or other "disadvantaged" businesses. The latest appellate decision regarding compliance with the Disadvantaged Business Enterprise ("DBE") rules held that a bidder has to only facially comply with such requirements in its bid or proposal and actual compliance is a contract administration issue.²⁸⁷ In *State Contracting & Engineering Corp. v. Department of Transportation*,²⁸⁸ involving a procurement for the replacement of tollbooths on a state road, the protester contended that the low bidder was nonresponsive because its proposed DBE subcontractors did not actually qualify as DBE's because they had to purchase materials from non-DBE's.²⁸⁹ The DOT contended that the low bidder was responsive because it properly completed its DBE form, and its ability to actually

282. *Capeletti Bros.*, 432 So. 2d at 1361.

283. *Id.* at 1362.

284. *Knaus Sys., Inc. of Fla. v. Dep't of Children & Family Servs.*, No. 99-1230BID (Fla. Div. Admin. Hr'gs Sept. 3, 1999). For additional discussion of *Knaus Systems, Inc.* see *supra* Part VI.F.

285. *Id.* ¶ 61.

286. *Id.*

287. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st Dist. Ct App. 1998) (affirming agency's rejection of hearing officer's decision granting protest).

288. 709 So. 2d 607 (Fla. 1st Dist. Ct App. 1998).

289. *Id.* at 608.

comply was a performance issue, not a responsiveness issue.²⁹⁰ The hearing officer disagreed, and the DOT rejected the decision.²⁹¹ The protester appealed, but the appellate court affirmed the DOT's final order.²⁹²

Despite the decision in *State Contracting*, one administrative law judge still continued to conduct a broad analysis of a bidder's actual ability to comply with the established DBE goals for the procurement.²⁹³ The DOT, however, rejected the administrative law judge's analysis based on *State Contracting*.²⁹⁴ In this procurement for the rehabilitation of the Jewfish Creek Bridge in Monroe County, the protester submitted the lowest priced bid of five bidders.²⁹⁵ The ITB established two DBE goals: eight percent for non-minority female DBE's and four percent for African-American DBE's.²⁹⁶ The DOT, however, rejected the protester's bid because it failed to meet the DBE goals.²⁹⁷

The protester challenged the agency's rejection of its bid and the ability of the intended awardee to meet DBE goals.²⁹⁸ The administrative law judge found that the intended award was improper because the intended awardee could not actually meet DBE goals, although it submitted all materials required by the ITB to determine such compliance.²⁹⁹ The administrative law judge reasoned that the DBE subcontractors proposed by the awardee did not comply with the DBE requirements because it was not clear that they could perform the work.³⁰⁰ Moreover, the administrative law judge found that the DOT improperly evaluated the protester's good faith effort to comply with applicable DBE goals.³⁰¹

The DOT, however, rejected the administrative law judge's decision in part.³⁰² The DOT stated that its regulations only require bidders to identify their DBE's, the description of work to be performed, the dollar amount of

290. *Id.*

291. *Id.* at 609.

292. *Id.* at 610.

293. *Quinn Constr., Inc. v. Dep't of Transp.*, No. 99-2277BID (Fla. Div. Admin. Hr'gs Aug. 3, 1999) (granting protest challenging DBE good faith effort evaluation, but rejecting in large part hearing officer's recommended decision).

294. *Id.*

295. *Id.* ¶ 4.

296. *Id.* ¶ 15.

297. *Id.* ¶ 20.

298. *Quinn Constr., Inc.*, No. 99-2277BID ¶ 43.

299. *Id.* ¶ 27.

300. *Id.* ¶ 67.

301. *Id.* ¶ 68.

302. *Id.* ¶¶ 70-71.

such work, any other documentation required by contract or bidding documents, the signature of the proposed DBEs, and evidence that the goal has been met.³⁰³ The DOT argued all other materials are performance issues, not responsiveness issues, relying on *State Contracting*, which the DOT determined that the hearing officer ignored and failed to distinguish.³⁰⁴ Nonetheless, although the evidence presented at the hearing regarding the protester's good faith compliance with the DBE requirements was not included with its bid, the DOT would consider the material now because the protester already had one DBE, and the DOT should have known about the severe limitation on certified painters, which rendered it meaningless to contact more.³⁰⁵ Thus, the DOT accepted the hearing officer's recommendation regarding the protester's good faith efforts to comply with the DBE goals, and that the protester should receive the contract.

In *Overstreet Paving Co. v. Department of Transportation*,³⁰⁶ an agency had to waive a bidder's failure to include its DBE form where evidence in the record demonstrated that it had been included with its bid, but that the agency lost it.³⁰⁷ The DOT found the low bid nonresponsive due to Overstreet's failure to include its DBE utilization form with its bid.³⁰⁸ The DOT dismissed the protest, and the low bidder appealed.³⁰⁹ The appellate court held that the bid should not have been declared nonresponsive for a technical omission that was not material to the bid, that did not result in competitive advantage, and that was a matter the DOT had discretion to overlook, in view of the hearing officer's findings establishing an unrefuted, prima facie case that the low bidder included the document in question in its sealed bid.³¹⁰ The decision in *Overstreet Paving Co.* should not be taken as firm precedent that an agency must waive an offeror's failure to include its

303. *Quinn Constr., Inc.*, No. 99-2277BID ¶ 67.

304. *See also* Old Tampa Bay Enters., Inc. v. Dep't of Transp., No. 99-0120BID (Fla. Div. Admin. Hr'gs May 27, 1999) (denying protest challenging evaluation of awardee in a procurement for bridge tending, maintenance, and repair services where protester failed to prove that proposed DBE could not perform the work and the work of the DBE was a matter of contract performance, not responsiveness).

305. *Quinn Constr., Inc.*, No. 99-2277BID ¶ 58.

306. 608 So. 2d 851 (Fla. 2d Dist. Ct. App. 1992) (reversing final order finding contractor nonresponsive).

307. *Id.* at 852.

308. *Id.*

309. *Id.*

310. *Id.* at 853.

DBE firm because of the finding that the agency had lost the documentation. The Division of Administrative Hearings has accepted this distinction.³¹¹

In *City of Wildwood v. Gibbs & Register, Inc.*,³¹² the court held a contractor cannot use its failure to comply with a solicitation's DBE requirements to withdraw a bid.³¹³ In *Gibbs & Register, Inc.*, the city brought an action against the low bidder for a wastewater system reuse storage pond construction contract, seeking damages stemming from a bidder's withdrawal of its bid in an ITB.³¹⁴ The bidder claimed that it could not meet the DBE participation requirements.³¹⁵ The bidder and its surety that had issued the bid bond counterclaimed for damages resulting from the city's refusal to return the bid bond.³¹⁶ All the parties moved for summary judgment, and the trial court granted the bidder's motion and denied the city's motion.³¹⁷ The city appealed, and the appellate court held that the bidder breached the agreements in its bid by refusing to provide post-award information necessary to comply with the DBE participation goal requirements as required for a contract, thus triggering forfeiture of the bidder's bid bond to the city.³¹⁸

IX. RESPONSIBILITY

It is very difficult for a bidder to successfully challenge the agency's determination that the bidder is not responsible. A responsible bidder is one who "has the capability in all respects to perform fully the contract requirements and has the integrity and reliability which will assure good faith performance."³¹⁹ In one recent decision, a city manager found a bidder not responsible based on his performance during a previous contract in

311. See *Hubbard Constr. Co. v. Dep't of Transp.*, No. 98-0749BID (Fla. Div. Admin. Hr'gs May 1, 1998) (denying protest challenging agency's determination that proposals were nonresponsive where one offeror failed to include its DBE form and another did not meet DBE goals when the proposed DBE was not certified).

312. 694 So. 2d 763 (Fla. 5th Dist. Ct. App. 1997).

313. *Id.* at 766 (reversing summary judgment for contractor who attempted to withdraw bid).

314. *Id.* at 764.

315. *Id.* at 765.

316. *Id.*

317. *Gibbs & Register, Inc.*, 694 So. 2d at 765.

318. *Id.* at 766.

319. FLA. STAT. § 287.012(13) (2000); see also BROWARD CO. PROCUREMENT CODE § 21.8 (b)(60).

which the bidder billed the city for work that it had not performed.³²⁰ A hearing officer disagreed with the city manager's conclusion, reasoning that the city manager did not know all of the pertinent facts.³²¹ The city commission, however, rejected the decision of the hearing officer, and still rejected the bid.³²² In an order affirming the denial of a temporary injunction sought by the purported nonresponsible bidder, the appellate court held that the bidder was not likely to succeed on the merits because, based on the bidder's performance under previous contract, it did not appear to be arbitrary to find the bidder nonresponsible.³²³

X. SUNSHINE LAW

Florida has a statutory requirement granting a broad right of access to public records and meetings of public boards and commissions.³²⁴ This law, known as the Sunshine Law, is a potentially powerful weapon that may be unleashed by a disappointed bidder to upset a procurement. Several recent decisions have considered the application of the Sunshine Law within a government procurement.

In *Silver Express Co. v. District Board of Lower Tribunal Trustees of Miami-Dade Community College*,³²⁵ a contractor that had submitted an unsuccessful proposal to the college to provide flight training services brought an action in circuit court seeking to enjoin the college from awarding a two-year contract to another contractor, alleging a violation of the Sunshine Law.³²⁶ The circuit court denied the motion for a temporary injunction, and the contractor appealed.³²⁷ On appeal, the appellate court held that the committee appointed by the college's purchasing director to consider proposals was subject to the Sunshine Law. The court further held

320. *Miami-Dade County v. Church & Tower, Inc.*, 715 So. 2d 1084, 1086 (Fla. 3d Dist. Ct. App. 1998).

321. *Id.* at 1085.

322. *Id.* at 1086.

323. *Id.* at 1091 (affirming denial of a temporary injunction because no substantial likelihood to prevail on the merits existed); *see also* *Culpepper v. Moore*, 40 So. 2d 366, 370 (Fla. 1949) (affirming the agency's decision that the low bidder was not responsible in part because of mistakes in the bid).

324. FLA. STAT. § 286.011 (2000). For an extensive analysis of the law, see Office of the Attorney General, *Florida's Government-In-The-Sunshine Manual and Public Records Law Manual* (2000 ed.).

325. 691 So. 2d 1099 (Fla. 3d Dist. Ct. App. 1997).

326. *Id.* at 1100-01.

327. *Id.* at 1100.

that the committee's violation of the law caused irreparable public injury, warranting a temporary injunction prohibiting the college from entering into the contract based on the ranking established by the committee.³²⁸ The appellate court also held that the plaintiff did not waive its Sunshine Law claim by failing to raise it in the chapter 120 bid protest.³²⁹

Other decisions, while confirming that procurements are subject to the Sunshine Law, did not provide similar relief to disappointed bidders. For instance, in *Leach-Wells v. City of Bradenton*,³³⁰ the appellate court held that the city violated the Sunshine Law when an ad hoc committee failed to hold a meeting regarding the short-listing of bidders for a construction contract for a municipal complex.³³¹ The city had appointed a selection committee comprised of the city clerk, a local engineer, the public works director, and a city councilman to review the six proposals submitted in response to the RFP.³³² These committee members were then required to rank the proposals, with the top three being permitted to make presentations to the city council, and then select one.³³³ Because all of the committee members had found the same three bidders to be the highest rated, the city did not hold a meeting to discuss who the top three should be.³³⁴ The appellate court reasoned that the ranking, which in essence eliminated three bidders from the process, was a "formal action" that was required to be done at a public meeting.³³⁵ Although a violation had occurred, the city had not been enjoined (the plaintiff had not appealed the denial of the temporary injunction), therefore the action was moot.³³⁶

The Sunshine Law does not prohibit all private discussions within the context of a procurement. In *Humana Medical Plan, Inc. v. School Board of*

328. *Id.* at 1101.

329. *Id.*

330. 734 So. 2d 1168 (Fla. 2d Dist. Ct. App. 1999).

331. *Id.* at 1169.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Leach-Wells*, 734 So. 2d at 1171.

336. *Id.*; see also *Capeletti Bros. v. Dep't of Transp.*, 499 So. 2d 855, 857 (Fla. 1st Dist. Ct. App. 1986). In *Capeletti Bros.*, the court held that the bid review committee was not subject to the Sunshine Law because section 337.168 of the *Florida Statutes*, the DOT statute, exempted DOT cost estimates, identities of potential bidders, and bid analysis under the Public Records Law, located in section 119.07(1) of the *Florida Statutes*. *Id.* The result of this case would be different now that a 1991 amendment to the Public Records Law states that exemptions from it do not provide an exemption from the Sunshine Law unless it is specifically provided. See FLA. STAT. § 119.07(2)(a) (2000).

Broward County,³³⁷ Humana claimed that three meetings violated the Sunshine Law.³³⁸ The administrative law judge ruled, however, that the individual committee members were free to meet with a consultant retained to assist with the procurement.³³⁹ Further, while two other meetings were violations of the Sunshine Law, the administrative law judge found that those violations were cured by holding a subsequent full and open public hearing on the same issues.³⁴⁰

XI. REMEDIES

Although Florida courts have awarded attorneys' fees and bid preparation costs to successful protestors, lost profits have not been held to be recoverable. In *City of Cape Coral v. Water Services of America, Inc.*, ("WSA"),³⁴¹ the city informed bidders that they did not have to be licensed as a general contractor under chapter 489 of the *Florida Statutes* in order to bid on the water treatment facility.³⁴² A bidder complained that it should receive the contract award because the other bidders were not licensed as general contractors.³⁴³ The city agreed, and WSA protested, seeking an injunction and damages.³⁴⁴ The request for an injunction was denied in another decision, but the trial court awarded lost profits, bid preparation costs, prejudgment interest, and attorneys' fees.³⁴⁵ Thereafter, the appellate court reversed as to lost profits only.³⁴⁶

337. No. 98-5086BID (Fla. Div. Admin. Hr'gs Apr. 29, 1999) (rejecting Humana's protest and awarding the contract to Foundation and HIP).

338. *Id.* ¶ 121.

339. *Id.* (citing *Sch. Bd. of Duval County v. Fla. Publ'g Co.*, 670 So. 2d 99, 101 (Fla. 1st Dist. Ct. App. 1996)) (holding that the Sunshine Law does not prevent private meetings between individual committee members and staff members or consultants). *But see* *Blackford v. Sch. Bd. of Orange County*, 375 So. 2d 578, 581 (Fla. 5th Dist. Ct. App. 1979) (finding that meetings between one subject to the Sunshine Law and one not subject to the Sunshine Law would be subject to Sunshine Law if the other person was acting as a liaison between persons subject to the Sunshine Law). *See also* Office of the Attorney General, *supra* note 324, at 18–19.

340. *Humana Med. Plan, Inc.*, No. 98-5086BID ¶¶ 122–23; *see* *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d Dist. Ct. App. 1994).

341. 567 So. 2d 510 (Fla. 2d Dist. Ct. App. 1990).

342. *Id.* at 511.

343. *Id.*

344. *Id.* at 512.

345. *Id.*

346. *City of Cape Coral*, 567 So. 2d at 514.

In contrast, in *City of Tallahassee v. Blankenship & Lee*,³⁴⁷ a disappointed bidder on a natural gas line project sued the city for disqualification from bidding, in which the trial court had found that the city's decision had come too late.³⁴⁸ The circuit court ordered the city to pay bid preparation costs, including attorneys' fees, incurred in pursuing the bid protest, but the district court of appeal held that attorneys' fees were not recoverable.³⁴⁹ Although there is a limited exception that attorneys' fees are available where the wrongful act involved a party in litigation against others, it was found to be inapplicable.³⁵⁰

In *Procacci Commercial Realty, Inc. v. Department of Health & Rehabilitative Services*,³⁵¹ the agency was awarded sanctions against the protester and attorneys' fees and costs for having to defend a frivolous appeal regarding a bid protest.³⁵²

XII. HEARING OFFICER'S DECISION

A. Rejection of Hearing Officer's Legal Conclusion

Decisions of the administrative law judges are only recommended decisions and the agencies may reject the decisions, subject to judicial review, though such rejections are rare. In *L.B. Bryan & Co. v. School Board of Broward County*,³⁵³ the appellate court held that the school board, in a procurement for insurance, properly rejected the administrative law judge's conclusions of law that the board had acted illegally by awarding the contract to the intended awardee.³⁵⁴ The protester claimed that the school board could not award the contract to the intended awardee because it was in violation of the surplus lines insurance statute.³⁵⁵ The administrative law judge agreed in its conclusions of law.³⁵⁶ The school board rejected these

347. 736 So. 2d 29 (Fla. 1st Dist. Ct. App. 1999) (reversing the trial court's decision and holding fees not recoverable).

348. *Id.* at 29.

349. *Id.* at 30.

350. *Id.*

351. 690 So. 2d 603 (Fla. 1st Dist. Ct. App. 1997).

352. *Id.* at 609; see FLA. STAT. §120. 595(5) (2000).

353. 746 So. 2d 1194 (Fla. 1st Dist. Ct. App. 1999) (affirming rejection of administrative law judge's conclusions of law, but noting statute has now been changed effective June 18, 1999).

354. *Id.* at 1197.

355. *Id.* at 1196.

356. *Id.*

two conclusions of law, and on appeal, the protester challenged the school board's authority to reject the judge's legal conclusions, contending that the school board could not reject such findings because it did not have "substantive jurisdiction" over the surplus lines statute.³⁵⁷

At the time, an agency could "reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction."³⁵⁸ The First District held that the phrase "over which it has substantive jurisdiction" only applied to "administrative rules," not to "conclusions of law."³⁵⁹ The appellate court reasoned that it has been the longstanding rule in Florida that an agency could reject any conclusion of law, but as to administrative rules, only those over which the agency has substantive jurisdiction.³⁶⁰ However, the district court noted that the recent amendment to section 120.57(1)(j) of the *Florida Statutes* has departed from long standing law, and now agencies may only reject or modify conclusions of law and administrative rules over which they have substantive jurisdiction.³⁶¹

In *State Contracting & Engineering Corp. v. Department of Transportation*,³⁶² a contractor challenged a final order of the DOT approving the acceptance of a competitive bid for construction work on a state road project.³⁶³ The district court of appeal held that the competing contractor's bid for replacement of tollbooths on a state road was only required to facially comply with the rule's requirements for subcontract work by disadvantaged businesses.³⁶⁴ The protester contended that the low bidder was nonresponsive because its DBE subcontractors intended to purchase goods from non-DBEs.³⁶⁵ The DOT contended that the low bidder's completed DBE form and actual compliance was a performance

357. *Id.*

358. *L.B. Bryan & Co.*, 746 So. 2d at 1197 (citing FLA. STAT. § 120.57(1)(j) (Supp. 1996)).

359. *Id.*

360. *Id.*

361. *Id.* In pertinent part, the section states as follows: "[t]he agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." FLA. STAT. § 120.57(1)(l) (2000).

362. 709 So. 2d 607 (Fla. 1st Dist. Ct. App. 1998) (affirming agency's rejection of hearing officer's decision granting protest).

363. *Id.* at 608.

364. *Id.* at 610.

365. *Id.* at 608.

issue, not a responsiveness issue.³⁶⁶ The hearing officer disagreed, but the agency rejected this argument.³⁶⁷ The appellate court affirmed and held that the burden is on the party protesting the award of the bid to establish the ground(s) for invalidating the award.³⁶⁸ Moreover, the appellate court held that an agency may reject a hearing officer's findings of fact only if not supported by competent and substantial evidence, but can reject or modify conclusions of law and interpretations of administrative rules over which the agency has substantive jurisdiction.³⁶⁹ Here, the court's review of the agency's decision is limited to whether it is correct as a matter of law, which is certainly not clearly erroneous.³⁷⁰

B. *Administrative Law Judge's Decision is Binding in a Chapter 120 Challenge if Supported by Substantial and Competent Evidence*

In *Hubbard Construction Co. v. Department of Transportation*,³⁷¹ the appellant/bidder challenged a final order in which the DOT rejected certain findings of fact and conclusions of law of the hearing officer that the bidder's discrepancy was a minor irregularity (no discussion of issue) and, thereby, denied the appellant's bid protest.³⁷² Because the hearing officer's recommended order was supported by competent substantial evidence and did not involve a misapplication of law, the appellate court reversed.³⁷³

In *Asphalt Pavers, Inc. v. Department of Transportation*,³⁷⁴ a chapter 120 case, a final order of the DOT dismissed a contractor's protest to the disqualification of its bid and the intended award of the project to the next lowest bidder.³⁷⁵ The contractor appealed.³⁷⁶ The contractor's bid was missing the disadvantaged business form, which was required to be

366. *Id.*

367. *State Contracting & Eng'g*, 709 So. 2d at 608.

368. *Id.* at 609.

369. *Id.* at 610.

370. *See id.*

371. 642 So. 2d 1192 (Fla. 1st Dist. Ct. App. 1994) (reversing DOT's rejection of hearing officer's granting of protest).

372. *Id.* at 1192.

373. *Id.* (stating no beneficial facts, but providing just another example of reversal of agency rejection of hearing officer's determination).

374. 602 So. 2d 558 (Fla. 1st Dist. Ct. App. 1992) (reversing agency's rejection of hearing officer's decision upholding protest that bidder was responsive).

375. *Id.* at 558.

376. *Id.* at 559.

responsive.³⁷⁷ The hearing officer found that the bidder included the form in its bid, but the DOT lost it.³⁷⁸ Thus, the protest was upheld.³⁷⁹ The DOT rejected the hearing officer's decision.³⁸⁰ The district court of appeal held that the hearing officer's findings of fact after an evidentiary hearing were supported by competent, substantial evidence, and the DOT's decision to reject the lowest bid was clearly arbitrary.³⁸¹

C. *Nonchapter 120 Procurements*

In *Miami-Dade County v. Church & Tower, Inc.*, ("C & T"),³⁸² a case applying Dade County Procurement Code 2-8.4, the court held that the county commission is not bound by the hearing examiner's recommendation, but still must not exercise its discretion arbitrarily or capriciously.³⁸³ The city manager found C & T nonresponsible based upon findings of previous contracts where C & T billed for work not performed.³⁸⁴ However, the hearing officer disagreed because the city manager did not know all the pertinent facts (although there were no findings that any allegations were false) and recommended the award go to C & T.³⁸⁵ The city commission rejected the decision and the bid.³⁸⁶ The appellate court held that the trial court improperly entered a temporary injunction because C & T failed to establish the likelihood of success on the merits and was therefore not entitled to an injunction.³⁸⁷ The Dade County Code permitted the commission to reject the hearing officer's decision (by a two-thirds requirement if it is the same as the manager), as long as the decision was not arbitrary or capricious.³⁸⁸ Here, based upon the facts under the previous contract, it was not found to be arbitrary.³⁸⁹

377. *Id.*

378. *Id.* at 560.

379. *Asphalt Pavers, Inc.*, 602 So. 2d at 560.

380. *Id.*

381. *Id.* at 562; *see also* *Overstreet Paving Co. v. Dep't of Transp.*, 608 So. 2d 851 (Fla. 2d Dist. Ct. App. 1992).

382. 715 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1998) (affirming denial of a temporary injunction because protestor did not show a substantial likelihood of prevailing on the merits).

383. *Id.* at 1089-90.

384. *Id.* at 1086.

385. *Id.*

386. *Id.*

387. *Church & Tower, Inc.*, 715 So. 2d at 1089.

388. *Id.* at 1088.

389. *Id.* at 1091.

XIV. CONCLUSION

The rules governing contracting with the government are intended to ensure the fair and equitable treatment of all persons who seek such contracts. While often these rules make it more difficult to obtain government contracts, as compared to private contracts, such rules provide all potential contractors with an equal opportunity. Despite this level playing field among contractors, the government is given a firm advantage. Governmental entities are provided with broad discretion as to the decisions they make regarding the evaluation of bids and proposals and the award of contracts for goods and services. Thus, potential government contractors, and their counsel, need to pay special attention to the unique rules governing the process, as discussed in this article.

Juvenile Law: 2000 Survey of Florida Law

Michael J. Dale*

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I. INTRODUCTION

Both the Florida courts and the state legislature spent a busy year dealing with juvenile justice and child welfare issues. The Supreme Court of Florida ruled on two significant matters. The first involved the reach of the *Florida Rules of Juvenile Procedure* in criminal cases, and the second the application of due process hearing rights to mental health residential treatment placements of children who have been committed to the custody of the Department of Children and Family Services as dependents.

The lower appellate courts continued more than a decade long process of holding the trial courts strictly accountable for compliance with basic constitutional principles of the right to counsel and statutory compliance in juvenile delinquency settings. In addition, the intermediate appellate courts faced an eclectic body of issues involving both the dependency and termination of parental rights settings including, among other things, questions of the rules for returning children to their natural parents.

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The legislature was also particularly active in the child welfare field. It passed legislation putting in place a dramatic reformulation of the child welfare system. Seeking a new approach, the legislature placed responsibility for child welfare services on private for-profit entities that would contract with the Department of Children and Family Services.

II. JUVENILE DELINQUENCY

A. Adjudicatory Issues

In juvenile law survey articles dating back a decade, this author has discussed the trial court's failure to comply with the United States Supreme Court's 1967 ruling in *In re Gault*,¹ providing that juveniles have a right to counsel in delinquency cases and if indigent, are entitled to an attorney paid for by the state.²

The *Florida Rules of Juvenile Procedure* and an extensive body of case law articulate the right to counsel and state the test for waiver of counsel.³ Yet, as recorded case law demonstrates, the trial courts continue to misapply the test for waiver of counsel. Thus, in *A.G. v. State*,⁴ a child waived counsel at a dispositional hearing in which the appellate court found that there was no determination that the child's waiver was knowing and voluntary as provided by the *Florida Rules of Juvenile Procedure*.⁵ Under Florida law, a juvenile has a constitutional right to the assistance of counsel at all critical stages of a delinquency proceeding.⁶ If there is a waiver, the court must determine if it was freely and intelligently made.⁷ In the case at bar, the court failed to advise the child of the nature of the rights he was waiving,

1. 387 U.S. 1 (1967).

2. See *id.* at 36-42; Michael J. Dale, *Juvenile Law: 1998 Survey of Florida Law*, 24 NOVA L. REV. 179, 185-86 (1999) [hereinafter *1998 Survey*]; Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179, 188 (1997) [hereinafter *1997 Survey*]; Michael J. Dale, *Juvenile Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 191, 194-95 (1995) [hereinafter *1995 Survey*]; Michael J. Dale, *Juvenile Law: 1992 Survey of Florida Law*, 17 NOVA L. REV. 335, 342-45 (1992) [hereinafter *1992 Survey*]; Michael J. Dale, *Juvenile Law: 1990 Survey of Florida Law*, 15 NOVA L. REV. 1169, 1179-80 (1991) [hereinafter *1990 Survey*]; Michael J. Dale, *1989 Survey of Florida Law: Juvenile Law*, 14 NOVA L. REV. 859, 861-64 (1990) [hereinafter *1989 Survey*].

3. FLA. R. JUV. P. 8.185; see *1998 Survey*, *supra* note 2, at 185 (discussing related Florida cases); *1997 Survey*, *supra* note 2, at 188 (addressing precisely the same topic).

4. 737 So. 2d 1244 (Fla. 5th Dist. Ct. App. 1999).

5. *Id.* at 1247; see FLA. R. JUV. P. 8.185.

6. See *A.G.*, 737 So. 2d at 1247.

7. *Id.*

that he understood the consequences of waiving legal representation, and that the waiver was knowingly and intelligently made.⁸

Similarly in *A.P. v. State*,⁹ in a short opinion, the appellate court reversed a trial court decision for failure to properly advise the child as to the right to counsel.¹⁰ In that case, not only was there no written waiver of counsel as required by the *Florida Rules of Juvenile Procedure*,¹¹ but the court found there was no thorough inquiry into the child's comprehension of the offer of counsel, nor a finding of the child's capacity to make the choice to waive counsel intelligently and understandingly as required under the *Florida Rules of Juvenile Procedure*.¹² This constituted fundamental error.¹³

Sometimes, the trial court personnel cannot even seem to get the document signing procedure correct. In *M.A.F. v. State*,¹⁴ the waiver of counsel was signed by the child but the place designated for the parent was left blank.¹⁵ In that case as well, there was a "failure to perform the necessary colloquy" about the right to counsel and a question as to whether the waiver of counsel was freely and intelligently made.¹⁶ The appellate court thus reversed.¹⁷

In testing whether the waiver of counsel is knowing and intelligent, the courts include in the analysis an evaluation of the child's prior exposure to the juvenile justice system and whether it would aid in the child's comprehension of his or her rights. In *T.S.D. v. State*,¹⁸ the appellate court held that the State did not meet its burden of demonstrating that the waiver of counsel was knowing and intelligent and specifically found that there was no demonstration that the juvenile's prior exposure to the juvenile court system would help in the comprehension of the right to counsel.¹⁹

In the author's experience, the process of advising juveniles of their right to counsel in delinquency cases often takes place in a group setting where a number of children are before the court waiting for their cases to be

8. *Id.* at 1246. The plea colloquy was as follows: The judge asked, "Okay. [A.G.], the Department of Juvenile Justice has recommended a Level 6 commitment program for you. Would you like to have a lawyer now?" A. G. responded, "No, ma'am." *Id.*

9. 740 So. 2d 1241 (Fla. 5th Dist. Ct. App. 1999).

10. *Id.* at 1241.

11. See FLA. R. JUV. P. 8.165(a).

12. *A.P.*, 740 So. 2d at 1241; see FLA. R. JUV. P. 8.165(b)(2).

13. *A.P.*, 740 So. 2d at 1241.

14. 742 So. 2d 534 (Fla. 2d Dist. Ct. App. 1999).

15. *Id.* at 535.

16. *Id.*

17. *Id.*

18. 741 So. 2d 1142 (Fla. 3d Dist. Ct. App. 1999).

19. *Id.* at 1143.

heard. The issue of whether this is acceptable arose in *B.F. v. State*.²⁰ The child appeared with his parents at an initial detention hearing, held as part of a group hearing.²¹ Some of the juveniles were present for arraignment hearings, while others were present for detention hearings, and the judge spoke to the entire group of youngsters explaining the nature of the hearing and informing them of various rights including the right to counsel.²² Subsequently, the child was called before the court and asked whether he heard the speech given when he first came in.²³ On appeal from a plea, the child claimed the court failed to adequately explain the right to counsel and to determine the child knowingly and intelligently waived the right.²⁴

The appellate court reversed, finding that while the arraignment colloquy minimally informed the child that he had the right to counsel, the trial court failed to make an individualized inquiry into the child's comprehension of the right to counsel and the capacity to make a decision to waive counsel in an intelligent and understanding fashion.²⁵ Recognizing that the generalized speech to a group of youngsters might not be enough, the appellate court ruled that testing the knowing and intelligent waiver of counsel requires several steps including informing the juvenile of the benefits that he would relinquish and the danger and disadvantages of representing himself, determining whether the youngster's choice was voluntarily and intelligently made, and determining whether there were any unusual circumstances which might preclude the youngster from exercising the right to represent himself.²⁶

Florida, like other states, provides for both waiver of a juvenile to adult court and certification as an adult.²⁷ This subject has been discussed on a number of occasions in prior editions of this survey.²⁸ In *State v. Brown*,²⁹ the circuit court certified a minor as an adult, despite his being seventeen years of age at the time of the alleged offense.³⁰ He had previously been adjudicated delinquent for possession of cocaine, which would have been a

20. 747 So. 2d 1061 (Fla. 5th Dist. Ct. App. 2000).

21. *Id.* at 1062.

22. *Id.*

23. *Id.* at 1063–64.

24. *Id.* at 1064.

25. *B.F.*, 747 So. 2d at 1065–66 (citing *J.R.V. v. State*, 715 So. 2d 1135 (Fla. 5th Dist. Ct. App. 1998) and *D.L. v. State*, 719 So. 2d 931 (Fla. 5th Dist. Ct. App. 1998)).

26. *Id.* at 1065.

27. See FLA. STAT. § 985.226 (2000).

28. 1998 Survey, *supra* note 2, at 185, 194–95; Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 23 NOVA L. REV. 819, 835–36 (1998) [hereinafter *Juvenile Law Issues*].

29. 745 So. 2d 1006 (Fla. 2d Dist. Ct. App. 1999).

30. *Id.* at 1006.

felony if committed as an adult.³¹ The appellate court held that certification as an adult did not end the jurisdiction of the juvenile court over the youngster's previous delinquent act.³² The adult criminal law statute provided certain exceptions to criminal court jurisdiction, those being: a person convicted of a felony whose civil rights and final authority had been restored, and a person who had committed a delinquent act but where the jurisdiction over the delinquent act had expired.³³ However, in the case at bar, the child was a delinquent under the jurisdiction of the juvenile court for his prior delinquent act at the time he was charged with possession of a firearm.³⁴ Thus, the appellate court reversed the trial court's dismissal of the State's information.³⁵

Another issue involving the interplay of juvenile and adult criminal court jurisdiction arose in *Williams v. State*.³⁶ In that case, a juvenile was charged as an adult for aggravated battery, an offense which qualified for direct filing in adult court.³⁷ He was also charged with other offenses which could have been heard in adult court together with the battery.³⁸ The question before the district court was whether, once the State entered a *nolle prosequi*³⁹ as to the battery offense, those other charges over which the adult court did not have any independent jurisdiction could still be heard in adult court.⁴⁰ The appellate court answered in the negative.⁴¹ Commenting that the issue was not, in its technical sense, one of subject matter jurisdiction (because both juvenile and adult criminal courts are divisions of the circuit court in Florida) the appellate court explained that the Supreme Court of Florida, nonetheless, recognizes the exclusive jurisdiction of the juvenile court in the absence of a statutory exception.⁴²

31. *Id.*

32. *Id.* at 1007.

33. FLA. STAT. § 790.23(2) (2000); see *Brown*, 745 So. 2d at 1007.

34. *Brown*, 745 So. 2d at 1007.

35. *Id.*

36. 737 So. 2d 1141 (Fla. 4th Dist. Ct. App. 1999).

37. *Id.* at 1142.

38. *Id.*

39. "A formal entry upon the record, by the plaintiff in a civil suit, or, more commonly, by the prosecuting attorney in a criminal action, by which he declares that he 'will no further prosecute' the case, either as to some of the defendants, or altogether." BLACK'S LAW DICTIONARY 1048 (6th ed. 1990).

40. *Williams*, 737 So. 2d at 1141.

41. *Id.* at 1142.

42. *Id.* at 1141.

The *Florida Rules of Juvenile Procedure* contain a ninety-day speedy trial rule.⁴³ In juvenile cases, the time begins to run on the earlier of the date the child is taken into custody or the date a delinquency petition is filed.⁴⁴ Should the hearing not commence within the ninety-day period the child can move to dismiss based upon violation of the speedy trial rule.⁴⁵ The Supreme Court of Florida has held that the State may not refile charges against a juvenile after the speedy trial rule has expired.⁴⁶ In *D.A.J. v. State*,⁴⁷ the State filed the initial petition 103 days after the child's arrest and thirteen days after the speedy trial period had run.⁴⁸ Thus, the court should have granted the motion to dismiss.⁴⁹ Furthermore, although the child failed to file a written motion for discharge, the court held that Rule 8.090 of the *Florida Rules of Juvenile Procedure*, which requires written motions dealing with the fifteen-day window of recapture, was irrelevant in this case because the State failed to file the initial petition within the speedy trial period.⁵⁰ Therefore, the appeal could be heard and the reversal ensued.⁵¹

A final case involved the issue of the application of the *Florida Rules of Juvenile Procedure* to a child who has been filed against in adult court. The question in *State v. Olivo*⁵² was whether the adult speedy trial rule or the juvenile speedy trial rule governs when the State directly files against a juvenile in the adult court.⁵³ The supreme court held that the adult speedy trial rule governs.⁵⁴

B. *Dispositional Issues*

Probation, known until recently as "community control" in Florida, is one of the dispositional alternatives in chapter 985 of the *Florida Statutes* which has been recently described by one court as a "moderately complex statute [that] allows for many different dispositions."⁵⁵ It has been the

43. FLA. R. JUV. P. 8.090(a).

44. 8.090(a)(1)-(2).

45. 8.090(d).

46. *P.S. v. State*, 658 So. 2d 92 (Fla. 1995).

47. 754 So. 2d. 817 (Fla. 2d Dist. Ct. App. 2000).

48. *Id.* at 819.

49. *Id.*

50. *Id.*

51. *Id.*

52. 759 So. 2d 647 (Fla. 2000).

53. *Id.* at 649.

54. *Id.* at 650.

55. *T.J. v. State*, 743 So. 2d 1158, 1159 (Fla. 2d Dist. Ct. App. 1999).

subject of substantial discussion in earlier surveys.⁵⁶ In *T.J. v. State*,⁵⁷ the issue was whether the trial court was obligated to actually enter an order citing the statutory requirement that community control end upon the child's eighteenth birthday.⁵⁸ The appellate court held that it was receding from prior decisions which either held or suggested that the order must require a statement that the community control end at age nineteen.⁵⁹ The court held that both the juvenile and the State are on legal notice of the content of chapter 39 regarding termination of community control at the child's nineteenth birthday and further that the form disposition order approved by the supreme court in 1987 did not contain the statutory language.⁶⁰

In an interesting opinion involving the application of the Miami Dade County ordinance relating to spray painting,⁶¹ the Third District Court of Appeal in *State v. D.S.*,⁶² recently held that sentencing a juvenile to time served in the detention center based upon a nolo contendere plea to possessing spray paint cans complied with the ordinance provision for punishment by a term in jail.⁶³ Significantly, the court did not reach the issue of the validity of the requirement that the juvenile disposition conform to a plan for punishment contained in the ordinance as provided for in section 806.13(7) of the *Florida Statutes*.⁶⁴ Raised, but not properly before the appellate court, was the constitutional validity of a statute that placed dispositional authority in the ordinance.⁶⁵ In dicta, Chief Judge Schwartz commented that it might be inappropriate to suggest that the court resist a view of the law that interferes with the right and duty of the juvenile court to render appropriate dispositions concerning a particular child and situation before the court.⁶⁶

56. See 1998 Survey, *supra* note 2, at 183–85; *Juvenile Law Issues*, *supra* note 28, at 833–34, 841–44; 1997 Survey, *supra* note 2, at 195–97.

57. 743 So. 2d 1158 (Fla. 2d Dist. Ct. App. 1999).

58. *Id.* at 1159.

59. *Id.* at 1160 (citing *C.D.D. v. State*, 684 So. 2d 866 (Fla. 2d Dist. Ct. App. 1996); *C.P. v. State*, 674 So. 2d 183 (Fla. 2d Dist. Ct. App. 1996); *M.T.H. v. State*, 676 So. 2d 77 (Fla. 2d Dist. Ct. App. 1996); *M.V. v. State*, 507 So. 2d 1166 (Fla. 2d Dist. Ct. App. 1987) and *F.R. v. State*, 473 So. 2d 785 (Fla. 2d Dist. Ct. App. 1985)).

60. *T.J.*, 743 So. 2d at 1160.

61. The Third District Court of Appeal previously upheld the constitutionality of the ordinance in *D.P. v. State*, 705 So. 2d 593 (Fla. 3d Dist. Ct. App. 1997); see *Juvenile Law Issues*, *supra* note 28, at 819, 838–39.

62. 760 So. 2d 957 (Fla. 3d Dist. Ct. App. 2000).

63. *Id.* at 958.

64. *Id.*

65. *Id.*

66. *Id.* at 959.

III. DEPENDENCY

In recent years, the subject of grandparent visitation and custody rights has been before the United States Supreme Court, the Supreme Court of Florida, and Florida's intermediate appellate courts. As the discussion in this section of the article shows, parent and grandparent visitation issues arise within dependency proceedings. Therefore, an analysis of the recent appellate visitation decisions is germane to understanding their effect upon dependency proceedings.

In the Spring of 2000, in a plurality opinion, the United States Supreme Court decided *Troxel v. Granville*,⁶⁷ a case involving the State of Washington's grandparent visitation statute.⁶⁸ The Supreme Court held that it need not reach the constitutional question of whether the Due Process Clause of the Fourteenth Amendment requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.⁶⁹ Because of the sweeping breadth and application of unlimited power under the Washington statute, the Supreme Court did not have to decide the narrower constitutional issue of whether harm need be proven to order grandparent visitation.⁷⁰ It found that the expansive Washington visitation statute was an unconstitutional infringement on the parental right to make decisions concerning the care, custody, and control of children.⁷¹ Specifically, the Court held that under Washington law the burden of disproving the visitation was on the parents, and the Washington court gave no weight to the parents' assent to visitation before the filing of a petition.⁷² Concluding that what happened in Washington was a simple disagreement between the court and the parents concerning the child's best interest, such a decision constituted an unconstitutional infringement on the parents' basic decisionmaking rights.⁷³

In a series of cases beginning with *Beagle v. Beagle*,⁷⁴ and presaging the United States Supreme Court opinion, the Supreme Court of Florida effectively rejected the entire Florida grandparent visitation statute on grounds that it violated the parents' right to privacy under Article I, section

67. 120 S. Ct. 2054 (2000).

68. *Id.* at 2057.

69. *Id.* at 2064.

70. *Id.*

71. *Id.* at 2065.

72. *Troxel*, 120 S. Ct. at 2062.

73. *Id.* at 2061.

74. 678 So. 2d 1271 (Fla. 1996) (holding that section 752.01(1)(a) of the *Florida Statutes* governing visitation in context of families was unconstitutional).

23 of the Florida Constitution.⁷⁵ The court decided on the basis of the Florida Constitution what the United States Supreme Court did not reach under the United States Constitution, namely that family privacy precludes court ordered grandparent visitation unless a showing is made that somehow lack of visitation will harm the child.⁷⁶

Despite these decisions, grandparent visitation and custody continue to be issues in Florida's dependency and termination of parental rights cases. Chapter 39 of the *Florida Statutes* provides for grandparent visitation after a child has been adjudicated dependent, and terminates visitation after the child is returned to the physical custody of the other parent.⁷⁷ In *L.B. v. C.A.*,⁷⁸ the Fourth District Court of Appeal affirmed a trial court's dismissal of the grandparents' petition for visitation in a dependency proceeding because there were no allegations of harm and the child had been reunited with his mother.⁷⁹

In a second case, *Powell v. Department of Children & Families*,⁸⁰ the appellate court affirmed a trial court's denial of the grandparents' application for unsupervised visitation with their dependent grandchildren.⁸¹ The trial court found a compelling reason not to allow the visitation in the home of the grandparents because the children's father, who had been arrested for kidnapping and domestic battery, had free access to the grandparents' home, and thus the grandparents could not assure the safety of the children.⁸²

Finally, grandparent intervention also arises in the context of adoption. Section 63.0425 of the *Florida Statutes* requires that a grandparent be

75. *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000) (finding the grandparent visitation statute was unconstitutional in the context of deceased parent); *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998) (ruling the grandparent visitation statute was unconstitutional in the context of out-of-wedlock child); see also *Lonon v. Ferrell*, 739 So. 2d 650 (Fla. 2d Dist. Ct. App. 1999) (holding that in face of mother's objection, biological father's parents have no right to visitation with child after biological father and mother divorce, mother remarries, and biological father consents to child's adoption by stepfather).

76. *Von Eiff*, 720 So. 2d at 515. In the 2000 Legislative Session Senator Campbell unsuccessfully sought to amend the grandparent visitation statute, section 752.01 of the *Florida Statutes*, to require a showing of present or threatened significant mental or physical harm as a result of the refusal to permit visitation. See Fla. S. Res. 288 (Fla. 2000).

77. FLA. STAT. § 39.509 (2000).

78. 738 So. 2d 425 (Fla. 4th Dist. Ct. App. 1999).

79. *Id.* at 427. In *L.B.*, the court discussed section 39.4105 of the *Florida Statutes*. *Id.* This section has since been renumbered § 39.509. See FLA. STAT. § 39.509 (2000).

80. 764 So. 2d 632 (Fla. 1st Dist. Ct. App. 2000).

81. *Id.* at 632.

82. *Id.*

provided with notice when the grandchild is placed for adoption if the child lived with the grandparent for at least six months.⁸³

Previous juvenile law surveys have discussed the issue of parents using a variety of procedures, including dependency proceedings, as tactical devices to oust spouses, former spouses, and putative parents from involvement with the child.⁸⁴ In *L.J.R. v. T.T.*,⁸⁵ a natural father appealed a final judgment granting a petition for adoption filed by the child's natural mother.⁸⁶ The judgment of adoption had terminated the father's parental rights.⁸⁷ He was imprisoned at the time in Massachusetts.⁸⁸ The court recognized that a proceeding to terminate parental rights, while generally brought by the Department of Children and Family Services, might be brought pursuant to Florida law by any person with knowledge of the facts, which would include a parent.⁸⁹ However, the court concluded that the parent could not go straight to the adoption process without complying with the termination of parental rights provisions of Florida law.⁹⁰ Further, the natural mother could not circumvent the statutory restrictions on terminating the father's parental rights while retaining her own by petitioning for adoption as a single birth parent.⁹¹

A significant issue of parents' custodial rights arose recently in the case of *Department of Children & Families v. Benway*.⁹² The Department of Children and Families appealed an order requiring it to send a dependent child to live with his natural father in Vermont.⁹³ Vermont officials had disapproved of the placement, having been contacted by Florida state officials it would appear, pursuant to the Interstate Compact on the Placement of Children ("ICPC").⁹⁴ Because Vermont disapproved of the placement, the Department of Children and Families appealed from the court order which held that the child should be placed with the father irrespective

83. FLA. STAT. § 63.0425(1) (2000); see *In re X.Z.C.*, 747 So. 2d 1006 (Fla. 2d Dist. Ct. App. 1999) (holding that the "lived with" provision is unambiguous and only requires that the child live with the grandparent for at least six months and not that the child resides solely with the grandparents).

84. See 1995 Survey, *supra* note 2, at 208–09; 1992 Survey, *supra* note 2, at 369.

85. 739 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1999).

86. *Id.* at 1284.

87. *Id.*

88. *Id.*

89. *Id.* at 1285 (citing FLA. STAT. § 39.461(1) (1997)).

90. *L.J.R.*, 739 So. 2d at 1287.

91. *Id.*

92. 745 So. 2d 437 (Fla. 5th Dist. Ct. App. 1999).

93. *Id.* at 438.

94. *Id.*; see FLA. STAT. § 409.401, Art. III (2000).

of Vermont's disapproval.⁹⁵ The appellate court held that the ICPC is applicable to an out-of-state placement of a dependent child with a natural parent, even though the statute makes no reference to a placement by a state agency back with a natural parent.⁹⁶ The statute does refer to the transfer of a child "for placement in foster care or as a preliminary to a possible adoption."⁹⁷ The Florida court held, nonetheless, that the statute ought to be liberally construed.⁹⁸ The Fifth District also relied upon other state court decisions and a law review article that suggest that the statute ought to be interpreted to include placement of a child with natural parents.⁹⁹ The District Court of Appeal concluded that "[o]nce a court has legal custody of a child, it would be negligent to relinquish that child to an out-of-state parent without some indication that the parent is able to care for the child appropriately."¹⁰⁰

Left undecided, indeed not even discussed in the *Benway* case, are the questions of family privacy and parental rights constitutionally protected under the United States Supreme Court decision in *Stanley v. Illinois*,¹⁰¹ and the series of Florida cases dealing with parental privacy beginning with *Beagle v. Beagle*.¹⁰² In a dependency proceeding, in the absence of a showing of harm, and it may well be that harm could have been shown in the *Benway* case, there is no constitutional basis for keeping a child from a natural parent.¹⁰³ To do otherwise is to deny the liberty and privacy based constitutional rights of natural parents recognized in these cases.¹⁰⁴

A second case, raising similar issues, is *V.P. v. Department of Children & Families*.¹⁰⁵ In *V.P.*, a non-custodial parent residing in Illinois sought to have the child, who was the subject of a dependency petition alleging abuse and neglect by the child's mother and stepfather, temporarily placed with him.¹⁰⁶ Instead, the trial court placed the child with a non-relative.¹⁰⁷ The

95. *Benway*, 745 So. 2d at 438.

96. *Id.*

97. *Id.* (quoting FLA. STAT. § 409.401, Art. III(a) (1997)).

98. *Id.*

99. *Id.* at 439 (citing Kimberly M. Butler, *CHILD WELFARE—Outside the Interstate Compact on the Placement of Children—Placement of a Child with a Natural Parent*, 37 VILL. L. REV. 896 (1991)).

100. *Benway*, 745 So. 2d at 439.

101. 405 U.S. 645 (1972).

102. 678 So. 2d 1271 (Fla. 1996).

103. *See id.* at 1277.

104. *See id.* at 1275.

105. 746 So. 2d 590 (Fla. 5th Dist. Ct. App. 1999).

106. *Id.* at 590.

107. *Id.*

district court held that the trial court did not comply with chapter 39 provisions regarding temporary custody, noting that absent evidence and findings that the temporary custody would endanger the safety, well-being, and physical, mental, or emotional health of the child, the court should order temporary placement of the child with the natural parent.¹⁰⁸

A third issue of parental custody arose in *J.R. v. Department of Children & Families*.¹⁰⁹ In *J.R.*, a mother and stepfather were charged with abusing their children.¹¹⁰ At the detention hearing the natural father requested custody of the minor children.¹¹¹ The court made no finding of facts pursuant to chapter 39, but simply placed the children in shelter care.¹¹² Section 39.508(8) of the *Florida Statutes* requires that when a child is removed from the custody of a parent, the court must determine whether there is a parent with whom the child is not residing who desires to assume custody of the child and that the child shall be placed with that parent “unless it finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child.”¹¹³ In the *J.R.* case, the district court held that the lower court should at least have conducted a hearing to determine the father’s suitability under the statute.¹¹⁴

These three cases demonstrate by their reference to the *Florida Statutes* that the failure to allow the parent to have custody of the child must be premised upon a showing of endangering the safety of the child. Although the appellate courts made no such reference, the statute and their holdings closely follow the Supreme Court decision in *Stanley v. Illinois*.¹¹⁵

Concern for conditions in a Department of Children and Family assessment center by a trial judge in Broward County generated an appellate decision on the scope of the authority of the dependency court in *Department of Children & Family Services v. I.C.*¹¹⁶ The issue arose from a statutory court review of a dependency case in which the trial court learned that the juvenile before the court, as well as others with disabilities who had been rejected from various placements, were being brought to a particular assessment center facility where they stayed until late at night without what appeared to be appropriate placement supervision.¹¹⁷ The trial court ordered

108. *Id.*

109. 745 So. 2d 1059 (Fla. 3d Dist. Ct. App. 1999).

110. *Id.* at 1059.

111. *Id.*

112. *Id.*

113. *Id.*; FLA. STAT. § 39.508(8) (2000).

114. *J.R.*, 745 So. 2d at 1059.

115. 405 U.S. 645 (1972).

116. 742 So. 2d 401 (Fla. 4th Dist. Ct. App. 1999).

117. *Id.* at 402.

the agency to terminate the practice, as well as to produce the relevant records of all the children who had recently been placed at the center.¹¹⁸ The issue before the appellate court was one of division of responsibility between the executive branch and the courts, and the degree to which the juvenile court can act to protect children within its jurisdiction.¹¹⁹ The appellate court affirmed in part requiring the agency to produce the names of the children at the assessment center, but reversed the production of more extensive records and the entry of an injunction against the agency preventing children with disabilities in the judge's division from being held in the center.¹²⁰

Finally, and most significantly, in dicta the appellate court recognized the severity of the problem of "the horrendous number of abused and abandoned children, and the difficult caseloads of both the case workers and the courts in juvenile proceedings."¹²¹ The court then added:

What would help considerably is if each child could have a guardian *ad litem* or attorney *ad litem* who could be in contact with the child on a more regular basis and serve as the child's advocate. Parents are represented in these proceedings, but the child, the alleged object of everyone's concern, has no voice and no capacity to reach the court in many cases. We commend the bar volunteer projects such as Lawyers for the Children of America, for their representation of dependent children.¹²²

Further discussion of the Florida legislature's very limited effort to fund a model program for the representation of children in dependency cases is discussed later in this article.

In making determinations of dependency, Florida appellate courts continue to apply and interpret the Supreme Court of Florida's 1991 decision in *Padgett v. Department of Health & Rehabilitative Services*,¹²³ in which the court held that the prior termination of a parent's rights as to one child supports the severing of the parent's rights as to another child.¹²⁴ In *M.F. v.*

118. *Id.*

119. *Id.* at 404.

120. *Id.* at 404-05.

121. *I.C.*, 742 So. 2d at 406.

122. *Id.*

123. 577 So. 2d 565 (Fla. 1991).

124. *Id.* at 571; see generally *Juvenile Law Issues*, *supra* note 28, at 825; Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 333, 368-73 (1991) [hereinafter *1991 Survey*].

Department of Children & Families,¹²⁵ a father appealed from an order adjudicating two minor children dependent following his conviction for attempted sexual battery on a stepdaughter.¹²⁶ The appellate court recognized that the abuse of one child can provide a cause for termination of parental rights or adjudication of dependency as to a sibling if there is a substantial likelihood of future abuse and neglect of the sibling if that child were returned to the parent.¹²⁷ The issue in *M.F.* was whether the copy of the father's conviction for sexual abuse of a stepchild, as the only evidence presented to support an adjudication of dependency of the two siblings, was adequate.¹²⁸ The court held it was.¹²⁹ The appellate court relied upon professional literature showing that the act of sexual abuse itself provides evidence of likelihood of sexual abuse of other children.¹³⁰ In so doing, however, the court distanced itself from the Fifth District Court of Appeal that required additional evidence of the likelihood that the parent would similarly abuse other children.¹³¹

Services to children who have been removed from their homes as a result of a petition for dependency in Florida have been the subject of significant recent litigation. Two class action lawsuits challenging conditions in the Florida foster care system are currently pending in the federal courts. *Ward v. Kearny*¹³² is a challenge to conditions in foster care in Broward County.¹³³ That case was filed on October 20, 1998 and conditionally certified as a class on March 17, 1999, with a settlement agreement signed by the parties on January 26, 2000.¹³⁴ The federal court held a Rule 23 of the *Federal Rules of Civil Procedure* fairness hearing on

125. 742 So. 2d 490 (Fla. 2d Dist. Ct. App. 1999).

126. *Id.* at 491.

127. *Id.*

128. *Id.*

129. *Id.*

130. *M.F.*, 742 So. 2d at 491.

131. *Id.* (citing *Eddy v. Dep't of Children & Family Servs.*, 704 So. 2d 734, 736 (Fla. 5th Dist. Ct. App. 1998); *Denson v. Dep't of Health & Rehab. Servs.*, 661 So. 2d 934, 936 (Fla. 5th Dist. Ct. App. 1995); and *Palmer v. Dep't of Health & Rehab. Servs.*, 547 So. 2d 981, 984 (Fla. 5th Dist. Ct. App. 1989)); see also Michael J. Dale, *Juvenile Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 190, 216-17 (1996) [hereinafter *1996 Survey*].

132. Compl. at 1, *Ward v. Feaver*, (S.D. Fla., filed Oct. 20, 1998) (No. 98-7137-Civ.) (subsequently *Kathleen Kearney*, in her official capacity as Secretary of State, was substituted as the named defendant in this case pursuant to Rule 25(d) of the *Federal Rules of Civil Procedure*).

133. Compl. at 1, *Ward* (No. 98-7137-Civ.).

134. Settlement Agreement, *Ward v. Kearney* (S.D. Fla., filed Feb. 17, 2000) (No. 98-7137-Civ.).

May 31, 2000, and approved the settlement agreement.¹³⁵ A second case, *Thirty-One Foster Children v. Bush*,¹³⁶ filed on June 13, 2000, is also presently pending in the federal district court for the Southern District of Florida.¹³⁷ That case challenges foster care throughout the state and makes multiple constitutional and statutory claims.¹³⁸

Another significant issue of out-of-home care in the dependency system came before the Supreme Court of Florida this past year in *M.W. v. Davis*.¹³⁹ The issue in that case was whether, when a court orders a child to be placed in a residential facility for mental health treatment after the child has been committed to the local custody of the Department of Children and Families in a dependency proceeding, the child must have an evidentiary hearing prior to the court ordering the temporary placement in the residential mental health facility.¹⁴⁰

The supreme court analyzed whether the requirements of Florida's civil commitment statute, known as the Baker Act,¹⁴¹ are incorporated into the laws regulating dependency proceedings.¹⁴² The court held that neither the requirements of chapter 39 nor the Florida Constitution mandates an evidentiary hearing that complies with the substantive and procedural requirements of the Baker Act prior to a dependent child being ordered by the court into a residential mental health facility.¹⁴³ In making its constitutional ruling, the Supreme Court of Florida relied on *Parham v. J.R.*,¹⁴⁴ the 1979 opinion in which the United States Supreme Court set out the constitutional due process procedural standards necessary when a child is committed by a parent voluntarily, or by a state agency when the child is in the custody of the state, into a state mental hospital.¹⁴⁵ The *Parham* court, according to the Supreme Court of Florida, set three minimum due process standards to be met when a child is committed including an inquiry by a neutral fact finder, albeit not in a form of a judicial inquiry, an inquiry to probe the child's background using available resources, and a periodic

135. Order Approving Settlement Agreement, *Ward v. Kearney* (S.D. Fla. May 31, 2000) (No. 98-7137-Civ.).

136. Amended Compl., *Thirty-One Foster Children v. Bush*, (S.D. Fla., filed Aug. 28, 2000) (No. 00-2116-Civ.).

137. *Id.*

138. *Id.* at 2-3.

139. 756 So. 2d 90 (Fla. 2000).

140. *Id.* at 92.

141. FLA. STAT. § 394.467 (2000).

142. *M.W.*, 756 So. 2d at 92.

143. *Id.*

144. 442 U.S. 584 (1979).

145. *Id.*; see *M.W.*, 756 So. 2d at 99.

review by a neutral fact finder.¹⁴⁶ Thus, the Supreme Court of Florida held implicitly that a prior due process evidentiary hearing was not constitutionally required.¹⁴⁷ The child argued alternatively that the *Florida Statutes* provided more rights than the minimum federal constitutional procedures.¹⁴⁸ After detailed review of chapter 39, the court concluded that the legislature did not intend the Baker Act to apply to children who had been adjudicated dependent and placed in the temporary legal custody of the Department of Children and Family Services.¹⁴⁹

Finally, the court looked at the question of what procedures should apply before the court orders a dependent child to be placed in a residential psychiatric facility against the child's wishes.¹⁵⁰ Initially, the court recognized that chapter 39 provides that there shall be judicial and other procedures to assure due process for children in the form of fair hearings that recognize, protect, and enforce children's constitutional and other legal rights.¹⁵¹ The court then expressed concern that while the procedures in the statute might be construed to require a precommitment hearing, the statute does not adequately address a number of significant issues including whether there ought to be an appointment of an attorney for the child before commitment, the type of hearing required, the standard of proof to apply, and whether the child should have the right to put on evidence before placement in the psychiatric facility.¹⁵² The decision to place a child in a psychiatric facility must be included in the case plan developed in the course of the dependency proceeding.¹⁵³ However, the court also concluded that an order that approves the placement of a dependent child in a locked residential facility against that child's wishes deprives a child of liberty and thus makes obligatory clear cut procedures to be followed by the dependency judge.¹⁵⁴ Such procedures, the court opined, do not appear to exist in the *Florida Rules of Juvenile Procedure*.¹⁵⁵

Then, in forceful language, the court pointed to its concern that while the various parties and actors in the proceeding would be acting in the child's best interest, nonetheless, the child might not perceive that anyone had his or her best interest at heart when the child was placed in a locked

146. *M.W.*, 756 So. 2d at 99.

147. *Id.*

148. *Id.* at 100.

149. *Id.* at 105.

150. *Id.*

151. *M.W.*, 756 So. 2d at 106 (citing FLA. STAT. § 39.001(1)(1) (2000)).

152. *Id.* at 106-07.

153. *Id.* at 107.

154. *Id.*

155. *Id.*

psychiatric facility against his or her wishes without an opportunity to be heard.¹⁵⁶ The court stated, "Indeed, the issue presented by this case extends beyond the legal question of what process is due; rather, this case also presents the question of whether a child believes that he or she is being listened to and that his or her opinion is respected and counts."¹⁵⁷ The court rejected the ill-conceived argument of the Guardian Ad Litem Program of the Eleventh Judicial Circuit, which argued that the court ought not find that the Baker Act procedures should be incorporated into the statutes, because the dependency courts are so busy and lack time and resources to accomplish the procedures that were already statutorily required.¹⁵⁸ The court explained that although dependency courts are busy this does not mean that the court could reject procedural rights of a child about to be placed in a residential treatment facility against his or her wishes simply because there are other hearings under chapter 39 and that additional hearings might somehow burden the court.¹⁵⁹

The court concluded that while the Baker Act did not apply, in the future there ought to be clear procedures prior to placement in a residential treatment facility, which should include a hearing in which the child has a meaningful opportunity to be heard.¹⁶⁰ The court directed the Juvenile Court Rules Committee to submit to the court proposed rules that set forth procedures to be followed in a residential mental health situation.¹⁶¹

Although children have no right to counsel in dependency proceedings in Florida, several years ago the Florida legislature made absolute the right to counsel to parents in dependency proceedings providing that, if indigent, parents are entitled to appointed counsel unless the indigent parent waives that right.¹⁶² The *Florida Rules of Juvenile Procedure* follow the statute and make explicit the procedure by which the court shall advise parents of the right to counsel and determine whether there is a waiver of counsel.¹⁶³ In *D.M. v. Department of Children & Family Services*,¹⁶⁴ the trial court blatantly failed to comply with these provisions and the appellate court reversed.¹⁶⁵ Among the trial court's failings were advising the parent at the arraignment that she could either admit or deny the allegations in the petition

156. *M.W.*, 756 So. 2d at 107-08.

157. *Id.* at 108.

158. *Id.*

159. *Id.*

160. *Id.* at 109.

161. *M.W.*, 756 So. 2d at 109.

162. See FLA. STAT. § 39.013(9)(a) (2000).

163. See FLA. R. JUV. P. 8.320.

164. 750 So. 2d 128 (Fla. 2d Dist. Ct. App. 2000).

165. *Id.* at 130.

and if she chose to deny them she would have the right to a lawyer.¹⁶⁶ At the arraignment hearing, while determining that the mother was on medication, the trial court only briefly mentioned the right to counsel which failed to fulfill the duty to advise of the right to counsel and what the right entails.¹⁶⁷ The trial court also failed to determine whether the mother's waiver was made knowingly, intelligently, and voluntarily.¹⁶⁸ At the shelter and dispositional hearings, the problem was the court's failure to advise the mother of a right to counsel at all.¹⁶⁹ The appellate court reversed.¹⁷⁰

Chapter 39 provides for termination of jurisdiction in a dependency case based upon the recommendation of the Department of Children and Family Services or the guardian ad litem or based upon any other relevant factors, once six months have passed since returning the child to the parents.¹⁷¹ In *W.R. v. Department of Children & Families*,¹⁷² despite the recommendations of the guardian ad litem and the Department, the court continued jurisdiction after six months had passed since the return of the child to her parents.¹⁷³ In the *W.R.* case, nothing appeared on the record to justify continued jurisdiction.¹⁷⁴ The appellate court recognized that it was difficult to let go when one takes responsibility for a child's welfare.¹⁷⁵ However, as the court put it, "our present legal system provides that under normal circumstances (as have come to pass in this case), parents have both the joy and the burden of raising their children without interference from the courts."¹⁷⁶

Finally, in an important case of first impression, the Third District Court of Appeal in *M.C. v. Department of Children & Families*,¹⁷⁷ ruled that the Americans With Disabilities Act¹⁷⁸ is inapplicable when used as a defense by the parent in proceedings under chapter 39 related to

166. *Id.* at 129.

167. *See id.*

168. *Id.* at 130.

169. *M.C.*, 750 So. 2d at 130.

170. *Id.*

171. FLA. STAT. § 39.806 (2000).

172. 757 So. 2d 605 (Fla. 5th Dist. Ct. App. 2000).

173. *Id.* at 606.

174. *Id.* at 606-07.

175. *Id.* at 607.

176. *Id.*

177. 750 So. 2d 705 (Fla. 3d Dist. Ct. App. 2000).

178. 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 2000).

dependency.¹⁷⁹ In so doing, the court followed several other state courts which had rejected the argument.¹⁸⁰

IV. TERMINATION OF PARENTAL RIGHTS

The current provision of chapter 39 governing termination of parental rights contains nine separate grounds for termination including: 1) the voluntary execution of a written surrender; 2) abandonment of the child and the identity and location of parent is unknown despite a sixty-day diligent search; 3) the existence of conduct toward the child demonstrating continuing parental relationship threatens life, safety, well-being, or physical, mental, or emotional health of the child despite services being rendered; 4) the incarceration in a state or federal institution for a substantial period of time before the child will reach the age of eighteen or the parent is determined to be a violent career criminal; 5) the filing of a plan and the child continues to be abused, neglected, or abandoned wherein the failure to comply is for a period of twelve months or more after filing for dependency; 6) the parents are engaged in egregious conduct toward the child; 7) the parents have subjected the child to aggravated sexual abuse; 8) the parents have committed murder or voluntary manslaughter of another child or a felonious assault involving serious bodily injury to the child; or 9) the parental rights of the parent to a sibling have been terminated involuntarily.¹⁸¹ The law is clear that the court must address the statutory factors listed in section 39.806 of the *Florida Statutes*.¹⁸²

Furthermore, the court at the termination hearing shall consider what the statute describes as the "manifest best interests of the child," and in doing so shall consider eleven different factors.¹⁸³ The court will then enter a written order with the findings of facts and conclusions of law.¹⁸⁴ In *A.C. v. Department of Children & Families*,¹⁸⁵ the appellate court was compelled

179. *M.C.*, 750 So. 2d at 706 (discussing 42 U.S.C.A. § 12132 (West 1999)).

180. *See Bartell v. Lohiser*, 215 F.3d 550 (6th Cir. 2000); *In re Antony B.*, 735 A.2d 8930 (Conn. App. Ct. 1999); *A.P. v. State*, 728 A.2d 375 (Pa. Super. Ct. 1999); *In re B.K.F.*, 704 So. 2d 314 (La. Ct. App. 1997); *In re B.S.*, 693 A.2d 716 (Vt. Ct. App. 1997); *Stone v. Daviess County Div. of Children & Family Servs.*, 656 N.E.2d 824 (Ind. Ct. App. 1995).

181. FLA. STAT. § 39.806(1)(a)(I) (2000).

182. *See id.*

183. § 39.810.

184. § 39.809(5).

185. 751 So. 2d 667 (Fla. 2d Dist. Ct. App. 2000).

to reverse because the final judgment failed to address the statutory factors listed in the manifest best interests of the child section of the statute.¹⁸⁶

Also in *A.C.*, the court commented on a rather basic evidentiary proposition. The court held that in conducting an adjudicatory hearing in a termination case the trial court is required to abide by the rules of evidence in civil cases and thus must receive admissible evidence prior to entry of a final judgment terminating parental rights.¹⁸⁷ The court is not permitted to consider inadmissible evidence in determining whether it shall terminate parental rights.¹⁸⁸

Termination of parental rights may not occur where a prior dependency adjudication is deficient because a parent is not properly served with notice of an arraignment hearing at which a default adjudication of dependency was entered against the parent.¹⁸⁹ In *T.R.F. v. Department of Children & Families*,¹⁹⁰ the problem was whether the failure to make a diligent search as a predicate to determining that the parents' failure to appear at the arraignment hearing may result in a default determination of dependency and subsequent termination of parental rights.¹⁹¹ Chapter 39 provides that an affidavit of diligent search shall be filed where the parent's identity or residence is unknown.¹⁹² The court in *T.R.F.* explained that a diligent search involves checking with the offices of the Department of Children and Family Services that might have information about the parent, other state and federal agencies that might have information, utility and postal providers, or appropriate law enforcement agencies.¹⁹³

The same problem arose in *S.N.S. v. Department of Children & Families*.¹⁹⁴ An order terminating parental rights was reversed because the record contained no evidence that the mother was served with notice of the arraignment hearing at which a default adjudication of dependency was entered.¹⁹⁵ In *S.N.S.*, the trial court took into account the father's representations regarding the mother's knowledge of the hearing and the father's specific statement that the mother was aware of the hearing but was

186. *Id.* at 669 (citing FLA. STAT. § 39.467(3) (1997)).

187. *Id.*

188. *Id.*

189. *See T.R.F. v. Dep't of Children & Families*, 741 So. 2d 1184, 1186 (Fla. 2d Dist. Ct. App. 1999).

190. 741 So. 2d 1184 (Fla. 2d Dist. Ct. App. 1999).

191. *Id.* at 1186.

192. FLA. STAT. § 39.502(8)–(9) (2000).

193. *T.R.F.*, 741 So. 2d at 1186.

194. 750 So. 2d 61 (Fla. 2d Dist. Ct. App. 1999).

195. *Id.* at 62.

too embarrassed to attend.¹⁹⁶ Such oral notice, if it existed at all, was insufficient to satisfy the Florida statute.¹⁹⁷

V. STATUTORY CHANGES

A. *Dependency and Termination of Parental Rights*

The Florida legislature has changed the name and purpose of the Department of Children and Family Services on a number of occasions over the past twenty years.¹⁹⁸ This year is no different. The legislature has changed the philosophical approach of the Department by moving to privatization of the child welfare system through the use of profit making entities to carry out many of the responsibilities of the Department.¹⁹⁹ The key component of the new approach involves authorizing the Department of Children and Family Services to contract for services with a lead agency in each county.²⁰⁰ The obligations of the lead agency shall include: directing and coordinating programs and services, including the provision of core services involving intake and eligibility, assessment, service planning, and case management; developing a service provider network that can develop services contained in client service plans; managing and monitoring provider contracts; developing and implementing effective bill payment mechanisms; providing or arranging for the provision of administrative services to support the service delivery scheme; employing department approved training and meeting department defined credentials and standards; providing for performance measurements in accordance with the department's quality assurance program; developing and maintaining interagency collaboration; insuring that all federal and state reporting requirements are met; operating the consumer complaint and grievance process; and insuring that services are coordinated.²⁰¹ The theory for the change in approach is one of free enterprise competition described as a competitive procurement approach to services.²⁰²

196. *Id.*

197. *Id.*

198. *See 1998 Survey, supra note 2, at 193-94; Juvenile Law Issues, supra note 28, at 828-30; 1997 Survey, supra note 2, at 205-06; 1995 Survey, supra note 2, at 217-19.*

199. *See Ch. 2000-139, § 2, 2000 Fla. Laws 306, 310 (codified at FLA. STAT. § 20.19 (2000)).*

200. *Id.* at 315 (codified at FLA. STAT. § 20.19 (2000)).

201. *Id.*

202. *See id.* § 7, 2000 Fla. Laws at 320-24 (codified at FLA. STAT. § 402.73 (2000)).

The second significant change has been the transfer of responsibility to perform child protective investigations to the sheriffs of Pasco, Manatee, and now Broward County.²⁰³

In an effort to clarify court jurisdiction when dependency proceedings and custody and/or divorce proceedings are pending at the same time, the legislature amended section 39.013 of the *Florida Statutes* to include a provision that when there are dissolution or other proceedings involving custody or visitation of a child pending at the same time as a dependency proceeding, the dependency proceeding shall take precedence.²⁰⁴

The legislature passed a narrowly focused bill aimed at providing attorneys ad litem to children in dependency cases in Orange County on a test basis.²⁰⁵ The legislature determined that in light of the declaration of goals for dependent children contained in the statute, a pilot program for attorneys ad litem for dependent children who are in out-of-home care by court order was to be put in place so the children received competent representation.²⁰⁶ It set up the program in the Ninth Judicial Circuit, which encompasses Orlando.²⁰⁷ Under the provisions of the statute, the circuit court contracts with a private or public entity to establish the private program which would represent the rights of children taken into custody by the Department.²⁰⁸ The Office of State Courts sets measurable outcomes for the program and the court designates an attorney to conduct administrative oversight of the program.²⁰⁹

The statute, while quite limited in scope geographically as well as in purpose, is significant because Florida does not provide for counsel to children in dependency cases.²¹⁰ Furthermore, while Florida receives funds pursuant to federal legislation for child welfare purposes,²¹¹ the state of Florida does not provide guardians ad litem for children in all cases as required by the federal statute.²¹² Indeed, Florida has not reported to the

203. *Id.* § 3, 2000 Fla. Laws at 316–18 (codified at FLA. STAT. § 39.3065 (2000)).

204. Ch. 2000-139, § 16, 2000 Fla. Laws 306, 336 (codified at FLA. STAT. § 39.013 (2000)).

205. *Id.* § 88, 2000 Fla. Laws at 389 (codified at FLA. STAT. § 39.4086 (2000)).

206. *Id.* (codified at § 39.4086(1) (2000)).

207. *Id.* at 390 (codified at FLA. STAT. § 39.4086(2)(a) (2000)).

208. *Id.* (codified at FLA. STAT. § 39.4086(2)(b) (2000)).

209. Ch. 2000-139, § 88, 2000 Fla. Laws 306, 390 (codified at FLA. STAT. § 39.4086(2)(b) (2000)).

210. *See* D.B. v. State, 385 So. 2d 83, 91 (Fla. 1980); Brevard County v. Dep't of Health & Rehab. Servs., 589 So. 2d 398, 400 (Fla. 5th Dist. Ct. App. 1991).

211. *See* Childhood Abuse Prevention and Treatment Act of 1974 ("CAPTA"), 42 U.S.C.A. §§ 5101–5119 (West 1995 & Supp. 2000).

212. *See infra* notes 214 and 215.

federal government on compliance²¹³ and contact with the Guardian Ad Litem Program in Broward County demonstrates that children are provided with guardians ad litem in less than fifty percent of the cases.²¹⁴ Furthermore, there is a body of case law in the State of Florida holding that children do not receive counsel in all cases and, despite the federal legislation, that they are not entitled to guardians ad litem.²¹⁵

B. Juvenile Delinquency

The legislature made several changes in the juvenile delinquency field including a well-deserved change in terminology from the term “community control” to “probation,” thus bringing Florida in line with most other states.²¹⁶ The legislature also expanded the use of pretrial detention for juveniles again.²¹⁷ It amended chapter 985 to provide for a period of up to seventy-two hours of prehearing detention for a child who is detained for failure to appear and who has previously willfully failed to appear after proper notice of the adjudicatory hearing on the same case regardless of the result of the risk assessment instrument.²¹⁸ The legislature also provided for detention for up to seventy-two hours for willful failure to appear at two or more court hearings of any nature with seventy-two hour detention resulting.²¹⁹

In addition, the legislature extended the time for pretrial extension for good cause shown to an additional nine days when the child is charged with an offense which, if committed as an adult, would be a capital felony, life

213. See Summary Data Component Survey 1998, Department of Children and Family Services.

214. Telephone Conversation with Jeanette Wagner and Melissa Solomon, Esq., Broward County Guardian Ad Litem Program. On November 9, 2000, the circuit court in Broward County had assigned 1341 cases to the local office of the guardian ad litem. Of that number, the office was able to assign 831 guardians or 62%.

215. See *Fisher v. Dep't of Health & Rehab. Servs.*, 674 So. 2d 207 (Fla. 5th Dist. Ct. App. 1996); *E.F. v. Dep't of Health & Rehab. Servs.*, 639 So. 2d 639 (Fla. 2d Dist. Ct. App. 1994); *1998 Survey*, *supra* note 2, at 190–91; *Juvenile Law Issues*, *supra* note 28, at 824–25; *1997 Survey*, *supra* note 2, at 209.

216. See Ch. 2000-135, § 18, 2000 Fla. Laws 209, 232 (codified at FLA. STAT. § 985.03(43)).

217. See generally *1998 Survey*, *supra* note 2, at 180; *Juvenile Law Issues*, *supra* note 28, at 831–34; *1997 Survey*, *supra* note 2, at 180–84; *1992 Survey*, *supra* note 2, at 348–53; *1991 Survey*, *supra* note 124, at 339–43.

218. See Ch. 2000-134, § 9, 2000 Fla. Laws 197, 204 (codified at FLA. STAT. § 985.215(2)(i) (2000)).

219. *Id.* (codified at FLA. STAT. § 985.215(2)(j) (2000)).

felony, felony of the first degree, or felony of the second degree involving violence.²²⁰

VI. CONCLUSION

The Supreme Court of Florida heard just a few cases involving children's issues, but rendered a major opinion establishing certain procedural due process rights for children who are in the child welfare system as dependents and who are to be placed in mental health residential facilities. Lower appellate courts ruled on diverse issues in both the delinquency and the child welfare fields upholding constitutional rights of children and strictly enforcing statutory protections for both children and their families.

The legislature put into effect a dramatic change in the focus of the child welfare system in Florida by authorizing the Department of Children and Family Services to contract with profit making entities to take over responsibility for major portions of the child welfare system.

220. *Id.* (codified at FLA. STAT. § 985.215(5)(f) (2000)).

2000 Survey of Florida Law: Real Property

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I. INTRODUCTION

This survey covers Florida judicial decisions and legislation that appeared between July 1, 1999 and June 30, 2000. As in past years, the volume is huge. So many cases and statutes can have an impact on real estate that we had to limit our coverage to what we thought would be of particular interest to the real estate community.¹ Our goal is to inform our readers of what has happened and, on occasion when we thought it was needed, to voice agreement, disagreement, or suggestions for the future. As always, we urge you to read the original cases and acts. As readers will discover, real estate law continues to develop in interesting ways.

II. ATTORNEYS' FEES

A. *In General*

*Munao v. Homeowners Ass'n of La Buona Vita Mobile Home Park.*² Owners of mobile homes who rented spaces in a mobile home park challenged the rent as unreasonable because the landlord had reduced the amenities.³ The trial court ruled in their favor and ordered a rent reduction, retroactively and prospectively until repairs were made.⁴ The court also ordered the payment of attorneys' fees.⁵ The fees were challenged on the ground that the plaintiff tenants had not proved all the defects they had alleged in their complaint.⁶ The district court pointed out that "the test is whether the party 'succeed[ed] on any significant issue in litigation which

1. Some areas, such as land use planning, are excluded because they are to be covered by separate survey articles. Other areas, like regulation of the construction industry, are too specialized to be of interest to our readers.

2. 740 So. 2d 73 (Fla. 4th Dist. Ct. App. 1999).

3. *Id.* at 75. The landlord and tenant issues of this case are discussed in the Landlord and Tenant section of this article. See discussion *infra* Part XIII.

4. *Munao*, 740 So. 2d at 75.

5. *Id.*

6. *Id.* at 78.

achieves some of the benefit the parties sought in bringing suit.”⁷ The plaintiff had won a rent reduction and the restoration of amenities, which was enough to make it a prevailing party.⁸

The landlord also challenged the use of a multiplier in the calculation of attorneys’ fees because the plaintiffs’ attorneys’ fee agreement was only partly based on a contingency fee.⁹ The district court found the use of the multiplier to be proper because the trial court had carefully explained the factors used to conclude that a contingency risk multiplier was warranted and justified the use of those factors based upon the expert witness testimony, Rule 4-1.5 of the *Florida Rules of Professional Conduct*, section 57.104 of the *Florida Statutes*, and relevant Florida case law.¹⁰

*Tri-County Development Group, Inc. v. C.P.T. of South Florida, Inc.*¹¹ The tenant was a corporation owned by Barrett Hess.¹² The landlord sued the tenant for a breach of the lease.¹³ Included as defendants were Mr. Hess, C.P.T., and Profitable Investment Corporation, another company that Hess owned.¹⁴ The defendants’ answer denied the landlord’s claims and also stated, “[t]he claims against DEFENDANTS, HESS AND CPT, are wholly without factual and/or legal merit and the DEFENDANTS should be awarded attorney’s fees pursuant to F.S. 57.105.”¹⁵ The trial court awarded \$75,000 in attorneys’ fees and costs to tenant Profitable Investment Corporation based upon the attorneys’ fees provision in the lease.¹⁶ The landlords appealed claiming that the tenant had failed to properly plead its claim for attorneys’ fees and, therefore, waived its attorneys’ fees claim.¹⁷ The unsuccessful appeal was based on two theories.¹⁸

First, the answer did not specify whether attorneys’ fees were sought based upon the contract or upon a statute.¹⁹ To the extent that section 57.105 of the *Florida Statutes* was mentioned, the answer did not specify under

7. *Id.* (quoting *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 809–10 (Fla. 1992)).

8. *Id.* at 79.

9. *Munao*, 740 So. 2d at 78–79.

10. *Id.* at 79–80.

11. 740 So. 2d 573 (Fla. 4th Dist. Ct. App. 1999).

12. *Id.* at 573.

13. *Id.*

14. *Id.* at 573–74.

15. *Id.* at 574.

16. *Tri-County Dev. Group, Inc.*, 740 So. 2d at 574.

17. *Id.*

18. *Id.*

19. *Id.*

which subsection attorneys' fees were being sought.²⁰ The district court found this unpersuasive.²¹ Waiver benefited the tenant rather than the landlord.²² The court stated:

[W]here a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead the entitlement, that party waives any objection to the failure to plead a claim for attorney's fees.²³

Any challenges to or questions about that claim could have and should have been raised by a responsive pleading.²⁴ Failure to do so resulted in waiver of the objections.²⁵ Moreover, section 57.105(1) of the *Florida Statutes* provided for attorneys' fees based on bringing a frivolous claim or action, and subsection two of the same statute provided for attorneys' fees under a contract where the contract would have allowed the other party to recover attorneys' fees for prevailing.²⁶ Thus, claiming attorneys' fees under section 57.105 of the *Florida Statutes* effectively gives notice that a claim is being made for either or both statutory or contractual attorneys' fees.²⁷

The next theory was that the answer only mentioned the claims against Hess and C.P.T. as being without merit and, therefore, Profitable Investment Corporation had not made any claim for attorneys' fees.²⁸ However, the answer said that "the DEFENDANTS should be awarded attorney's fees."²⁹ The tenant was one of the defendants.³⁰ In fact, the tenant was the only defendant who was a party to the lease that was the subject of the suit and which contained the attorneys' fees provision to which subsection two of the statute would apply.³¹ Thus, the claim was sufficient to give the landlord notice that all three defendants were seeking attorneys' fees.³²

20. *Id.*

21. *Tri-County Dev. Group, Inc.*, 740 So. 2d at 575.

22. *Id.* at 574.

23. *Id.*

24. *See id.* at 575.

25. *Id.*

26. *Tri-County Dev. Group, Inc.*, 740 So. 2d at 575.

27. *Id.*

28. *Id.* at 574.

29. *Id.*

30. *Id.*

31. *Tri-County Dev. Group, Inc.*, 740 So. 2d at 575.

32. *Id.*

B. Eminent Domain

*Reese v. Department of Transportation.*³³ The Department of Transportation ("DOT") began proceedings to take the entire property.³⁴ Reese challenged the taking, but the DOT prevailed after an evidentiary hearing.³⁵ The tenant appealed.³⁶ The parties reached an agreement that the appeal would be dismissed in exchange for the DOT allowing the tenants to remain two additional months.³⁷ During that period, the tenant realized a profit of \$58,098.³⁸ The tenant then claimed attorneys' fees equal to thirty-three percent of that profit.³⁹ The trial court rejected the attorneys' fees claim and the district court affirmed.⁴⁰

Under section 73.092(1) of the *Florida Statutes*, attorneys' fees in an eminent domain proceeding are to be based on the benefit the attorney achieved for the client.⁴¹ That benefit could be monetary or nonmonetary, but in this case the court could find neither, characterizing the profit achieved during the extended period of possession as betterment that the tenant had achieved for itself by its own efforts.⁴²

The district court also rejected the argument that the statute produced an unconstitutional result in this case.⁴³ The argument was raised for the first time on appeal.⁴⁴ Failure to raise the issue in the trial court would constitute waiver unless the trial court had made a fundamental error.⁴⁵ In the lease, the tenant assigned any condemnation settlement or award, except business damages.⁴⁶ However, the Florida Constitution does not require the payment of business damages or attorneys' fees incurred in recovering them.⁴⁷ Business damages are a benefit provided by the legislature and

33. 743 So. 2d 1227 (Fla. 4th Dist. Ct. App. 1999).

34. *Id.* at 1228.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Reese*, 743 So. 2d at 1228.

39. *Id.*

40. *Id.*

41. *Id.* at 1229; *see* FLA. STAT. § 73.092(1) (2000).

42. *Reese*, 743 So. 2d at 1229.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 1228.

47. *Reese*, 743 So. 2d at 1228.

failure of the court to award them without being asked would not be fundamental error.⁴⁸

*Department of Transportation v. Lakepointe Associates.*⁴⁹ As noted, section 73.092(1) of the *Florida Statutes* provides that attorneys' fees should be calculated based "solely on the benefits achieved for the client."⁵⁰ It goes on to provide that "benefits means the difference . . . between the final judgment or settlement and the last written offer made by the condemning authority."⁵¹ In this case, the landowner had received a letter purporting to be a "summary of the Department's offer" for the property.⁵² The letter had a line for the signature of the District Right of Way Administrator, but that person had not signed it because such letters were routinely sent out without signatures.⁵³ The landowner's attorneys claimed that this was not a valid offer and that the attorneys' fees should therefore be based on the final judgment, i.e., calculate the benefit as if the offer had been zero.⁵⁴ The trial court agreed that there had not been a valid offer.⁵⁵ The statute did not specify what to do in such a case, so the trial court decided to calculate fees based on the difference between the final judgment and the figure testified to by the DOT's expert.⁵⁶

The district court disagreed, concluding there had been a valid offer.⁵⁷ Focusing on the purpose of the statute and reading it *in pari materia* with section 119.07(3)(n) of the *Florida Statutes*, the court concluded that the letter was an offer within the meaning of this attorneys' fees statute.⁵⁸ The statute did not require an offer that could, by mere acceptance, ripen into a contract.⁵⁹ In fact, what was anticipated was that a formal contract would be executed if the landowner agreed to the terms of the offer.⁶⁰ "Moreover, it is

48. *Id.* at 1229.

49. 745 So. 2d 364 (Fla. 1st Dist. Ct. App. 1999).

50. FLA. STAT. § 73.092(1) (2000).

51. § 73.092(1)(a).

52. *Lakepointe Assocs.*, 745 So. 2d at 365.

53. *Id.*

54. *Id.* at 366.

55. *Id.*

56. *Id.* at 367.

57. *Lakepointe Assocs.*, 745 So. 2d at 367.

58. *Id.* at 368. Section 119.07 of the *Florida Statutes* provides that a contract to purchase property acquired by eminent domain shall not be formalized for 30 days by the condemning agency in order to give the public time to review the transaction. FLA. STAT. § 119.07(3)(n) (2000).

59. *Lakepointe Assocs.*, 745 So. 2d at 367–68.

60. *Id.* at 368.

clear from the circumstances that the letter was intended as a binding offer, despite the absence of a signature.”⁶¹ Thus, the court managed to avoid dealing with the difficult problem of how to calculate attorneys’ fees if the condemnor makes no offer.⁶²

C. Homeowner Associations

Southpointe Homeowners Ass’n, Inc. v. Segarra.⁶³ The issue here was whether the trial court properly concluded and did not abuse its discretion when it awarded \$785 for attorneys’ fees and \$133 for costs, due to the fact that the homeowner had attempted to settle the matter and that the association had been quick to file suit.⁶⁴

The dispute arose over a \$294 arrearage for maintenance and dues that the homeowner owed the association.⁶⁵ The homeowner testified that she had made efforts to determine the exact amount she owed so that she could pay it but had difficulty in obtaining this information from the association’s law firm.⁶⁶ The association sought \$4646 in attorneys’ fees and \$689 in costs.⁶⁷ The trial court observed that the association had been quick to file suit and that the amount of fees claimed over \$294 was outrageous.⁶⁸ The law firm sought fees for 29.4 hours.⁶⁹ The court awarded three hours for the lawyer’s time and two hours for paralegal time.⁷⁰

The court held that the trial court properly concluded the case and that it did not abuse its discretion when it found the homeowner was sincere in her efforts to settle and the association was too quick to file suit.⁷¹ It based this on the fact that the trial court is able, based on its familiarity with the type of litigation involved, to determine that some work was unnecessary.⁷²

61. *Id.*

62. *See id.*

63. 763 So. 2d 1186 (Fla. 4th Dist. Ct. App. 2000).

64. *Id.* at 1186.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Segarra*, 763 So. 2d at 1186.

69. *Id.*

70. *Id.*

71. *Id.* at 1187.

72. *Id.*; *see* *Wiederhold v. Wiederhold*, 696 So. 2d 923 (Fla. 4th Dist. Ct. App. 1997).

III. CONDOMINIUMS

*Gulf Island Resort, L.P. v. Gulf Island Beach & Tennis Club Condominium Ass'n II, Inc.*⁷³ The issue was whether the trial court properly held that the association could file a complaint seeking alternate remedies of lien foreclosure or money judgment, and could elect different remedies on different delinquent units in the same action.⁷⁴

The association brought suit against Gulf for delinquency in maintenance assessments on forty-one units that Gulf owned.⁷⁵ The association sought alternate remedies of lien foreclosure or a money judgment on different units based on the amount of equity in the units.⁷⁶ The trial court entered two partial final judgments of foreclosure on twenty-two units and a monetary judgment of \$53,593.49 against Gulf which was the delinquent amount owed on the other units.⁷⁷ Gulf appealed this judgment, arguing that the final decision must either be foreclosure on all units or a monetary judgment.⁷⁸

The appellate court held that the trial court was correct and that the association was entitled to seek alternate remedies and elect the judgment of foreclosure on some units and a monetary judgment for remaining assessments in the same action.⁷⁹ The court based its opinion on section 718.116(6)(a) of the Condominium Act.⁸⁰

*Wellington Property Management v. Parc Corniche Condominium Ass'n.*⁸¹ The issue here was whether a bare majority of condominium owners could amend the declaration pursuant to a provision in the declaration by "add[ing] a new provision which permits the common elements to be amended or altered and, by applying this new provision retroactively, defeat the vested rights of the pre-amendment purchasers."⁸²

In this case, the condominium association made an amendment to the declaration that would allow the association to alter the common elements by

73. 740 So. 2d 64 (Fla. 2d Dist. Ct. App. 1999).

74. *Id.* at 64.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Gulf Island Resort, L.P.*, 740 So. 2d at 65.

79. *Id.*

80. *Id.* (citing FLA. STAT. § 718.116(6)(a) (1997)); see *Mellor v. Goldberg*, 658 So. 2d 1162 (Fla. 2d Dist. Ct. App. 1995); *Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C.*, 438 So. 2d 408 (Fla. 2d Dist. Ct. App. 1983).

81. 755 So. 2d 824 (Fla. 5th Dist. Ct. App. 2000).

82. *Id.* at 825.

a fifty-one percent vote of the board of directors.⁸³ The court held that due to the importance placed on the common elements, when interpreting a general power to amend in the declaration, the court must “consider the statutory law and other provisions of the declaration and by-laws applicable when the condominium was purchased in order to determine existing rights.”⁸⁴ The court found that a purchaser should be able to rely on the provisions of the declaration at the time of purchase, so the purchaser may determine its ability to afford the unit.⁸⁵ In its interpretation of section 718.110(4) of the *Florida Statutes*, which provides for the alteration of the declaration as provided by the declaration, the court found the legislature was talking about a provision existing in the declaration at the time of purchase.⁸⁶ The court reversed and remanded this case.⁸⁷

Legislation affecting condominiums includes the addition of a new section for multicondominium associations and statutory authority for transferring limited common elements.⁸⁸ Also, there is a definition of a “successor or assignee” of a first mortgagee who takes title to a condominium by foreclosure and receives limited liability for outstanding association assessments.⁸⁹ For that protection one must be a successor holder of the first mortgage.⁹⁰

IV. CONSTRUCTION

*Sunshine-Jr. Stores, Inc. v. Autopump Services Co.*⁹¹ Sunshine operated convenience stores with self-service gasoline stations.⁹² It had contracted for the removal of its old filling station equipment and the installation of new tanks, pumps, and a protective canopy at one of its stores.⁹³ After a subcontractor put in the tanks and pumps, the contractor

83. *Id.*

84. *Id.* at 826.

85. *Id.*

86. *Wellington Prop. Mgmt.*, 755 So. 2d at 826-27.

87. *Id.* at 828.

88. Ch. 2000-302, § 55, 2000 Fla. Laws 3129, 3147 (codified at FLA. STAT. § 718.115 (2000)).

89. *Id.* § 56, 2000 Fla. Laws at 3149 (codified at FLA. STAT. § 718.116 (2000)).

90. Ch. 2000-201, § 1, 2000 Fla. Laws 2040, 2040 (codified at FLA. STAT. § 718.116 (2000)).

91. 240 B.R. 788 (Bankr. M.D. Fla. 1999).

92. *Id.* at 790.

93. *Id.*

began work on the protective canopy, which was the source of the dispute.⁹⁴ Sunshine became concerned about the quality and quantity of the bracing.⁹⁵ After an unsuccessful conference with the contractor, it hired a structural engineer who found the design questionable and the construction substandard.⁹⁶ The contractor claimed the construction was completed, or at least ninety percent completed, and refused to remedy the problems or remove the canopy.⁹⁷ Sunshine terminated the contract.⁹⁸ It then hired a structural engineer to make new drawings for the canopy and remove and replace the old one.⁹⁹

The court decided that Florida law applied and the first step should be to determine if the case was controlled by Article 2 of the Uniform Commercial Code ("U.C.C.").¹⁰⁰ Construction contracts are typically dominated by the services element rather than by the provision of goods for the construction.¹⁰¹ Consequently, the court applied contract law and not the U.C.C. to the damages and breach issues.¹⁰²

Under Florida law, Sunshine would have been entitled to terminate the contract if the contractor had materially breached.¹⁰³ It found that the primary purpose of the canopy was to have a safe and operational self-service station.¹⁰⁴ The canopy was intended to provide protection for the customers and the gas tanks.¹⁰⁵ A dangerous canopy would defeat the purpose of the contract.¹⁰⁶ The contractor did not produce a safe canopy and, in fact, showed no concern about doing so.¹⁰⁷ It treated the drawings and the code requirements as mere formalities to be circumvented.¹⁰⁸ Moreover, the contractor was given ample opportunities to remedy the

94. *Id.* at 791.

95. *Id.* at 792.

96. *Sunshine-Jr. Stores, Inc.*, 240 B.R. at 793.

97. *Id.*

98. *Id.*

99. *Id.* at 794.

100. *Id.*

101. *Sunshine-Jr. Stores, Inc.*, 240 B.R. at 794.

102. *Id.*

103. *Id.*

104. *Id.* at 795.

105. *Id.*

106. *Sunshine-Jr. Stores, Inc.*, 240 B.R. at 795.

107. *Id.*

108. *Id.*

deficiencies and refused.¹⁰⁹ The contractor was in breach and the termination of the contract was justified.¹¹⁰

Under the circumstances, Sunshine was entitled to be put in the position it expected to be in under the contract.¹¹¹ So long as it did not constitute unreasonable economic waste, Sunshine could recover what it cost to get the construction it had bargained for.¹¹² Here, Sunshine had expected to get the work done for \$67,500 and it had already paid \$25,000 to the contractor.¹¹³ To get the job completed properly, it had to pay the structural engineer \$62,608.12.¹¹⁴ Consequently, Sunshine was entitled to recover \$20,108 so that its total cost would not exceed the original price.¹¹⁵

Sunshine also sought lost profits.¹¹⁶ To recover lost profits it would have to prove that the contractor's breach had caused that loss and there had to be a standard for calculating the amount of damages.¹¹⁷ The evidence was insufficient to meet the test.¹¹⁸ Even if the pumps had been operational on schedule, the inside of the store was still being remodeled during the period when lost profits were sought.¹¹⁹ So the amount of profits which might have been attributable to the inoperable pumps could not be determined.¹²⁰

V. CONVERSION AND MERGER OF BUSINESS ENTITIES

Legislation now provides that there is no need to record a deed for title to transfer by merger or conversion of business entities.¹²¹

VI. COVENANTS AND RESTRICTIONS

*Boyce v. Simpson.*¹²² The issue here was whether the trial court properly denied Boyce's request for a permanent injunction against the

109. *Id.* at 796.

110. *Id.*

111. *Sunshine-Jr. Stores, Inc.*, 240 B.R. at 796.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Sunshine-Jr. Stores, Inc.*, 240 B.R. at 797.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Ch. 2000-298, § 7, 2000 Fla. Laws 2940, 2942 (creating FLA. STAT. § 694.16 (2000)).

122. 746 So. 2d 507 (Fla. 4th Dist. Ct. App. 1999).

Simpsons' proposed use of their dwelling as an Adult Congregate Living Facility ("ACLF").¹²³

The Simpsons purchased their single family dwelling to both live in and to operate as an ACLF for up to six non-family members as allowed by sections 419.01 and 400.401 of the *Florida Statutes*.¹²⁴ The Boyces objected to the use of the home as an ACLF and sought to enforce the applicable restrictive covenant within their residential neighborhood.¹²⁵ The covenant provided:

USE RESTRICTIONS. Lots may be used for dwelling units and pertinent uses and for no other purposes. *No business buildings* may be erected in the *subdivision* and no business may be conducted *on any part thereof*, nor shall any dwelling unit or any portion thereof be used or maintained as a professional office.¹²⁶

The dispute centered around "whether the phrase 'on any part thereof' applies to the term 'business building' or the word 'subdivision.'"¹²⁷ The trial court denied the request for the permanent injunction ruling that any ambiguity should be resolved in favor of the homeowner.¹²⁸

The appellate court held that the trial court was correct in denying the request for the permanent injunction.¹²⁹ This was based on the fact that restrictive covenants are to be strictly construed in favor of the homeowners.¹³⁰

Loren v. Sasser.¹³¹ The issue here was whether to grant an amended motion for a preliminary injunction on Loren's First Amendment claim to be allowed to place a "for sale" sign on her property without violating the community's judicially enforceable deed restriction ban on all homeowner signs.¹³²

The court had previously recognized that judicial enforcement in Florida of rules and restrictions banning or restricting free speech constitutes

123. *Id.* at 508.

124. *Id.*

125. *Id.*

126. *Id.* (emphasis supplied).

127. *Boyce*, 746 So. 2d at 508.

128. *Id.*

129. *Id.*

130. *Id.*; see *Palma v. Townhouses of Oriole Ass'n*, 610 So. 2d 112, 113 (Fla. 4th Dist. Ct. App. 1992); *James v. Smith*, 537 So. 2d 1074, 1076 (Fla. 5th Dist. Ct. App. 1989).

131. 13 Fla. L. Weekly Fed. D241 (M.D. Fla. Apr. 11, 2000).

132. *Id.* at D241.

state action.¹³³ Therefore, the constitutional validity of the speech ban or restriction is properly subject to federal scrutiny under the First and Fourteenth Amendments in an action under section 1983 of Title 42 of the *United States Code*.¹³⁴

The court denied the amended motion for preliminary injunction.¹³⁵ It reasoned that Loren had not met the burden of showing it would suffer irreparable harm absent the Association's being enjoined from interfering with her First Amendment rights to place a "for sale" sign on her property.¹³⁶

VII. DEEDS

Griem v. Zabala.¹³⁷ The question was whether the trial court erred when it denied a quiet title petition involving two condominium units, when the sellers of one unit did not sign the deed and had not met or been in the presence of the notary who notarized the deed, and for the second unit, the grantees did not introduce the deed into evidence or adequately explain why it was missing.¹³⁸

In 1978, Griem purchased condominium unit numbers 106 and 110, the units at issue.¹³⁹ After his wife's death, Griem quitclaimed these units to himself and his two daughters.¹⁴⁰ Afterwards, Griem entered into an agreement with a real estate agent to manage, maintain, and rent the units.¹⁴¹ From 1980 to 1989, Griem visited Miami annually to check on the properties and receive statements from the real estate agent as to the properties' status.¹⁴² These reports stopped in 1989.¹⁴³ From 1989 to 1996, Griem did not visit Miami due to health and business problems.¹⁴⁴ Additionally, Griem owned six other condominium units located in Pointe South which were also

133. See *Gerber v. Longboat Harbour N. Condo, Inc.*, 724 F. Supp. 884, 887 (M.D. Fla. 1989).

134. *Id.*

135. *Loren*, 13 Fla. L. Weekly Fed. at D241.

136. *Id.*; see *Ladue v. Gilleo*, 512 U.S. 43 (1994); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85 (1977).

137. 744 So. 2d 1139 (Fla. 3d Dist. Ct. App. 1999).

138. *Id.* at 1140.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Griem*, 744 So. 2d at 1140.

143. *Id.*

144. *Id.*

managed by the real estate agent.¹⁴⁵ These units were severely damaged by Hurricane Andrew and “[t]here were no reserve funds nor incoming rents to pay the mortgage and maintenance assessments” on these units.¹⁴⁶ Allegedly, the real estate agent sold units 106 and 110 to avoid foreclosure on the other units.¹⁴⁷ In 1996, Griem came to Miami and discovered the units in question had been transferred to the Zabalas and to the Moraleses without his consent or knowledge.¹⁴⁸ Further, he stated that he did not sign any deeds or powers of attorney.¹⁴⁹ Griem filed suit to quiet title, to eject the Zabalas and the Moraleses, and to obtain declaratory relief against them.¹⁵⁰ The trial court entered final judgment for the Zabalas and the Moraleses.¹⁵¹

The appellate court held that the trial court erred in holding that the Zabalas and Moraleses had valid deeds to units 106 and 110.¹⁵² For there to be a transfer of a property interest, “a deed must be in writing and signed by the person conveying such interest.”¹⁵³ Further, section 117.05(6)(a) of the *Florida Statutes* prohibits a notary to notarize a signature if the person is not in his or her presence at the time the signature is notarized.¹⁵⁴ The notary in this case testified that she did not know Griem and he was not in her presence when she notarized the deed.¹⁵⁵ Therefore, the Zabalas did not have a valid deed for unit 106.¹⁵⁶ Section 90.952 of the *Florida Statutes* requires the offering of an original writing or a sufficient explanation for its unavailability.¹⁵⁷ The Moraleses failed to introduce their deed into evidence or adequately explain its absence.¹⁵⁸ Therefore, there was no evidence to support a finding that the Moraleses owned unit 110.¹⁵⁹

145. *Id.*146. *Id.*147. *Griem*, 744 So. 2d at 1140.148. *Id.*149. *Id.*150. *Id.*151. *Id.*152. *Griem*, 744 So. 2d at 1140.153. *Id.*; see FLA. STAT. § 689.01 (2000).154. *Griem*, 744 So. 2d at 1140; see also FLA. STAT. § 117.05(6)(a) (2000); *The Fla. Bar v. Farinas*, 608 So. 2d 22, 23 (Fla. 1992).155. *Griem*, 744 So. 2d at 1140.156. *Id.*157. *Id.*; FLA. STAT. § 90.952 (2000).158. *Griem*, 744 So. 2d at 1141.159. *Id.*

VIII. EMINENT DOMAIN

A. *Condemnation*

*Alternative Networking, Inc. v. Solid Waste Authority.*¹⁶⁰ The Authority condemned a building that was partially occupied by tenants.¹⁶¹ Three of those tenants had been found by Alternative Networking under a contract with the landowner that gave it fifteen percent of the monthly rents paid by any tenants it procured for as long as they remained tenants.¹⁶² Alternative Networking sought part of the condemnation award on the theory that it had a property interest, but the district court disagreed.¹⁶³ It characterized the interest as merely a personal contract.¹⁶⁴ Alternative Networking was not the beneficiary of a covenant that ran with the land because the covenant was only binding between Alternative Networking and the landowner.¹⁶⁵ Alternative Networking did not have any land that was benefited by the contract.¹⁶⁶ It could not enforce its right to payment by a lien on the land and any tenant could terminate its lease upon giving proper notice.¹⁶⁷ By its terms, the lease lasted only as long as a tenant remained on the land, so the loss of the land in condemnation terminated Alternative Networking's right to payment.¹⁶⁸

*Brevard County v. A. Duda & Sons, Inc.*¹⁶⁹ The county had obtained an order to take 240 acres of Duda's land for the construction of artificial wetlands.¹⁷⁰ After the order was entered, the county realized that it needed an easement for the flow of partially treated wastewater from those artificial wetlands to Lake Winder by way of a canal owned by Duda.¹⁷¹ So the county filed an amended complaint to acquire the easement.¹⁷² In determining the value of the easement, there was evidence that the government was considering more stringent pollution limits on water

160. 758 So. 2d 1209 (Fla. 4th Dist. Ct. App. 2000).

161. *Id.* at 1210.

162. *Id.*

163. *Id.* at 1211.

164. *Id.*

165. *Alternative Networking, Inc.*, 758 So. 2d at 1211.

166. *Id.*

167. *Id.*

168. *Id.* at 1212.

169. 742 So. 2d 476 (Fla. 5th Dist. Ct. App. 1999).

170. *Id.* at 477.

171. *Id.*

172. *Id.*

flowing into Lake Winder from Duda's canal.¹⁷³ The effect of the county adding contaminants from its artificial wetlands, while the total contaminants allowed was reduced, would be to limit the amount of contaminants that could flow into the canal from Duda's land; and that could "substantially impact Duda's operations and future development of its Cocoa Ranch."¹⁷⁴

The county attempted to reduce the amount of compensation ordered by having the taking order place restrictions on its use of the easement.¹⁷⁵ Both parties submitted proposed language and the trial court adopted the county's version.¹⁷⁶ Duda appealed and the district court reversed, finding that the fatal error in the language adopted was that it would "exceed the plans, specifications and testimony presented at the hearing on the order of taking, and attempt to impose contractual obligations . . . in the absence of a contractual agreement."¹⁷⁷ In addition, from Duda's perspective, the contractual language was so vague that future litigation to interpret it would be inevitable.¹⁷⁸ The court concluded that "[t]he condemnee is entitled to just compensation now . . . not vague promises to act in the future to cure future problems in an attempt to limit compensation."¹⁷⁹

*Claussen v. Department of Transportation.*¹⁸⁰ In this condemnation proceeding, the DOT sought to reduce its liability by showing that the landowner knew that a part of the land might be taken in a road widening project.¹⁸¹ On the stand, the landowner denied he had such knowledge.¹⁸² The DOT then produced a letter that had been written by an attorney to the DOT two years earlier complaining about the proposed road widening.¹⁸³ At the time the letter was written, the attorney represented the prior landowner.¹⁸⁴ Later, that attorney represented the current landowner in

173. *Id.* at 478.

174. *A. Duda & Sons, Inc.*, 742 So. 2d at 478.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 479.

179. *A. Duda & Sons, Inc.*, 742 So. 2d at 479.

180. 750 So. 2d 79 (Fla. 2d Dist. Ct. App. 1999).

181. *Id.* at 80.

182. *Id.* at 81.

183. *Id.*

184. *Id.*

negotiations for the land's purchase.¹⁸⁵ On appeal, the district court found the use of the letter so tainted the trial that reversal was necessary.¹⁸⁶

The DOT claimed that the letter was used for impeachment purposes and, therefore, it had no obligation to disclose the letter during discovery.¹⁸⁷ The district court rejected both assertions.¹⁸⁸ A witness can only be impeached by the witness's prior inconsistent statement.¹⁸⁹ This letter was written by another person, so it could not be used for impeachment.¹⁹⁰ Even if it could, disclosure in discovery would be necessary to avoid trial by ambush, which is contrary to the current theory of civil litigation.¹⁹¹

The DOT also claimed that the letter was admissible as a public record.¹⁹² The district court rejected this argument because the letter was based on information from an outside source.¹⁹³ There is a hearsay exception that allows an agency to "present proof of its activities by utilizing its records or reports that demonstrate compliance by a government agency with duties it was lawfully required to perform."¹⁹⁴ That was not what the letter was used for in this case.¹⁹⁵

The court also rejected the DOT's claim that the letter was properly used to refresh the witness's memory.¹⁹⁶ However, the statute allows such use only when the witness expresses an inability to remember something.¹⁹⁷ Here, the witness made no such statement.¹⁹⁸ To the contrary, he specifically denied ever having knowledge of the road widening project.¹⁹⁹ Moreover, even if the letter had been properly used to refresh the witness's memory, the DOT still could not publish the letter's contents to the jury as was done in this case.²⁰⁰ In fact, the DOT's lawyer went even further and "also provided his own interpretation of its substance in the jury's presence."²⁰¹ Such action

185. *Claussen*, 750 So. 2d at 82.

186. *Id.* at 80.

187. *Id.* at 81.

188. *Id.* at 81–82.

189. *Id.* at 81.

190. *Claussen*, 750 So. 2d at 82.

191. *Id.*

192. *Id.* at 81; *see* FLA. STAT. § 90.606 (2000).

193. *Claussen*, 750 So. 2d at 82.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*; FLA. STAT. § 90.613 (2000).

198. *Claussen*, 750 So. 2d at 82.

199. *Id.*

200. *Id.*

201. *Id.*

was intended to prejudice the jury.²⁰² Consequently, the landowner had been denied his constitutional right to a jury trial.²⁰³

*CSR Partnership v. Department of Transportation.*²⁰⁴ The DOT made an offer of judgment.²⁰⁵ Under Rule 1.442 of the *Florida Rules of Civil Procedure* the offer of judgment was served too late.²⁰⁶ Under section 73.032 of the *Florida Statutes* the service was timely because it requires service no later than twenty days before trial.²⁰⁷ The circuit court applied the statute, but the district court reversed.²⁰⁸ It stated that “the supreme court has previously found that time limits for offers of judgment are procedural.”²⁰⁹ While the legislature has primary authority over substantive matters, the court has primary authority over procedural matters.²¹⁰ Thus, the rules promulgated by the supreme court, rather than the statute, control the timing of offers of judgment.²¹¹

*Department of Transportation v. Duplissey.*²¹² The landowner sought severance damages.²¹³ The DOT admitted liability and made a good faith deposit with the court.²¹⁴ At trial, the landowner succeeded in excluding the proffered testimony of the DOT’s expert.²¹⁵ The jury had only the testimony of the landowner’s expert to consider in determining the severance damages, but arrived at a figure that was lower than what the expert had calculated.²¹⁶ In fact, it was lower than the good faith deposit.²¹⁷ Faced with a case of first impression, the trial court granted the landowner’s motion for a new trial.²¹⁸

The district court, however, reversed.²¹⁹ If the jury had the good faith deposit amount to consider, it would have been required to consider that the

202. *Id.*

203. *Claussen*, 750 So. 2d at 82.

204. 741 So. 2d 623 (Fla. 2d Dist. Ct. App. 1999).

205. *Id.* at 625.

206. *Id.*; see FLA. R. CIV. P. 1.442 (requiring service no later than 45 days before trial).

207. *CSR P’ship*, 741 So. 2d at 623; see FLA. STAT § 73.032 (2000).

208. *CSR P’ship*, 741 So. 2d at 623.

209. *Id.* (citing *Knealing v. Puleo*, 675 So. 2d 593, 596 (Fla. 1996)).

210. *See id.*

211. *Id.* at 624.

212. 751 So. 2d 117 (Fla. 5th Dist. Ct. App. 2000).

213. *Id.* at 118.

214. *Id.*

215. *Id.*

216. *Id.* at 119.

217. *Duplissey*, 751 So. 2d at 119.

218. *Id.* at 118.

219. *Id.* at 119.

minimum award.²²⁰ However, the only evidence before the jury was the landowner's expert's testimony.²²¹ The jury was not bound by that and could, based on the facts before it, reach its own conclusion.²²² Here, the conclusion was for a lesser amount of severance damages.²²³ Excluding the DOT's expert's testimony had backfired.

*Seminole County v. Sanford Court Investors, Ltd.*²²⁴ The county engaged in a road widening project that required taking part of the parking lot owned by Cumberland Farms.²²⁵ At that time, Cumberland Farms had two tenants, Deis and Hancock Company.²²⁶ Deis' original written lease had expired and he was under a month-to-month lease.²²⁷ Hancock was under an extension of its original lease.²²⁸ After the filing of the condemnation action, Cumberland Farms notified these tenants that their leases would not be renewed because it was going to build a new and bigger store.²²⁹ However, but for the condemnation, the leases would have been renewed at least for the indefinite future.²³⁰

In the condemnation proceeding, the tenants sought business damages.²³¹ Their expert witness was allowed to testify about their business damages calculated on the theory that their leases would be continually renewed for the indefinite future.²³² He based this on the past history of renewals.²³³ The district court found that the admission of this testimony was error.²³⁴ A tenant is entitled to recover business damages based only upon its leasehold interest at the time of the taking.²³⁵ Thus, Deis, who had a

220. *Id.*

221. *Id.* at 118.

222. *Duplissey*, 751 So. 2d at 120.

223. *Id.*

224. 743 So. 2d 1165 (Fla. 5th Dist. Ct. App. 1999). The original opinion was withdrawn following the grant of a motion to supplement the record and review of the supplemental materials. See Ronald Benton Brown & Joseph M. Grohman, *1999 Survey of Florida Law: Real Property*, 24 NOVA L. REV. 267, 297 (1999); *Seminole County v. Sanford Court Investors, Ltd.*, 24 Fla. L. Weekly D1056 (5th Dist. Ct. App. Apr. 30, 1999).

225. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1167.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1168.

231. *Id.* at 1167.

232. *Id.* at 1168.

233. *Id.*

234. *Id.*

235. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1169.

month-to-month lease, was entitled to business damages suffered over a one-month period, and Hancock was entitled to business damages for what remained of its two-year term.²³⁶

The tenants' claim for moving expenses was found to be without merit.²³⁷ Moving expenses could be recovered "if the tenant[s] [are] required to move [their] possessions off the property or to move them from one part of the property to another as a result of the taking."²³⁸ There was no evidence indicating that had occurred here.²³⁹

In order to vacate the premises, the tenants had auctioned off their inventory and trade fixtures.²⁴⁰ The tenants had suffered a loss because the auction prices were so low and their expert had included this loss in his calculation of business damages.²⁴¹ That was an error.²⁴² Recovery for the trade fixtures would be severance damages, not business damages.²⁴³ The jury was not given a special verdict form that separated severance damages from business damages.²⁴⁴ Consequently, the case was reversed and remanded.²⁴⁵

*M.J. Stavola Farms, Inc. v. Department of Transportation.*²⁴⁶ This case involved the partial taking of land that had been leased out as a limerock mine.²⁴⁷ The expert for the tenant testified that the tenant would suffer business damages calculated on the amount of limerock located in the taken land.²⁴⁸ The landowners and lessees appealed based on the trial judge's order to strike that testimony. The district court disagreed and held that the trial court had not erred.²⁴⁹ The testimony revealed that the tenant had consistently been removing about six hundred thousand tons of limerock per year and that there was no evidence that it would ever mine more than that annual amount.²⁵⁰ At the current rate, the tenant could continue to remove

236. *Id.*

237. *Id.* at 1171.

238. *Id.*

239. *Id.*

240. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1170.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Sanford Court Investors, Ltd.*, 743 So. 2d at 1171.

246. 742 So. 2d 391 (Fla. 5th Dist. Ct. App. 1999).

247. *Id.* at 392-93.

248. *Id.* at 394.

249. *Id.* at 395.

250. *Id.* at 393.

limerock for the next twenty-five years without being affected by the taking.²⁵¹ In year twenty-six the tenant would run out of limerock and suffer business damages for the remaining nineteen years of the lease.²⁵² At the current rate, the tenant would never have removed all the limerock in the taken land, so its business damages should not have been calculated on all the limerock in the taken land.²⁵³ Its business damages should only have been calculated on its income from the limerock it would have removed in the last nineteen years, but for the taking.²⁵⁴ Basing business damages on the possibility that the tenant might begin removing limerock at a faster rate would be speculation, and damages cannot be based on speculation.²⁵⁵

*Owens v. Orange County.*²⁵⁶ The county brought this condemnation as part of a road widening project.²⁵⁷ The landowners claimed business damages and hired a certified public accountant as their business damages expert.²⁵⁸ The parties reached a mediated settlement with two components.²⁵⁹ First, the landowners would be paid \$90,000 in full settlement of all claims except attorneys' fees, experts' fees, and costs.²⁶⁰ Second, the county would make certain improvements to the landowners' remaining property.²⁶¹ The landowners filed a motion for expert fees due to their business damages expert, but the county objected, arguing that the landowners had abandoned their claim for business damages based on an inference from the amount of the settlement.²⁶² The statute provided for payment of a reasonable accountant's fee only when business damages were compensable.²⁶³ Accepting that argument, the trial court denied the motion.²⁶⁴

The district court, however, reversed, finding that there had never been an express abandonment of business damages.²⁶⁵ The nature of the

251. *M.J. Stavola Farms, Inc.*, 742 So. 2d at 395.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. 747 So. 2d 467 (Fla. 5th Dist. Ct. App. 1999).

257. *Id.* at 467.

258. *Id.* at 468.

259. *Id.* at 467.

260. *Id.*

261. *Owens*, 747 So. 2d at 467.

262. *Id.* at 468.

263. *Id.*; see FLA. STAT. § 73.091 (2000).

264. *Owens*, 747 So. 2d at 469.

265. *Id.* at 470.

settlement indicated that the county was to make the promised improvements to avoid having to pay business damages.²⁶⁶ Accepting an alternative to money did not suggest abandonment of the claim.²⁶⁷ Rather, it suggested that the claim was compromised.²⁶⁸ Lawyers would be well advised to avoid similar disputes in the future by expressly addressing the abandonment issue in the settlement agreement.

B. *Inverse Condemnation*

*Burnham v. Monroe County.*²⁶⁹ The county adopted a “Rate of Growth Ordinance” that limited the number of building permits that could be issued.²⁷⁰ A point system existed to allocate the permits.²⁷¹ Points could be earned by including certain design features, such as solar hot water heaters or low flow plumbing fixtures.²⁷² These landowners unsuccessfully sought a building permit.²⁷³ They were repeatedly informed by the county that a few design changes would give them a high enough score to get the permit, but they declined to make the changes and instead brought this suit.²⁷⁴ The circuit court found the ordinance constitutional and that no taking had occurred.²⁷⁵ The Third District Court of Appeal affirmed.²⁷⁶ The ordinance was constitutional because it “substantially advance[d] the legitimate state interests of promoting water conservation, windstorm protection, energy efficiency, growth control, and habitat protection.”²⁷⁷ Moreover, to prevail on their claim that a taking had occurred, the landowners had the burden of showing “that the challenged regulation denies *all* economically beneficial or productive use of land.”²⁷⁸ They failed to make that showing.²⁷⁹

266. *Id.*

267. *Id.*

268. *Id.*

269. 738 So. 2d 471 (Fla. 3d Dist. Ct. App. 1999).

270. *Id.* at 472.

271. *Id.*

272. *Id.* at 472 n.1.

273. *Id.* at 472.

274. *Burnham*, 738 So. 2d at 472.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Burnham*, 738 So. 2d at 472.

*Saboff v. St. John's River Water Management District.*²⁸⁰ As mandated by the Florida legislature, the Water Management District created Riparian Habitat Protection Zones.²⁸¹ The landowners' land was in one of these zones.²⁸² Consequently, in order to build a residence, the landowners needed a permit from the District, but the District would issue the permit only if the landowners would mitigate the loss of wildlife habitat caused by the construction.²⁸³ The District demanded a conservation easement over part of the landowners' undeveloped land.²⁸⁴ The landowners complied but challenged the requirement by filing suit in state court claiming inverse condemnation, denial of substantive due process, and denial of equal protection.²⁸⁵ The District removed the case to federal court based on federal question jurisdiction and then moved to dismiss the federal due process and equal protection claims as unripe.²⁸⁶ The landowners voluntarily dismissed their federal claims and the case was remanded to state court which dismissed the case for failure to state a claim.²⁸⁷ The district court of appeal affirmed.²⁸⁸ The landowners next filed suit in federal court claiming denial of their federal substantive due process and equal protection rights.²⁸⁹ The District's defense was that these claims were barred by the doctrine of res judicata.²⁹⁰

Two rules created a dilemma for the landowners. A federal court plaintiff is required "to pursue any available state court remedies that might lead to just compensation prior to bringing suit in federal court for a takings claim."²⁹¹ However, res judicata prevents a party from bringing a claim in federal court that has already been litigated in state court.²⁹² The dismissal of the landowners' claims was an adjudication on the merits against the landowner.²⁹³ The doctrine of res judicata in Florida "bars subsequent litigation where there is (1) identity of the thing sued for, (2) identity of the

280. 200 F.3d 1356 (11th Cir. 2000).

281. *Id.* at 1358.

282. *Id.* at 1359.

283. *Id.*

284. *Id.*

285. *Saboff*, 200 F.3d at 1358.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Saboff*, 200 F.3d at 1359.

291. *Id.*

292. *Id.*

293. *Id.* at 1360.

cause of action, (3) identity of persons and parties to the action, and (4) identity of the quality or capacity of the person for or against whom the claim is made.”²⁹⁴ Of the four, there was only a question as to whether there was identity of cause of action, but the court decided it existed since the facts underlying the federal and state claims were identical.²⁹⁵

To avoid state court litigation preventing any subsequent federal claim, a narrow exception to res judicata has been created. To claim the exception, the landowner had to make a “*Jennings* reservation” by expressly reserving on the state court records the federal claims for subsequent litigation in federal court.²⁹⁶ The landowners, however, had not reserved their rights on the record.²⁹⁷ Their assertions that there was an off the record agreement or that the reservation was implicit were not enough to satisfy the rule and qualify for the exception.²⁹⁸

*Department of Transportation v. S.W. Anderson, Inc.*²⁹⁹ A bridge building project resulted in the relocation of a state road.³⁰⁰ The landowner claimed that the effect of the relocation was the loss of access to its commercial property, amounting to a taking and entitling it to compensation.³⁰¹ The claim encountered two roadblocks. First, the plaintiff’s land did not abut the state road.³⁰² The landowner tried to establish abutter’s status by claiming it had an easement by reason of necessity to the state road across a neighbor’s land.³⁰³ However, that easement had not previously been established and it could not be established in this litigation because the servient landowner was not a party.³⁰⁴ Thus, the landowner had failed to establish this crucial element of its case.³⁰⁵

Even if this case involved land abutting the state road, the landowner had failed to demonstrate that its access had been substantially diminished.³⁰⁶ That is a factual determination, but it requires a showing of

294. *Id.* (citing *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1997)).

295. *Saboff*, 200 F.3d at 1360.

296. *Id.*; see *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331 (5th Cir. 1976).

297. *Saboff*, 200 F.3d at 1360.

298. *Id.*

299. 744 So. 2d 1098 (Fla. 1st Dist. Ct. App. 1999).

300. *Id.* at 1098.

301. *Id.*

302. *Id.* at 1099.

303. *Id.*

304. *S.W. Anderson, Inc.*, 744 So. 2d at 1099.

305. *Id.*

306. *Id.* at 1102.

more than a change to a less convenient route or a diminished flow of traffic passing by.³⁰⁷ The plaintiff here showed that getting from the state road to its front door involved more turns and increased distance, but that was not enough.³⁰⁸

IX. ENVIRONMENTAL LAW

*Coastal Petroleum Co. v. Florida Wildlife Federation, Inc.*³⁰⁹ The issue here was a challenge to an order of the Department of Environmental Protection ("DEP") denying Coastal's application for a drilling permit "because oil extraction is potentially too dangerous to the environment."³¹⁰ Coastal contended that the order was unconstitutional because the DEP's interpretation of the applicable statute was an unconstitutional taking of its property.³¹¹

The statute at issue here was section 377.241 of the *Florida Statutes*, which gives the following three criteria to guide the DEP when issuing permits:

- (1) The nature, character and location of the lands involved; whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.
- (2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.
- (3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the exploration and extraction of such products on a commercially profitable basis.³¹²

Coastal argued that in the past the DEP had issued permits when all three of these criteria were met.³¹³ Yet, when the DEP announced its intention to

307. *Id.*

308. *Id.*

309. 766 So. 2d 226 (Fla. 1st Dist. Ct. App. 1999).

310. *Id.* at 227.

311. *Id.*

312. *Id.* at 227-28; FLA. STAT. § 377.241 (2000).

313. *Coastal Petroleum Co.*, 766 So. 2d at 228.

issue a permit in this case, due to the environmental groups challenging the decision, the DEP reconsidered its past practice and stated that just meeting the criteria was not legally sufficient, but that this must be balanced against the danger to the coastal environment.³¹⁴

The court held that the DEP correctly determined that its previous practice was not consistent with the proper interpretation of the statute and that the DEP had adequately explained why it made this determination.³¹⁵ Further, the court held that Coastal did have a contract to explore for and extract oil from submerged sovereignty lands, but that the DEP's action was not unconstitutional unless just compensation is not paid.³¹⁶ Therefore, the matter was to be resolved in circuit court.³¹⁷

X. FORECLOSURE

*Ahmad v. Cobb Corner, Inc.*³¹⁸ The question here was whether a mortgagee holding guarantees as collateral is entitled to a deficiency judgment when he has sold the property and made a reasonable return on his investment.³¹⁹

In this case, the mortgagee, Ahmad, purchased the note and mortgage in a pool of loans.³²⁰ When the mortgagor, Cobb Corner, defaulted, the mortgagee sued for foreclosure, purchasing the property for \$100 in the foreclosure sale.³²¹ Six months later, the mortgagee sold the property for \$775,000.³²² The mortgagee then filed for a deficiency judgment against the guarantors, Resolution Trust Corporation.³²³

The Fourth District Court of Appeal held that the return on investment made cannot be the determining factor as to a mortgagee's right to recover.³²⁴ The court also held that the mortgagee is entitled to recover the

314. *Id.*

315. *Id.*; see FLA. STAT § 120.68(12) (2000). Cf. *Dep't of Admin. v. Albanese*, 445 So. 2d 639, 641 (Fla. 1st Dist. Ct. App. 1984) (finding "the Department, however, possesses only such authority as is specifically delegated to it by statute and cannot promulgate rules that go beyond that grant of authority or are contrary to the intent of the legislature").

316. *Coastal Petroleum Co.*, 766 So. 2d at 228; see FLA. CONST. art. X, § 6.

317. *Coastal Petroleum Co.*, 766 So. 2d at 228.

318. 762 So. 2d 944 (Fla. 4th Dist. Ct. App. 2000).

319. *Id.* at 945.

320. *Id.*

321. *Id.* at 945-46.

322. *Id.* at 946.

323. *Ahmad*, 762 So. 2d at 946.

324. *Id.* at 947.

entire contract amount through any avenue available to him and his recovery is not limited by the amount he has invested.³²⁵

Bowman v. Saltsman.³²⁶ The issue here was whether the trial court properly granted Saltsman's request to reform deeds previously given, and properly denied Bowman's purchaser any relief, thereby denying Bowman his right of redemption because foreclosure was not required.³²⁷

Bowman desired an easement across Saltsman's property.³²⁸ However, "Saltsman would not convey an easement but agreed to sell the entire parcel to Bowman if the deal could be arranged as a tax free exchange."³²⁹ They entered into an agreement for deed under which Bowman would pay \$425,000 to a trustee who would purchase property desired by Saltsman.³³⁰ When all the money had been paid, Bowman would get legal title to the property.³³¹ At that time Saltsman would get the property he desired with no tax consequence.³³² Bowman made over \$300,000 in payments before breaching.³³³ Saltsman claimed ownership of both parcels and filed an action to reform certain deeds pursuant to the agreement, instead of declaring a default and foreclosing the mortgage.³³⁴ Bowman counterclaimed for, among other things, specific performance of the land contract.³³⁵ The trial court found Bowman had defaulted by not making all the payments that were due, denied him relief, and granted Saltsman's request to reform the deeds.³³⁶ Bowman was denied his right of redemption because foreclosure was not required.³³⁷

The appellate court held the agreement for deed was a mortgage and carried all the burdens of such, including the right of redemption.³³⁸ Since Bowman's equitable interest in the land had not been foreclosed and Bowman sought to resume payments under the agreement, even though he

325. *Id.*

326. 736 So. 2d 144 (Fla. 5th Dist. App. 1999).

327. *Id.* at 146.

328. *Id.* at 145.

329. *Id.*

330. *Id.*

331. *Bowman*, 736 So. 2d at 145.

332. *Id.*

333. *Id.*

334. *Id.* at 146.

335. *Id.* at 145.

336. *Bowman*, 736 So. 2d at 145.

337. *Id.* at 146.

338. *Id.*

had defaulted, his rights needed to be enforced under the agreement.³³⁹ The appellate court emphasized that “the secured party may either waive the default or declare a default and foreclose,” but cannot “treat the default as an automatic termination of the buyer’s interest.”³⁴⁰

*Caple v. Tuttle’s Design-Build, Inc.*³⁴¹ The issue here was whether the Third District Court of Appeal properly held that section 702.10(2) of the *Florida Statutes*, which allows a commercial mortgagee to request a court order requiring the mortgagor to continue payments pending litigation, post bond, or relinquish possession of the property, is unconstitutional because it does not adequately protect the due process rights of the mortgagor and impermissibly conflicts with the supreme court’s rulemaking authority.³⁴²

Tuttle purchased a plant nursery from Caple for a price of seventeen million dollars.³⁴³ “The purchase was financed by a bank, with three promissory notes to Caple Enterprises, and one promissory note to George Caple.”³⁴⁴ Tuttle subsequently defaulted on one of the notes to Caple Enterprises and the one note to George Caple.³⁴⁵ Caple filed an action for foreclosure and requested, pursuant to section 702.10(2) of the *Florida Statutes*, an order to show cause.³⁴⁶ Tuttle answered asserting various affirmative defenses.³⁴⁷ The court ordered Tuttle to either pay Caple interest retroactive to the date of the request of the order or alternatively post a bond in the amount of \$6,865,572, which was the amount of the unpaid mortgage principal and interest.³⁴⁸

Tuttle appealed the Third District Court of Appeal’s decision.³⁴⁹ The Third District found the statute unconstitutional under the United States and Florida Constitutions, “because it forces a mortgagor who wants to retain possession of the property to make payments without due process protection in the form of a mortgagee’s bond or sequestration.”³⁵⁰ Further, the court held that “because it only provides for an excessive bond to stay the

339. *Id.*

340. *Id.*

341. 753 So. 2d 49 (Fla. 2000).

342. *Id.* at 50.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Caple*, 753 So. 2d at 50.

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.* at 51.

payments, that the section impermissibly regulates matters of practice and procedure.”³⁵¹

The Supreme Court of Florida held that section 702.10(2) of the *Florida Statutes* was constitutional based on two analyses.³⁵² First, “[i]t is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional.”³⁵³ The supreme court opined that, based on the totality of the statute as a whole, this statute gives some flexibility to the court and, therefore, does not violate due process rights.³⁵⁴ Further, the court stated that if the statute is “substantive and that it operates in an area of legitimate legislative concern,” it is “precluded from finding it unconstitutional.”³⁵⁵ Substantive law has been defined to include the “rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.”³⁵⁶ The Supreme Court of Florida held the statute “created substantive rights and any procedural provisions [were] directly related to the definition of those rights.”³⁵⁷ Therefore, the statute does not infringe on the court’s rulemaking authority and is constitutional.³⁵⁸

*Edwards v. Federal Deposit Insurance Corp.*³⁵⁹ The issue here was whether the trial court properly calculated the deficiency judgment amount in a foreclosure when it failed to reduce the property’s fair market value by the amount of delinquent ad valorem taxes.³⁶⁰

The appellate court concluded the trial court failed to follow proper procedure in this case by not including the amount of unpaid ad valorem taxes in its deficiency calculation.³⁶¹ The Fourth District further held the trial court has discretion with respect to granting or denying a deficiency judgment.³⁶² “However, granting a deficiency judgment is more the rule than the exception.”³⁶³

351. *Caple*, 753 So. 2d at 51.

352. *Id.*

353. *Id.*; see *VanBibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880, 883 (Fla. 1983).

354. *Caple*, 753 So. 2d at 52–53.

355. *Id.* at 53 (citing *VanBibber*, 439 So. 2d at 883).

356. *Id.* at 54 (citing *Adams v. Wright*, 403 So. 2d 391 (Fla. 1981)).

357. *Caple*, 753 So. 2d at 55.

358. *Id.*

359. 746 So. 2d 1157 (Fla. 4th Dist. Ct. App. 1999).

360. *Id.* at 1157.

361. *Id.* at 1158.

362. *Id.*

363. *Id.* at 1157; see *Chidnese v. McCollem*, 695 So. 2d 936, 938 (Fla. 4th Dist. Ct. App. 1997).

Further, the court held that “[e]quitable considerations upon which the trial court might deny a deficiency should be presented after the potential deficiency is determined (amount of judgment on note less fair market value of property).”³⁶⁴ Prior to that “the trial court would not be able to determine what set-off might be appropriate.”³⁶⁵ Pursuant to this case, the appellate court remanded for recalculation of the deficiency amount after which the appellants might appeal the deficiency judgment.³⁶⁶

Hamilton v. Hughes.³⁶⁷ The issue here was whether the trial court properly awarded excess mortgage foreclosure sale proceeds to Hughes and no portion of the excess sale proceeds to Hamilton.³⁶⁸

The action started with Chase Manhattan Mortgages Corporation’s (“Chase”) mortgage foreclosure complaint.³⁶⁹ Originally, Hamilton and her former husband had mortgaged their property to Chase during their marriage.³⁷⁰ Later, the couple divorced and the husband defaulted on the \$26,000 mortgage.³⁷¹ Further, Dolphin Hamilton, the former husband, obtained a mortgage from the Hughes after the dissolution of the marriage.³⁷² This mortgage was only signed by Dolphin Hamilton.³⁷³ The Hughes agreed to pay Chase \$31,000 for assignment of the first mortgage.³⁷⁴ Hamilton received copies of all significant filings in this case and did not make any appearance through the trial.³⁷⁵ Yet, she did inform the court by letter that she could not afford an attorney but claimed a fifty percent interest in the encumbered property.³⁷⁶ The property sold for more than the outstanding mortgages held by the Hughes.³⁷⁷ The trial court made disbursements to the Hughes and the state to satisfy the amounts owed to them.³⁷⁸ It retained \$5600 in excess funds.³⁷⁹ The Hughes requested a disbursement of \$5500 to

364. *Id.* at 1158.

365. *Edwards*, 746 So. 2d at 1158 (quoting *Chidnese*, 695 So. 2d at 938).

366. *Id.*

367. 737 So. 2d 1248 (Fla. 5th Dist. Ct. App. 1999).

368. *Id.* at 1249.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Hamilton*, 737 So. 2d at 1249.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Hamilton*, 737 So. 2d at 1250.

378. *Id.*

379. *Id.*

them and \$100 to Hamilton.³⁸⁰ Hamilton filed a response noting her half interest in the property and that she and her former husband had owned the property as tenants in common, requesting \$3338.³⁸¹

The Fifth District Court of Appeal held that Hamilton should be awarded the entire \$5600 in excess proceeds.³⁸² It reasoned that “one tenant in common cannot properly sell or dispose of more than his or her own interest in the common property to a third person unless authorized to do so.”³⁸³

Further, the Second District held that foreclosure defendants who failed to answer the first foreclosure complaint do not waive their right to excess proceeds.³⁸⁴ Because Hamilton only contested the \$5500 disbursement, that was all that was reviewed.³⁸⁵ The Hughes had constructive notice of Hamilton’s interest in the property.³⁸⁶ Thus, their contention that they relied on her silence was not valid.³⁸⁷

*Mody v. California Federal Bank.*³⁸⁸ The issue here was whether the trial court properly concluded, when it vacated the sale of foreclosed property, that the foreclosure sale bid was grossly inadequate and that the inadequacy resulted from a mistake by the bank.³⁸⁹

On February 19, 1999, the bank’s bidding agent attended a foreclosure sale with the intention of bidding up to \$239,200 on the subject property.³⁹⁰ The bidding agent was to bid on three other pieces of property at the foreclosure sale.³⁹¹ But, the agent failed to bid on the property because he had been furnished a different case name.³⁹² Mody and Cava were the highest bidders with a bid of \$202,000.³⁹³ The bank filed an objection to the

380. *Id.*

381. *Id.*

382. *Hamilton*, 737 So. 2d at 1250.

383. *Id.* (citing 86 C.J.S. *Tenancy in Common* § 138); see *Cadle Co. II v. Stauffenberg*, 581 N.E.2d 882, 884 (Ill. 3d Dist. Ct. App. 1991) (holding that “where a cotenant who owns less than the entire interest attempts to mortgage the whole, the mortgage is valid [only] as to the actual interest [of the mortgagor]”).

384. *Hamilton*, 737 So. 2d at 1250; see *Schroth v. Cape Coral Bank*, 377 So. 2d 50, 51 (Fla. 2d Dist. Ct. App. 1979).

385. *Hamilton*, 737 So. 2d at 1251.

386. *Id.*

387. *Id.*

388. 747 So. 2d 1016 (Fla. 3d Dist. Ct. App. 1999).

389. *Id.* at 1017.

390. *Id.*

391. *Id.*

392. *Id.*

393. *Mody*, 747 So. 2d at 1017.

sale and moved to have it vacated because the Mody and Cava bid was grossly inadequate.³⁹⁴ The trial court was presented with several different values for the property.³⁹⁵

Mody and Cava's expert valued the property at \$225,000.³⁹⁶ The bank's expert valued the property at \$300,000.³⁹⁷ The property's assessed value for tax purposes was \$252,612.³⁹⁸ On June 22, 1999, the trial court entered an order vacating the foreclosure sale and ordering a new sale.³⁹⁹

The Third District Court of Appeal held that it was error to vacate the foreclosure sale bid where it was not shown that the bid was grossly or startlingly inadequate.⁴⁰⁰ In order to vacate a foreclosure sale the trial court is required to find that "the foreclosure sale bid was grossly or startlingly inadequate" and "the inadequacy of the bid resulted from some mistake, fraud or other irregularity in the sale."⁴⁰¹ The court noted that the Supreme Court of Florida had found that a foreclosure bid of seventy percent of the value of the property is not a startling inadequacy.⁴⁰² Further, the Third District Court of Appeal had similarly found that a foreclosure sale bid of seventy-two percent of the value of the foreclosed property is not startlingly or grossly inadequate.⁴⁰³ Here, even though the trial court did not assign the property one of the proposed values, that was not necessary.⁴⁰⁴ Even if the highest appraisal value of \$300,000 was used, the foreclosure bid price was 67.3% and was not grossly or startlingly inadequate.⁴⁰⁵ Further, if one of the other possible values of \$225,000 or \$252,612 were used, the foreclosure bid would have been 89.8% or 80% respectively.⁴⁰⁶

*Parsons v. Whitaker Plumbing of Boca Raton, Inc.*⁴⁰⁷ The issue here was whether the trial court properly amended its foreclosure judgment on a

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Mody*, 747 So. 2d at 1017.

399. *Id.*

400. *Id.* at 1018.

401. *Id.* at 1017-18; see *Arlt v. Buchanan*, 190 So. 2d 575, 577 (Fla. 1996); *Maule Indus., Inc. v. Seminole Rock & Sand Co.*, 91 So. 2d 307, 311 (Fla. 1956).

402. *Mody*, 747 So. 2d at 1018; see *Maule Indus., Inc.*, 91 So. 2d at 311.

403. *Mody*, 747 So. 2d at 1018; see *Moody v. Glendale Fed. Bank*, 643 So. 2d 1149 (Fla. 3d Dist. Ct. App. 1994).

404. See *Mody*, 747 So. 2d at 1018.

405. *Id.*

406. *Id.*

407. 751 So. 2d 655 (Fla. 4th Dist. Ct. App. 1999).

mechanics' lien to include attorneys' fees after the judgment debtors already exercised their right of redemption for the judgment entered for labor and material provided by the mechanic's lienor.⁴⁰⁸

Whitaker filed an action against Parsons and DeFalco to foreclose on a mechanics' lien for plumbing work performed on Parsons' and DeFalco's property.⁴⁰⁹ On March 24, 1998, the trial court entered a final judgment of foreclosure, finding that Whitaker held a lien for \$3117.43, including interests and costs on Parson's property.⁴¹⁰ On April 22, 1998, Parson and DeFalco "exercised their statutory right of redemption by paying the total amount due under the March 24 final judgment of foreclosure, plus a clerk's fee."⁴¹¹ The clerk issued a certificate of redemption.⁴¹² "On August 6, 1998 . . . the court entered an amended final judgment of foreclosure, awarding Whitaker \$12,000 in attorney's fees and setting a foreclosure sale to satisfy this debt."⁴¹³

The Fourth District Court of Appeal determined the entry of an amended foreclosure judgment for attorneys' fees was proper procedurally and in correct form.⁴¹⁴ Parsons and DeFalco, exercising their redemption rights regarding the first judgment, did not preclude the trial court from entering the second judgment.⁴¹⁵ The redemption only satisfied the specified debt in the first judgment and not the liability for the attorneys' fees which remained unpaid as of August 6, 1998.⁴¹⁶ Whitaker sought to foreclose a lien created by section 713.05 of the *Florida Statutes*.⁴¹⁷ When there is an action to foreclose this type of lien, "the prevailing party is entitled to recover a reasonable fee for the services of her or his attorney for trial and appeal . . . in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions."⁴¹⁸ Attorneys' fees and costs awarded under section 713.29 are included within the lien which is created by the statute.⁴¹⁹

408. *Id.* at 655.

409. *Id.*

410. *Id.*

411. *Id.*

412. *Parsons*, 751 So. 2d at 655.

413. *Id.*

414. *Id.* at 657.

415. *Id.*

416. *Id.*

417. *Parsons*, 751 So. 2d at 656.

418. *Id.* (quoting FLA. STAT. § 713.29 (2000)).

419. *Id.* at 656; *Zalay v. Ace Cabinets of Clearwater, Inc.*, 700 So. 2d 15, 17-18 (Fla. 2d Dist. Ct. App. 1997) (examining section 713.06(1) of the *Florida Statutes*). The language

Texas Commerce Bank National Ass'n v. Nathanson.⁴²⁰ In this case there was a request for a rehearing which was denied.⁴²¹ However, the appellate court issued a clarification of its original opinion.⁴²²

The issue here was whether the trial court properly ruled that the clerk did not err when he refused to accept the highest bid in a foreclosure sale on the grounds that the bidder, Texas Commerce Bank National Association ("TCBNA"), tendered a law firm check rather than cash for the clerk's fee.⁴²³ The trial court overruled TCBNA's objection to the foreclosure sale.⁴²⁴

TCBNA offered the highest bid at \$151,000 for a piece of property sought by both TCBNA and Jupiter Assets.⁴²⁵ Jupiter Assets "objected to TCBNA paying the \$40 clerk's fee for the sale with a law firm cost account check as opposed to cash."⁴²⁶ The deputy clerk on the scene refused to accept the check and Jupiter Assets was declared the successful bidder.⁴²⁷ TCBNA filed motions to correct the mistake and the trial court declined to grant it relief, despite the clerk of the court's acknowledgment on the record that erred in rejecting the cost check and bid submitted on behalf of TCBNA.⁴²⁸ The trial court found that, because "TCBNA had prepared the proposed form of the final judgment in the foreclosure case, which was signed as submitted, and which provided that the Clerk's fee would be paid in cash and in advance of the sale," TCBNA failed to comply under contract law with the terms of the agreement.⁴²⁹

The Fourth District Court of Appeal held the trial court grossly abused its discretion and reversed with an order requiring the clerk to accept TCBNA's bid and cost payment and declaring it the successful bidder on the

in section 713.06(1) is almost identical to that of section 713.05 and the reasons stated in *Zalay* are equally applicable to the lien at issue and the court adopts them. See *Parsons*, 751 So. 2d at 656. Further, under section 713.29 of the *Florida Statutes* fees may properly be taxed after the entry of a final judgment in a foreclosure lien action. *NCN Elec., Inc. v. Leto*, 498 So. 2d 1377, 1377-78 (Fla. 2d Dist. Ct. App. 1986).

420. 763 So. 2d 1107 (Fla. 4th Dist. Ct. App. 2000).

421. *Id.* at 1108.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Nathanson*, 763 So. 2d at 1108.

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

property in question.⁴³⁰ Prior to this, the clerk established that a “for cash” requirement in Palm Beach County “is understood to be cash or check.”⁴³¹ Further, this is stated in Palm Beach County Administrative Order 95-3-R which provides that “[i]f you are an attorney and you (or your client) are the successful bidder, you may pay your deposit and bid . . . and costs and fees by a trust account check . . . or law firm account check.”⁴³² This order was in effect at the time of the sale.⁴³³

*Zerquera v. Centennial Homeowners’ Ass’n.*⁴³⁴ The issue here was whether the trial court erred when it entered a final judgment of foreclosure as to Zerquera for the total amount owed, including attorneys’ fees and costs of \$31,023.79 and ordered a foreclosure sale if Zerquera did not pay the judgment within three days of the order.⁴³⁵

In 1989, Zerquera purchased Centennial property which was subject to a “Declaration of Covenants, Conditions, and Restrictions” (“Declaration”).⁴³⁶ The pertinent provisions were: “(1) assessments would be a continuing lien on the property; (2) Centennial could foreclose on the property if the continuing lien was not paid; and (3) Centennial could amend the Declaration in the future.”⁴³⁷

“In 1991, Centennial amended the Declaration to provide that violators of the Declaration’s covenants could be fined and that said fines would be treated as assessments”⁴³⁸ In 1995, Centennial fined Zerquera \$200 for keeping a boat and a truck on his property which violated the Declaration.⁴³⁹ Zerquera challenged these fines and on appeal the court held that the amendments to the Declaration were valid and enforceable.⁴⁴⁰ An award was affirmed against Zerquera for \$21,400 which included the fine, attorneys’ fees, and costs.⁴⁴¹ On March 16, 1999, the trial court entered its final judgment of foreclosure against Zerquera for \$31,023.79 and ordered a

430. *Nathanson*, 763 So. 2d at 1109.

431. *Id.* at 1108–09.

432. *Id.* at 1109.

433. *Id.*

434. 752 So. 2d 694 (Fla. 3d Dist. Ct. App. 2000).

435. *Id.* at 695.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Zerquera*, 752 So. 2d at 695.

440. *Id.*

441. *Id.*; see also *Zerquera v. Centennial Homeowners’ Ass’n, Inc.*, 721 So. 2d 751 (Fla. 3d Dist. Ct. App. 1998).

foreclosure sale of his homestead property within three days if Zerquera did not pay the judgment.⁴⁴²

The Third District Court of Appeal held that Zerquera's property may be foreclosed upon to satisfy the \$31,023.79 judgment.⁴⁴³ A homestead "may be foreclosed to satisfy a continuing lien on the property if the homeowner had either actual or constructive notice of the covenant" that provides for the lien when the owner took title to the property.⁴⁴⁴ Here, Zerquera had at least constructive notice of the Declaration when he took title to the property in 1989.⁴⁴⁵ Further, based on the Declaration, Zerquera was on proper notice when this Declaration was later amended.⁴⁴⁶ He was aware that his homestead property was subject to foreclosure if fines were not paid.⁴⁴⁷

XI. HOMEOWNER ASSOCIATIONS

Recent legislation prohibits homeowner associations from restricting respectful displays of the United States flag.⁴⁴⁸

XII. HOMESTEAD

*Bakst, Cloyd & Bakst, P.A. v. Cole.*⁴⁴⁹ The issue was whether the trial court correctly held that Cole's homestead property was not subject to her attorney's charging lien.⁴⁵⁰

Bakst represented Cole in her divorce.⁴⁵¹ As a result of that representation, Bakst obtained a charging lien.⁴⁵² Bakst requested that Cole's homestead property be subject to attachment.⁴⁵³ The trial court

442. *Zerquera*, 752 So. 2d at 695.

443. *Id.*

444. *Id.*; see also *Bessemer v. Gersten*, 381 So. 2d 1344 (Fla. 1980).

445. *Zerquera*, 752 So. 2d at 695.

446. *Id.* at 696.

447. *Id.*

448. Ch. 2000-302, § 47, 2000 Fla. Laws 3129, 3031 (codified at FLA. STAT. § 617.3075(3) (2000)).

449. 750 So. 2d 676 (Fla. 4th Dist. Ct. App. 1999).

450. *Id.* at 676.

451. *Id.*

452. *Id.*

453. *Id.*

determined that Cole's homestead property should not be subject to the attorney's charging lien.⁴⁵⁴

The Fourth District Court of Appeal affirmed that Cole's homestead property was not subject to the charging lien.⁴⁵⁵ A waiver of the homestead exemption was not enforceable on public policy grounds.⁴⁵⁶ The language in the contract was insufficient to establish a knowing waiver of an important constitutional right such as homestead protection.⁴⁵⁷

*In re Coin.*⁴⁵⁸ The issue here was whether the Coins, debtors in bankruptcy, were entitled to claim five contiguous lots and a house as part of a homestead exemption when they took affirmative steps to have each lot individually taxed and only claimed homestead exemption status on the lot with the house situated on it.⁴⁵⁹

The Coins purchased their house and lots five through nine on December 20, 1985 in the same purchase transaction.⁴⁶⁰ Their house was located on lot seven, with lots five, six, eight, and nine being used as their driveway and front lawn.⁴⁶¹ All of the lots were contiguous and the Coins never used lots five, six, eight, or nine other than for household purposes.⁴⁶² In 1993, the Coins requested that Monroe County tax each lot separately and only claimed homestead exemption on lot seven.⁴⁶³ On May 5, 1999, the Coins filed for Chapter 7 bankruptcy and scheduled lots five through nine as exempt homestead under Article X, section 4(a)(1) of the Florida Constitution.⁴⁶⁴

The court held that the Coins qualified for homestead exemption on lots five, six, eight, and nine and for their house on lot seven.⁴⁶⁵ It based its decision on Article X, section 4(a)(1) of the Florida Constitution which states in part:

454. *Cole*, 750 So. 2d at 676.

455. *Id.*

456. *Id.* at 676-77; *see also* *Sherbill v. Miller Mfg. Co.*, 89 So. 2d 28 (Fla. 1956).

457. *Cole*, 750 So. 2d at 677.

458. 241 B.R. 258 (Bankr. S.D. Fla. 1999).

459. *Id.* at 258-59.

460. *Id.* at 258.

461. *Id.*

462. *Id.*

463. *Coin*, 241 B.R. at 258.

464. *Id.* at 259.

465. *Id.* at 258.

SECTION 4. Homestead; exemptions –

(a) There shall be exempt . . . the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon . . . or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family.⁴⁶⁶

Further, the court held that the divisibility of the lots for zoning purposes and tax purposes did not defeat the homestead claim.⁴⁶⁷

*Colwell v. Royal International Trading Corp.*⁴⁶⁸ The issue here was whether married individuals living on two distinct noncontiguous parcels of property can be granted separate homestead exemptions, where their living arrangements were not known to be the subject of fraud, and there was no evidence brought forward to overcome the presumption in favor of the exception.⁴⁶⁹

The Colwells jointly filed for Chapter 7 bankruptcy.⁴⁷⁰ Although legal separations are not recognized under Florida law, the Colwells had been separated for three and one half years, and each had acquired a separate home and had obtained a separate homestead exemption on that home.⁴⁷¹ Florida has chosen to opt out of federal exemptions and to apply its own.⁴⁷² The bankruptcy court ruled there was no case law to support the dual exemptions.⁴⁷³ The Colwells appealed to the United States District Court for the Southern District of Florida which reversed the bankruptcy court.⁴⁷⁴

The district court held that the Colwells were each entitled to separate homestead exemptions when they were married but legitimately living apart in separate residences and there was neither fraud nor evidence to overcome the presumption in their favor.⁴⁷⁵ Florida state court decisions, as a matter of

466. FLA. CONST. art. X, § 4(a)(1).

467. *Coin*, 241 B.R. at 259; see also *In re Dudeney*, 159 B.R. 1003, 1004 (Bankr. S.D. Fla. 1993).

468. 196 F.3d 1225 (11th Cir. 1999).

469. *Id.* at 1226.

470. *Id.* at 1225.

471. *Id.* at 1225–26.

472. *Id.* at 1226.

473. *Colwell*, 196 F.3d at 1226.

474. *Id.*

475. *Id.*

public policy, liberally construe the state's homestead exemption.⁴⁷⁶ Additionally, there is a presumption in favor of the exemption.⁴⁷⁷

*In re Harrison.*⁴⁷⁸ The issue here was whether Harrison could claim as exempt a residence located on Marco Island on which she did not reside but in which she still owned a half interest.⁴⁷⁹

Harrison and Christopher Lewis Hoef, Harrison's former spouse, were married in 1982 and had two children.⁴⁸⁰ They established their residence on Marco Island, and it remained their marital home until their divorce in 1997.⁴⁸¹ Afterwards, Harrison continued to reside in the home until July 1998, when she moved to Naples and rented a home where she resided with the younger child.⁴⁸² Harrison contended she was forced to move because the elder son's drug related activities created a harmful environment for the younger child.⁴⁸³ Harrison's former spouse and elder son still resided in the Marco Island home.⁴⁸⁴ Further, Harrison was to receive the first \$7000 from the sale of the home.⁴⁸⁵

The court held Harrison was entitled to claim interest in the Marco Island property as her homestead.⁴⁸⁶ The homestead exemption established by Article X, section 4 of the Florida Constitution places the burden on the objecting party to make a strong showing that Harrison was not entitled to claim exemption.⁴⁸⁷ Further, abandonment may only be proven by a strong showing that Harrison never intended to return to the residence and mere absence for financial, health, or family reasons is not abandonment.⁴⁸⁸ Harrison still owned a half interest in the property and resided there after the divorce.⁴⁸⁹ She left because of family reasons, which alone would not be deemed abandonment.⁴⁹⁰

476. *Id.*

477. *Id.*; see also *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997).

478. 236 B.R. 788 (Bankr. N.D. Fla. 1999).

479. *Id.* at 789.

480. *Id.*

481. *Id.*

482. *Id.*

483. *Harrison*, 236 B.R. at 789.

484. *Id.*

485. *Id.*

486. *Id.* at 790.

487. *Id.*; see *In re Impraser*, 86 B.R. 721, 722 (Bankr. M.D. Fla. 1988).

488. *Harrison*, 236 B.R. at 790; see *Monson v. First Nat'l Bank of Bradenton*, 497 F.2d 135, 138 (5th Cir. 1974).

489. *Harrison*, 236 B.R. at 790.

490. *Id.*

*In re Hendricks.*⁴⁹¹ The issue here was whether Hendricks would be allowed to claim homestead exemption in a bankruptcy suit where the claimed exempt property was owned as tenancy by the entirety by both Hendricks and the nondebtor spouse, and the claims from the creditors were only against Hendricks.⁴⁹² Further, there was the issue of whether Hendricks' converting nonexempt assets into an exempt home caused Hendricks to lose her homestead exemption.⁴⁹³

Prior to moving to Florida, Hendricks owned a residence in California.⁴⁹⁴ A large judgment was issued against Hendricks on August 7, 1997 in favor of her creditors.⁴⁹⁵ Shortly afterwards, Hendricks sold her California residence.⁴⁹⁶ In September 1997, Hendricks and her spouse purchased a home in Melbourne, Florida.⁴⁹⁷ Hendricks used her personal funds to make a cash payment.⁴⁹⁸ The home was jointly owned by Hendricks and her spouse as tenancy by the entirety.⁴⁹⁹ There was no dispute that Hendricks and her spouse owned the home as a tenancy by the entirety and also that there were no joint creditors of the couple.⁵⁰⁰

The bankruptcy court held that Hendricks was entitled to summary judgment.⁵⁰¹ It reasoned Article X, section 4 of the Florida Constitution does not provide that the right to exempt property is forfeited if property is acquired or improved with the intent to hinder creditors where the property qualified, as it did in this case, for homestead exemption.⁵⁰² Further, the bankruptcy court opined that section 222.29 of the *Florida Statutes* does not apply to homestead property.⁵⁰³ Therefore, Hendricks established she was entitled to exempt the home from creditors.

*Havoco of America, Ltd. v. Hill.*⁵⁰⁴ The primary issue here was whether the trial court properly denied Havoco's objection to a claimed homestead exemption and tenancy by the entirety, on the ground that Hill converted

491. 237 B.R. 821 (Bankr. M.D. Fla. 1999).

492. *Id.* at 823.

493. *Id.*

494. *Id.* at 822.

495. *Id.*

496. *Hendricks*, 237 B.R. at 822-23.

497. *Id.* at 823.

498. *Id.*

499. *Id.*

500. *Id.* at 824.

501. *Hendricks*, 237 B.R. at 826.

502. *Id.* at 825.

503. *Id.*

504. 197 F.3d 1135 (11th Cir. 1999).

nonexempt assets into exempt assets with the intent to hinder, delay, or defraud Havoco.⁵⁰⁵ Because of the property involved, the United States Court of Appeals for the Eleventh Circuit certified the following question to the Supreme Court of Florida:

DOES ARTICLE X, SECTION 4 OF THE FLORIDA CONSTITUTION EXEMPT A FLORIDA HOMESTEAD WHERE THE DEBTOR ACQUIRED THE HOMESTEAD USING NON-EXEMPT FUNDS WITH THE SPECIFIC INTENT OF HINDERING, DELAYING, OR DEFRAUDING CREDITORS IN VIOLATION OF FLA. STAT. § 726.105 OR FLA. STAT. §§ 222.29 and 222.30?⁵⁰⁶

The court held, however, that, in a case involving a tenancy by the entireties where the wife's property rights may be terminated, her due process rights require that she be a party to the proceeding.⁵⁰⁷ Therefore, this court found that Hill's wife was an indispensable party to Havoco's claim and Havoco's objection was denied.⁵⁰⁸ Havoco must seek to avoid this transfer in an adversarial proceeding with both Hill and his wife as parties.⁵⁰⁹ In the meantime, the court certified the aforementioned question to the Supreme Court of Florida.⁵¹⁰

Kellogg v. Schreiber.⁵¹¹ There were two issues here.⁵¹² The first was procedurally oriented in determining whether the district court was correct when it held that the bankruptcy judge did not abuse his discretion in denying Kellogg's motion for continuance and rehearing.⁵¹³ The court held that missed deadlines for disclosing witnesses and evidence, and a last minute attempt to terminate his counsel did not warrant a continuance and affirmed.⁵¹⁴ The second issue was whether the bankruptcy court was correct when it ordered the sale of Kellogg's property, which exceeded the one-half acre homestead limitation, because if Kellogg selected one-half acre to be

505. *Id.* at 1136–37.

506. *Id.* at 1144.

507. *Id.* at 1140.

508. *Id.*

509. *Hill*, 197 F.3d at 1140.

510. *Id.* at 1144.

511. 197 F.3d 1116 (11th Cir. 1999).

512. *See id.* at 1119–20.

513. *Id.* at 1120.

514. *Id.*

exempt, the remaining nonexempt property would have no legal or practical use because it would violate local zoning laws.⁵¹⁵

In 1993, Schreiber obtained a judgment lien against Kellogg for \$512,863 and had been trying to collect it since then.⁵¹⁶ In 1995, Kellogg filed a Chapter 7 bankruptcy petition claiming a Florida homestead exemption on his Palm Beach oceanfront property.⁵¹⁷ “Kellogg stated his homestead was approximately 1.3 ‘indivisible acres,’” and had a tax assessor’s value of \$799,432.⁵¹⁸ Schreiber objected to the claim because it exceeded Florida’s exemption for municipal property, which is limited to one-half acre.⁵¹⁹ Kellogg’s property was zoned R-AA.⁵²⁰ “For R-AA property, Palm Beach’s zoning laws required a minimum parcel size of 60,000 square feet with at least 150 feet fronting a road”⁵²¹ Kellogg’s property could not be divided in a legal or practical manner to meet this requirement.⁵²² Therefore, the court ruled that Kellogg’s property must be sold and the proceeds apportioned between Kellogg and the bankruptcy estate.⁵²³

The Eleventh Circuit Court of Appeals held that Kellogg could not select a one-half acre portion of his property to be exempt homestead when the local zoning laws prohibited him from subdividing his property.⁵²⁴ Therefore, the bankruptcy court correctly ordered the property sold and the proceeds divided.⁵²⁵ This was based on the fact that Florida’s homestead laws must be liberally construed, but not so liberally that they become “‘instruments of fraud, an imposition on creditors, or a means to escape honest debts.’”⁵²⁶ Further, Kellogg may reasonably designate his one-half acre portion of the property as homestead as long as the remaining portion

515. *Id.*

516. *Kellogg*, 197 F.3d at 1118.

517. *Id.*

518. *Id.*

519. *Id.*; see FLA. CONST. art. X, § 4(a).

520. *Kellogg*, 197 F.3d at 1118.

521. *Id.*

522. *Id.* at 1118–19.

523. *Id.* at 1119.

524. *Id.* at 1120.

525. *Kellogg*, 197 F.3d at 1121.

526. *Id.* at 1120 (citing *Frase v. Branch*, 362 So. 2d 317, 318 (Fla. 2d Dist. Ct. App. 1978)).

has legal and practical use.⁵²⁷ Here, the nonexempt parcel would have no legal or practical use because it would violate local zoning laws.⁵²⁸

*Law v. Law.*⁵²⁹ The issue here was whether, when the husband and wife separated and the husband moved from the home they had shared and claimed as their homestead (his mother's home), the home became the husband's homestead and therefore exempted the husband from any claim for support payments to his former wife.⁵³⁰

In May 1995, Law and his present wife, Barbara, separated and he moved out of the home that the two of them owned in tenancy by the entireties and into his mother's home.⁵³¹ He took his minor great grandson, for whom he was the legal guardian, with him.⁵³² He received both his grandson's and his mail at this home.⁵³³ Law's mother became ill in February 1997 and Barbara moved into that home to help him care for his mother.⁵³⁴ Law received power of attorney and contracted to sell his mother's home.⁵³⁵ His mother died in March 1997 and Law inherited her home.⁵³⁶ The probate court entered an order on April 22 that the home had passed to Law as his mother's only heir.⁵³⁷ The house was sold pursuant to the contract on April 28.⁵³⁸

The court held the home that Law had inherited was his homestead and, therefore, exempt from his ex-wife's judgment.⁵³⁹ The court stated that homestead exemption can be extended to each of two people who are married, but "legitimately" live apart in separate residences, if they meet the other requirements of the exemption.⁵⁴⁰ In this case there was evidence of a legitimate separation between Law and Barbara in May 1995, and ample evidence that Law was residing in his mother's home and that he intended to

527. *Id.* at 1120; *see* Englander v. Mills, 95 F.3d 1028, 1032 (11th Cir. 1996).

528. *Kellogg*, 197 F.3d at 1120.

529. 738 So. 2d 522 (Fla. 4th Dist. Ct. App. 1999).

530. *Id.* at 523.

531. *Id.*

532. *Id.*

533. *Id.*

534. *Law*, 738 So. 2d at 523.

535. *Id.*

536. *Id.*

537. *Id.* at 523-24.

538. *Id.* at 524.

539. *Law*, 738 So. 2d at 524.

540. *Id.* at 525; *see* Isaacson v. Isaacson, 504 So. 2d 1309 (Fla. 1st Dist. Ct. App. 1987).

reside there until it was sold.⁵⁴¹ There was no reason that Law could not have one homestead and that it be different than his wife's since their separation was bona fide and since Law intended to reside in the home he had inherited from his mother.⁵⁴²

*In re Simms.*⁵⁴³ The issue here was whether the Simms should be allowed a claimed exemption in an annuity that was invested together with the net proceeds from the sale of their former homestead or, in the alternative, should they be denied their claim of homestead exemption on their Okeechobee property.⁵⁴⁴

Prior to January 29, 1999, the Simms resided at 1802 Montague Lane, Lake Worth, Florida and used the Okeechobee property for recreational purposes.⁵⁴⁵ During the summer of 1998, they sold the Lake Worth property and established the Okeechobee property as their permanent residence.⁵⁴⁶ They sold their Lake Worth property on January 29, 1999.⁵⁴⁷ After paying off their mortgage, they received net sale proceeds of \$65,467.57.⁵⁴⁸ The Simms endorsed this check over to USG Annuity and Life Company in exchange for the annuity.⁵⁴⁹ Both worked for John H. Simms, Inc., a janitorial service, which Mr. Simms owned.⁵⁵⁰ In March 1999, Mrs. Simms' health declined sharply and she was no longer able to work, causing the company to lose some major accounts.⁵⁵¹ The Simms decided to file bankruptcy and filed for Chapter 7 on August 7, 1999.⁵⁵²

The bankruptcy court held that the Simms were allowed both the exemption for the annuity and also the homestead exemption on the Okeechobee property.⁵⁵³ The court based the exemption for the annuity on the Simms' conversion of the nonexempt funds and net proceeds from the sale of the Lake Worth property, which was not done to hinder, delay, and defraud creditors in violation of sections 726.105, 726.108, 222.29, and

541. *Law*, 738 So. 2d at 525.

542. *Id.*

543. 243 B.R. 156 (Bankr. S.D. Fla. 2000).

544. *Id.* at 157.

545. *Id.*

546. *Id.*

547. *Id.* at 157-58.

548. *Simms*, 243 B.R. at 158.

549. *Id.*

550. *Id.*

551. *Id.*

552. *Id.*

553. *Simms*, 243 B.R. at 160.

222.30 of the *Florida Statutes*.⁵⁵⁴ The Simms continued to pay their creditors until March when Mrs. Simms became very ill.⁵⁵⁵ Therefore, the facts did not suggest any intent on the part of the Simms to hinder, delay, or defraud their creditors by purchasing the annuity.⁵⁵⁶ Further, the court noted the Simms' decision to sell their Lake Worth property and transfer their homestead to the Okeechobee property was made a year before the filing of the bankruptcy petition.⁵⁵⁷ Again, there did not seem to be any intent to defraud their creditors. The court acknowledged that Florida has very liberal exemption laws, and that absent legislative intervention, these laws must be applied with consistency.⁵⁵⁸

Staten Island Savings Bank v. Morace.⁵⁵⁹ The issue here was whether the trial court properly held the establishment of homestead could not be defeated by statutory provisions for voiding a fraudulent transfer of nonexempt assets converted into homestead property, even when the intent of the debtor is to defeat creditors' claims.⁵⁶⁰

The appellate court held that the trial court was correct on the above issues.⁵⁶¹ The appellate court based its opinion on the fact that the Supreme Court of Florida's prior statements that neither the legislature nor the supreme court has the power to create an exception to the constitutionally provided homestead exemption.⁵⁶²

XIII. LANDLORD AND TENANT

*3679 Waters Avenue Corp. v. Water Street Ovens, Ltd.*⁵⁶³ Here, the tenant leased space for a restaurant in a shopping center, but never moved in.⁵⁶⁴ Both the landlord and the tenant claimed the other had breached, but, the trial court, finding the lease to be clear and unambiguous, held for the tenant and awarded damages because the landlord had failed to make certain improvements.⁵⁶⁵ The lease provided that the landlord was contemplating a

554. *Id.* at 159.

555. *Id.* at 160.

556. *Id.* at 159.

557. *Id.*

558. *Simms*, 243 B.R. at 160.

559. 745 So. 2d 467 (Fla. 4th Dist. Ct. App. 1999).

560. *Id.* at 468.

561. *Id.*

562. *Id.*

563. 25 Fla. L. Weekly D441 (2d Dist. Ct. App. Feb. 18, 2000).

564. *Id.* at D441.

565. *Id.* at D441-42.

major renovation of the shopping center which might involve demolition of a portion of the leased building.⁵⁶⁶ It required the landlord to make certain improvements after demolition and to abate the rent at certain times during construction, but it never specifically required the landlord to demolish anything.⁵⁶⁷ Since this involved only the interpretation of the lease document, the district court was not obligated to defer to the trial court.⁵⁶⁸ After reviewing the language of the entire lease, it concluded that the lease was ambiguous as to whether the landlord was obligated to demolish anything and that, inferentially, demolition was the condition precedent to the landlord's obligation to make the improvements.⁵⁶⁹ Thus, the trial court's judgment that the landlord had breached that obligation was incorrect and the case was remanded so that parol evidence could be introduced to help in interpreting the lease.⁵⁷⁰

*Baldwin Sod Farms, Inc. v. Corrigan.*⁵⁷¹ The commercial tenant filed for bankruptcy but the bankruptcy court granted the landlords limited relief from the automatic stay to the extent that they could proceed in rem to recover possession of the realty.⁵⁷² The landlords subsequently filed a two count complaint in circuit court.⁵⁷³ The first count sought eviction and requested the court retain jurisdiction to determine damages when the bankruptcy court lifted the stay on that issue.⁵⁷⁴ The second count sought a temporary injunction to prevent the removal of certain personal property.⁵⁷⁵ The trial court found for the landlords and ordered eviction.⁵⁷⁶ That decision made the claim for injunctive relief moot.⁵⁷⁷

On appeal, the tenant challenged the circuit court's subject matter jurisdiction.⁵⁷⁸ In eviction and equity matters, the county courts and circuit courts have concurrent jurisdiction, however, the circuit courts' jurisdiction extends only to cases that satisfy the statutory amount in controversy of

566. *Id.* at D442.

567. *Id.*

568. *3679 Waters Ave. Corp.*, 25 Fla. L. Weekly at D442.

569. *Id.*

570. *Id.*

571. 746 So. 2d 1198 (Fla. 4th Dist. Ct. App. 1999).

572. *Id.* at 1200.

573. *Id.* at 1201.

574. *Id.*

575. *Id.*

576. *Corrigan*, 746 So. 2d at 1202.

577. *Id.*

578. *Id.*; see FLA. STAT. § 34.011(1) (2000).

\$15,000.⁵⁷⁹ The complaint must state the grounds on which the circuit court's jurisdiction is based, but the landlord's complaint did not seek damages because to do so would have violated the stay.⁵⁸⁰ However, the landlord did ask that the court retain jurisdiction to determine damages.⁵⁸¹ The three day notice letter, which was an exhibit to the complaint, and therefore incorporated into the complaint by reference, demanded the past due rent that was far in excess of the jurisdictional amount.⁵⁸² According to the district court, that was enough to give the circuit court jurisdiction.⁵⁸³ Moreover, the claim for equitable relief was sufficient to invoke the circuit court's jurisdiction under the circumstances because the allegations in the complaint were sufficient even though equitable relief was not granted.⁵⁸⁴

The tenant also challenged the trial court's denial of a jury trial.⁵⁸⁵ The tenant made a timely demand for a jury trial and the district court held the failure to remind the court of that demand did not constitute a waiver.⁵⁸⁶ But the district court was faced with the question of whether the tenant had a right to a jury trial.⁵⁸⁷ Neither chapter 51 nor chapter 83 of the *Florida Statutes* expressly provided for a right to a jury trial in an eviction.⁵⁸⁸ Chapter 51 merely provides when to make a demand for a jury trial "[i]f a jury trial is authorized by law" and chapter 83, governing nonresidential tenancies, is silent in regards to the right to a jury trial.⁵⁸⁹ The question turned on "whether the right was recognized at common law, at the time the Florida Constitution was adopted."⁵⁹⁰ No Florida case provided an answer, so the district court relied on a decision of the United States Supreme Court which concluded that a jury trial was required because a modern eviction action served the same function as a common law action of ejectment.⁵⁹¹

In this case, the tenant had claimed that the three day notice was improperly served, that it had not been given the notice of default required by the lease, that rent payments had been tendered but rejected, and that the

579. *Corrigan*, 746 So. 2d at 1202; FLA. STAT. §§ 34.01(c), .011(1) (2000).

580. *Corrigan*, 746 So. 2d at 1203.

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.*

585. *Corrigan*, 746 So. 2d at 1202.

586. *Id.* at 1206.

587. *Id.* at 1203-06.

588. *Id.* at 1203; see FLA. STAT §§ 51, 83 (2000).

589. *Corrigan*, 746 So. 2d at 1203; FLA. STAT. §§ 51.011(3), 83.21 (2000).

590. *Corrigan*, 746 So. 2d at 1203.

591. *Id.* at 1205 (citing *Pernell v. Southall Realty*, 416 U.S. 363, 376 (1974)).

tenant had made accountings as required.⁵⁹² Therefore, issues of fact existed for a jury to decide.⁵⁹³ Consequently, the case had to be reversed and remanded for a jury trial.⁵⁹⁴

Carney v. Gambel.⁵⁹⁵ The plaintiff was the head of security for a country club community.⁵⁹⁶ The defendants lived in the community.⁵⁹⁷ The adult son of the defendants lived in their home.⁵⁹⁸ The plaintiff alleged that, while performing his duties, he was physically attacked by the defendants' adult son.⁵⁹⁹ His claim against the defendants was based on the theory that the defendants owed him a duty of care, both as parents and as landlords, to protect him from the son's reasonably foreseeable criminal conduct.⁶⁰⁰ The trial court disagreed and dismissed the complaint.⁶⁰¹ The Fourth District Court of Appeal affirmed because it could find no precedent or reason for imposing a duty of care in the absence of a special relationship between the parents and their son.⁶⁰² The son was an emancipated adult even though he was living with his parents.⁶⁰³ Therefore, they had no power to control him.⁶⁰⁴

Grant v. Thornton.⁶⁰⁵ The landlord leased part of a duplex as a residence.⁶⁰⁶ The front door was secured with a double cylinder deadbolt which required a key to unlock the door from either side.⁶⁰⁷ That type of lock on exit doors of a residence was prohibited by the building code.⁶⁰⁸ A fire started in the kitchen, but the tenant's keys were in the kitchen.⁶⁰⁹ Unable to escape through the locked front door, the tenant jumped through the living room window and was seriously injured.⁶¹⁰ The tenant filed suit

592. *Id.*

593. *Id.*

594. *Id.* at 1206.

595. 751 So. 2d 653 (Fla. 4th Dist. Ct. App. 1999).

596. *Id.* at 654.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Carney*, 751 So. 2d at 654.

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

605. 749 So. 2d 529 (Fla. 2d Dist. Ct. App. 1999).

606. *Id.* at 531.

607. *Id.* at 530.

608. *Id.*

609. *Id.*

610. *Grant*, 749 So. 2d at 530.

against the landlord for personal injuries.⁶¹¹ The landlord's motion for summary judgment was granted because the tenant had never notified the landlord that a dangerous condition existed and the landlord was unaware that the locks violated the code.⁶¹²

The second district reversed.⁶¹³ The landlord had a duty to make the leased residence reasonably safe.⁶¹⁴ State statute obligated the landlord to maintain the premises in compliance with the applicable code.⁶¹⁵ The statute, in effect, created a statutory warranty of habitability, the violation of which might be considered evidence of negligence.⁶¹⁶ The landlord gave the keys to the tenant, so it was clear that he knew about the locks.⁶¹⁷ His claim that he did not know the locks violated the building code was not a valid defense.⁶¹⁸ Consequently, summary judgment should not have been granted for the landlord.⁶¹⁹

*Investment Builders of Florida, Inc. v. S.U.S. Food Market Investments, Inc.*⁶²⁰ The president of the tenant corporation was sick and failed to send the notice needed to renew the lease.⁶²¹ When his omission was called to his attention eight days after the renewal deadline had passed, he immediately sent the renewal notice.⁶²² The landlord refused to renew the lease, so the tenant brought this action for declaratory judgment.⁶²³ Equity can provide relief from the consequences of a mistake, such as failing to give timely notice of renewal, when "(1) the tenant's delay is slight, (2) the delay did not prejudice the landlord, and (3) failure to grant relief would cause the tenant unconscionable hardship."⁶²⁴ The trial court held that the tenant had satisfied the test and the district court affirmed.⁶²⁵

611. *Id.*

612. *Id.* at 532.

613. *Id.*

614. *Id.*

615. *Grant*, 749 So. 2d at 531; see FLA. STAT. § 83.51 (2000).

616. *Grant*, 749 So. 2d at 531-32.

617. *Id.* at 532.

618. *Id.*

619. *Id.*

620. 753 So. 2d 759 (Fla. 4th Dist. Ct. App. 2000).

621. *Id.* at 759.

622. *Id.*

623. *Id.*

624. *Id.* at 760.

625. *Inv. Builders of Fla., Inc.*, 753 So. 2d at 760.

*LPI/Key West Associates, Ltd. v. Sarah Luna, Inc.*⁶²⁶ Plaintiff was a tenant under a commercial lease which expressly provided that it would be the only tenant “whose main business purpose is the sale or distribution of bagels, or whose business otherwise functions as a ‘bagel bakery.’”⁶²⁷ Pursuant to that clause, the tenant unsuccessfully sought an injunction to prevent the landlord from leasing space to a Dunkin’ Donuts franchise.⁶²⁸ The district court reasoned that the plain language of the lease was controlling.⁶²⁹ The testimony showed that Dunkin’ Donuts would serve bagels, but its main business was the sale of donuts and Dunkin’ Donuts would not be a “bagel bakery” because baking and selling bagels was not its primary function.⁶³⁰ Consequently, leasing to Dunkin’ Donuts would not breach the plaintiff’s lease.

*Magnolia Village Homeowners Ass’n v. Magnolia Village, Inc.*⁶³¹ The owners of mobile homes who leased spaces in a mobile home park challenged the landlord’s rent increase.⁶³² The judge certified the tenant class but limited its membership to current tenants who were there when the rent was increased.⁶³³ The district court held that the class should be expanded to include assignees of leases from tenants who would have qualified as class members but for their having assigned their leases, so long as the assignees had paid the increased rent.⁶³⁴ The court relied on statutory language that, “[t]he purchaser of a mobile home who becomes a resident of the mobile home park in accordance with this section has the right to assume the remainder of the term of any rental agreement then in effect.”⁶³⁵ Consequently, a lease assignee succeeds to the original tenant’s right to challenge the propriety of the rent amount.⁶³⁶

*Mangum v. Susser.*⁶³⁷ The landlord sued the commercial tenant for possession and back rent.⁶³⁸ The tenant vacated the property and defended

626. 749 So. 2d 564 (Fla. 3d. Dist. Ct. App. 2000).

627. *Id.* at 565.

628. *Id.*

629. *Id.*

630. *Id.*

631. 758 So. 2d 1201 (Fla. 5th Dist. Ct. App. 2000).

632. *Id.* at 1202. Such leases are regulated by chapter 723 of the *Florida Statutes*, entitled “Mobile Home Park Tenancies.” See FLA. STAT. § 723 (2000).

633. *Magnolia Vill. Homeowners Ass’n*, 758 So. 2d at 1202.

634. *Id.*

635. *Id.* (citing FLA. STAT. § 723.059 (1997)).

636. *Magnolia Vill. Homeowners Ass’n*, 758 So. 2d at 1202.

637. 764 So. 2d 653 (Fla. 1st Dist. Ct. 2000).

638. *Id.* at 654.

the suit on the theory that the notice to vacate was defective.⁶³⁹ The trial court granted summary judgment for the tenant, but the district court reversed.⁶⁴⁰ The tenant had failed to follow the rules of civil procedure requiring affirmative defenses to be raised in the answer and that failure of a condition precedent, such as filing a notice to vacate, must be pled specifically.⁶⁴¹ Therefore, the tenant had waived its affirmative defenses by failing to raise them properly.⁶⁴² Moreover, the claim for possession had become moot when the tenant vacated, leaving only the claim for damages for overdue rent.⁶⁴³ A notice to vacate is not needed before the landlord can recover rent that is owed.⁶⁴⁴ The tenant had also claimed that the successor landlord could not be the assignee of a claim for rent without a writing, but the court could find no authority for the assertion that a rent claim could only be assigned by a writing.⁶⁴⁵

*Munao v. Homeowners Ass'n of La Buona Vita Mobile Home Park, Inc.*⁶⁴⁶ The owners of mobile homes who rented space in a mobile home park challenged the rent as being unconscionable under section 723.033 of the *Florida Statutes* because the landlord had reduced the amenities.⁶⁴⁷ Subsequent to the 1990 amendment of the statute, which lowered the standard of the prohibition from "unconscionable" rent to "unreasonable" rent, the trial court allowed the tenants to amend their complaint to charge the rent was unreasonable.⁶⁴⁸ Then the trial court found that the unreasonable condition of the park necessitated a reduction in rent.⁶⁴⁹ On appeal the landlord challenged the application of the 1990 standard, *inter alia*, as an unconstitutional impairment of an existing contract.⁶⁵⁰ The district court rejected that challenge because the state had the reserved power to regulate the landlord-tenant relationship.⁶⁵¹

639. *Id.*

640. *Id.*

641. *Id.*

642. *Mangum*, 764 So. 2d at 655.

643. *Id.*

644. *Id.*

645. *Id.*

646. 740 So. 2d 73 (Fla. 4th Dist. Ct. App. 1999).

647. *Id.* at 75.

648. *Id.*

649. *Id.*

650. *Id.* at 76.

651. *Munao*, 740 So. 2d at 76.

The landlord also challenged the finding that the rent was unreasonable when it did not exceed what comparable parks charge.⁶⁵² The district court found that the statute allowed the court to consider other factors, such as the condition of the amenities, in determining whether the rent was unreasonable.⁶⁵³ Moreover, the court found that section 723.033 of the *Florida Statutes* still had sufficient standards to survive a vagueness challenge.⁶⁵⁴

*Ocwen Federal Bank v. LVWD, Ltd.*⁶⁵⁵ The lease provided that the tenant would pay "additional rent" which was defined as a pro-rata share of operating expenses.⁶⁵⁶ The lease divided operating expenses into twelve categories and limited to four percent the amount that certain expenses could be increased.⁶⁵⁷ The landlord had calculated the additional rent on a line by line, category by category basis for the first three years of the lease.⁶⁵⁸ The landlord then billed the tenant on an aggregate basis that produced a substantial rent increase.⁶⁵⁹ The tenant objected and filed this suit for declaratory judgment and damages.⁶⁶⁰

The landlord demanded arbitration and the trial court agreed, although it characterized the arbitration clause as "fuzzy."⁶⁶¹ On review, the district court noted that this was a question of contract interpretation, so the review would be de novo.⁶⁶² It then reversed.⁶⁶³ The arbitration clause expressly restricted the arbitrator to specific issues, such as whether a particular item was improperly included in the calculation of additional rent.⁶⁶⁴ While doubts about whether the parties had agreed to submit a particular issue to arbitration should be resolved in favor of arbitration, arbitration should not be ordered where there is no doubt.⁶⁶⁵ The district court found no room for doubt.⁶⁶⁶ This complaint challenged the method by which the additional rent

652. *Id.* at 76.

653. *Id.* at 77.

654. *Id.*

655. 766 So. 2d 248 (Fla. 4th Dist. Ct. App. 2000).

656. *Id.* at 248.

657. *Id.* at 249.

658. *Id.*

659. *Id.*

660. *Ocwen Fed. Bank*, 766 So. 2d at 249.

661. *Id.*

662. *Id.*

663. *Id.*

664. *Id.*

665. *Ocwen Fed. Bank*, 766 So. 2d at 249.

666. *Id.*

was calculated, not whether a particular item was properly included.⁶⁶⁷ Clearly, it was not within the scope of the arbitration clause.⁶⁶⁸

*Park Avenue BBQ & Grille of Wellington, Inc. v. Coaches Corner, Inc.*⁶⁶⁹ Coaches Corner operated a sports bar in a shopping center.⁶⁷⁰ Under the terms of its lease, the landlord was prohibited from leasing space to a restaurant or bar that devoted “more than ten percent of its space to use as a sports bar/sports restaurant or for the viewing of sporting events.”⁶⁷¹ The new landlord subsequently sold the property.⁶⁷² Later, Coaches Corner learned that the landlord intended to lease space to a restaurant that would have televisions showing sports events, so Coaches Corner’s attorney sent a letter to the successor landlord reminding it of the restriction.⁶⁷³ The president of Park Avenue was made aware of the restriction and got the successor landlord to agree to a term in its lease allowing it to televise sports.⁶⁷⁴ Coaches Corner brought this action for an injunction against both Park Avenue and the landlord.⁶⁷⁵

The first defense raised was laches.⁶⁷⁶ However, Coaches Corner had brought this action less than one month after Park Avenue had signed its lease and before it had opened for business.⁶⁷⁷ Since the plaintiff had acted promptly, laches was not a viable defense.⁶⁷⁸

Park Avenue next raised lack of privity as a defense.⁶⁷⁹ Its point was that it had not undertaken an obligation to Coaches Corner to refrain from showing sports; its only contractual duties were to the landlord under the terms of its lease.⁶⁸⁰ This argument also failed.⁶⁸¹ The evidence showed that Park Avenue took with notice of the restriction, that Coaches Corner would suffer irreparable injury from the violation of the restriction, and that

667. *Id.*

668. *Id.*

669. 746 So. 2d 480 (Fla. 4th Dist. Ct. App. 1999).

670. *Id.* at 481.

671. *Id.*

672. *Id.* at 482.

673. *Id.* at 481–82.

674. *Park Ave. BBQ & Grille*, 746 So. 2d at 482.

675. *Id.* at 481.

676. *Id.*

677. *Id.* at 482.

678. *Id.* at 481.

679. *Park Ave. BBQ & Grille*, 746 So. 2d at 482.

680. *Id.*

681. *Id.*

Coaches had no adequate remedy at law.⁶⁸² In essence, Coaches Corner had demonstrated the essentials for equitable relief based on the logic that the restriction burdened the land with an equitable servitude.⁶⁸³

*Springbrook Commons, Ltd. v. Brown.*⁶⁸⁴ The landlord brought this eviction action based on the tenant's alleged failure to pay rent.⁶⁸⁵ Having failed twice to personally serve the tenant, the landlord effected service by posting the complaint on the front door of the leased premises.⁶⁸⁶ The tenant failed to respond to the complaint and the court awarded the landlord judgment for possession.⁶⁸⁷ The landlord, however, also wanted the court to award costs, but the court refused.⁶⁸⁸

The landlord argued that it was entitled to costs under section 85.59(4) of the *Florida Statutes*.⁶⁸⁹ However, the court reasoned that service by posting did not confer personal jurisdiction on the court under the statute.⁶⁹⁰ The district court affirmed, reasoning, "[i]f this tenant had been personally served, the landlord would be entitled to costs under the statute, but in the absence of personal service, a costs judgment would violate due process."⁶⁹¹

XIV. LIENS

*Betaco, Inc. v. Countrywide Home Loans, Inc.*⁶⁹² The issue here was whether the trial court erred when it decided that an "execution sale" which occurs beyond the twenty year period from the recording of a judgment lien was ineffective because the judgment lien had expired before the execution sale occurred.⁶⁹³

Betaco's predecessor-in-interest recorded a judgment against the owner of the property on March 10, 1977.⁶⁹⁴ In May 1979, a writ of execution was

682. *Id.*

683. *Id.* at 482.

684. 761 So. 2d 1192 (Fla. 4th Dist. Ct. App. 2000).

685. *Id.* at 1193.

686. *Id.* Service by posting was allowed under section 48.183 of the *Florida Statutes*. FLA. STAT. § 48.183 (2000).

687. *Brown*, 761 So. 2d at 1193.

688. *Id.*

689. *See id.* at 1194; *see also* FLA. STAT. § 89.59(4) (2000).

690. *Brown*, 761 So. 2d at 1193.

691. *Id.* at 1194.

692. 752 So. 2d 696 (Fla. 2d Dist. Ct. App. 2000).

693. *Id.* at 697.

694. *Id.*

issued.⁶⁹⁵ Then, in 1993, the property owner mortgaged the property to Countrywide, who was the mortgage holder at the time of the default.⁶⁹⁶ On January 27, 1997, Betaco delivered instructions to the sheriff, who levied the property on February 18.⁶⁹⁷ This was recorded several days later.⁶⁹⁸ The sheriff's sale was held on April 17, 1997.⁶⁹⁹ Betaco's predecessor-in-interest took title through sheriff's deed at that time, and Betaco subsequently took title to the property by warranty deed.⁷⁰⁰

The appellate court held that the trial court was correct in deciding that the judgment lien on the property had expired before the execution sale, stating that the deed held by Betaco's predecessor-in-interest was legally null because the lien had expired before the sheriff held the execution sale.⁷⁰¹ "An execution is valid and effective only during the life of the judgment on which it is issued."⁷⁰² Further, the court referred to section 55.091 of the *Florida Statutes*, which provided that "no judgment . . . shall be a lien upon real . . . property within the state after the expiration of 20 years from the date of the entry of such judgment."⁷⁰³ Therefore, since the life of the judgment expired on March 10, 1997, and the execution sale was not completed before that date, the lien was no longer valid when the execution sale took place.⁷⁰⁴

*CDS & Associates of the Palm Beaches, Inc. v. 1711 Donna Road Associates, Inc.*⁷⁰⁵ The issue here was whether the trial court properly held that a construction lien cannot be based on a contract implied in law.⁷⁰⁶

The appellate court noted that "[t]he trial court found as a factual matter that no contract was created in this case by the parties' words or conduct, and that CDS was limited to quasi contractual remedies."⁷⁰⁷ Therefore, CDS was not able to "enforce its quantum meruit recovery through the imposition of a mechanics' lien."⁷⁰⁸ First, section 713.05 of the *Florida Statutes* states:

695. *Id.*

696. *Id.*

697. *Betaco, Inc.*, 752 So. 2d at 697.

698. *Id.*

699. *Id.*

700. *Id.*

701. *Id.*

702. *Betaco, Inc.*, 752 So. 2d at 697; see FLA. STAT. § 56.021 (2000).

703. *Betaco, Inc.*, 752 So. 2d at 697 (quoting FLA. STAT. § 55.091 (1977)).

704. *Id.*

705. 743 So. 2d 1223 (Fla. 4th Dist. Ct. App. 1999).

706. *Id.* at 1224.

707. *Id.* at 1225.

708. *Id.*

[A] contractor who complies with the provisions of this part shall, subject to the limitations thereof, have a lien on the real property improved for any money that is owed to him or her for labor, services, materials, or other items required by, or furnished in accordance with, the direct contract.⁷⁰⁹

Second, section 713.01(5) defines a contract as “an agreement for improving real property, written or unwritten, express or implied, and includes extras or change orders.”⁷¹⁰ Therefore, a contract under the mechanics’ lien law requires an agreement.⁷¹¹ No agreement, either express or implied, was found to exist in this case.⁷¹² In regards to the quasi contractual claim, the court defined such contract as “a contract implied in law”⁷¹³ Further, a quasi contract does not require an agreement, as does the mechanics’ lien statute.⁷¹⁴ Therefore, a quasi contract is not a contract for purposes of the mechanics’ lien statute.⁷¹⁵

Diaz v. Plumhoff.⁷¹⁶ The issue here was whether the trial court properly “declared Plumhoff to be the owner of real property previously owned by Diaz, but deeded to Plumhoff by sheriff’s sale under section 56.061, Florida Statutes.”⁷¹⁷

This was a case of first impression.⁷¹⁸ Plumhoff obtained a money judgment against Diaz for a total of \$8774.⁷¹⁹ The money judgment “did not constitute a lien on the property of Diaz because no certified copy containing the address of Plumhoff was ever recorded.”⁷²⁰ However, Plumhoff proceeded directly under section 56.061 of the *Florida Statutes*, which states, “[l]ands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporations, shall be subject to levy and sale under execution.”⁷²¹ The trial court held that Plumhoff was not required to proceed under section 55.10 of the *Florida Statutes* because

709. FLA. STAT. § 713.05 (2000).

710. § 713.01(5).

711. *CDS & Assocs. of the Palm Beaches, Inc.*, 743 So. 2d at 1224.

712. *Id.* at 1225.

713. *Id.* at 1224.

714. *Id.* at 1224–25.

715. *Id.* at 1225.

716. 742 So. 2d 846 (Fla. 2d Dist. Ct. App. 1999).

717. *Id.* at 846.

718. *Id.*

719. *Id.*

720. *Id.* at 846–47.

721. *Diaz*, 742 So. 2d at 847; see also FLA. STAT. § 56.061 (2000).

perfecting the lien was not necessary for the sheriff to proceed under section 56.061 of the *Florida Statutes*.⁷²²

The appellate court held that it was necessary for Plumbhoff to comply with the requirements of section 55.10 of the *Florida Statutes* before proceeding under section 56.061.⁷²³ Further, the appellate court stated that chapter 55 deals with the subject of judgments, and chapter 56 with final process.⁷²⁴ The requirements of chapter 55 must be met before moving to chapter 56.⁷²⁵

*Gulfside Properties Corp. v. Chapman Corp.*⁷²⁶ The issue here was whether the trial court properly held that “Gulfside could not assert lack of proper notice to [the] owner as a defense to Chapman’s suit to enforce a construction lien against Gulfside’s property” where Gulfside failed to sign the notice of commencement as owner, as required by section 713.13(1)(g) of the *Florida Statutes*.⁷²⁷

Gulfside, the owner of a real estate development, entered into an agreement with Willis Construction, Inc. (“Willis”) for the completion of phase seven of a beach villas project.⁷²⁸ Ronnie Willis signed his own name on the line indicated for the owner’s signature on the notice of commencement.⁷²⁹ This notice was filed and recorded in Walton County.⁷³⁰ Willis and Chapman entered into a contract to provide materials and labor for the project.⁷³¹ Gulfside paid Willis in full.⁷³² Willis did not pay Chapman in full.⁷³³ Chapman filed a lien against Gulfside.⁷³⁴

The appellate court held that Chapman failed to comply with construction lien law by failing to serve a notice to the owner and that Gulfside could assert this as a complete defense.⁷³⁵ Further, the court held that serving a notice to an owner would be a separate requirement under construction lien law and must be followed, even if there is another problem

722. *Diaz*, 742 So. 2d at 847.

723. *Id.*

724. *Id.*

725. *Id.*

726. 737 So. 2d 604 (Fla. 1st Dist. Ct. App. 1999).

727. *Id.* at 605.

728. *Id.*

729. *Id.*

730. *Id.*

731. *Gulfside Props. Corp.*, 737 So. 2d at 605.

732. *Id.*

733. *Id.*

734. *Id.* at 606.

735. *Id.* at 607.

created by the other party.⁷³⁶ In this case, Gulfside was required to sign the notice of commencement as owner.⁷³⁷ Because it failed to sign as owner, the notice of commencement was not valid.⁷³⁸ The appellate court further noted that a notice to owner must be served as a prerequisite for recording of a lien, regardless of other violations, for the lien to be valid.⁷³⁹ If it is not, this failure can be used as a complete defense by the other party.⁷⁴⁰

*Klein Development v. Ellis K. Phelps & Co.*⁷⁴¹ The issue here was whether a fax copy of a release of lien would be binding and would prevent the releasing party from later filing for foreclosure on that lien.⁷⁴²

In this case, the developer, Klein, stopped payment on its check to the general contractor.⁷⁴³ The general contractor's check to the subcontractor, Phelps, bounced when he tried to cash it.⁷⁴⁴ The subcontractor then filed for foreclosure on the lien.⁷⁴⁵ Klein tried to rely on the signed fax copy of a release of lien.⁷⁴⁶

The appellate court, after review of discovery, determined that the subcontractor never intended to give up its right to foreclose on the lien until the check it received had cleared.⁷⁴⁷ Therefore, it affirmed the lower court's decision in favor of the subcontractor.⁷⁴⁸

*Lachance v. Desperado's of Holly Hill, Inc.*⁷⁴⁹ The issue here was which interest should have priority when there is a lien against a liquor license.⁷⁵⁰ In this case there was an assignment of a lease to a third party, with a provision requiring the license to be reconveyed to the assignor in the event of a default or at the end of the lease.⁷⁵¹

736. *Gulfside Props. Corp.*, 737 So. 2d at 607.

737. *Id.*

738. *Id.*

739. *Id.*

740. *Id.*; see FLA. STAT. § 713.06(2)(a) (2000); see also *Torres v. MacIntyre*, 334 So. 2d 59 (Fla. 3d Dist. Ct. App. 1976).

741. 761 So. 2d 441 (Fla. 2d Dist. Ct. App. 2000).

742. *Id.* at 442.

743. *Id.*

744. *Id.*

745. *Id.*

746. *Klein Dev.*, 761 So. 2d at 442.

747. *Id.* at 443.

748. *Id.*

749. 760 So. 2d 1023 (Fla. 5th Dist. Ct. App. 2000).

750. *Id.* at 1023.

751. *Id.*

The trial court found that the assignor had priority interest over an investor who made a loan to the third party with the license as collateral.⁷⁵² The court said that having the agreement on file with the Division of Alcoholic Beverages and Tobacco Division and “available for any person to examine or inspect” was enough to establish priority, especially where the original lessor held an ownership interest and not a lien interest in the license and, therefore, had priority over the investor’s lien.⁷⁵³

The appellate court agreed with the outcome of the case but for different reasons.⁷⁵⁴ The court found that the lessor should prevail because of the rule which allows for security interests in such licenses to exist and to be enough to put potential investors on notice that they should make an inquiry with the Department.⁷⁵⁵ The appellate court recommended in its decision that the legislature expand section 561.65 of the *Florida Statutes* so that persons having an interest in such a license other than security may record it with the division to provide notice to subsequent investors.⁷⁵⁶

*Sasso Air Conditioning, Inc. v. United Companies Lending Corp.*⁷⁵⁷ The issue here was whether the trial court properly granted summary judgment in favor of the mortgagee, United, and against a lienor, Sasso, under a claim of lien, determining that while the notice of commencement was recorded prior to the mortgage, the notice did not comply with the mechanics’ lien statute requiring the signature of all owners of the property.⁷⁵⁸

Kevin and Sita Martin, as tenants by the entireties, executed a mortgage with United.⁷⁵⁹ This mortgage was recorded on February 21, 1996.⁷⁶⁰ Sita Martin had previously signed and recorded a notice of commencement on January 3, 1996.⁷⁶¹ The notice listed Sita Martin as the owner of the property and Plumb, Level & Square, Inc. (“PLS”) as the contractor.⁷⁶² Kevin Martin owned PLS.⁷⁶³ The notice also provided that the owner

752. *Id.* at 1025.

753. *Id.*

754. *Lachance*, 760 So. 2d at 1025–27.

755. *Id.* at 1026.

756. *Id.* at 1027.

757. 742 So. 2d 468 (Fla. 4th Dist. Ct. App. 1999).

758. *Id.* at 469.

759. *Id.*

760. *Id.*

761. *Id.*

762. *Sasso Air Conditioning, Inc.*, 742 So. 2d at 469.

763. *Id.*

appoint Kevin Martin to “receive notices required under the mechanics lien law and designated him to receive lienor’s notices.”⁷⁶⁴

During September of 1996, Kevin Martin contracted with Sasso to replace his home’s central air conditioning.⁷⁶⁵ The contract listed PLS as the “job name” and stated the work was to be done on “Kevin’s own house.”⁷⁶⁶ Kevin Martin signed the contract in his name and listed his residential address.⁷⁶⁷ Sasso filed a claim of lien after the Martins failed to pay.⁷⁶⁸ Eventually, the Martins stopped paying their mortgage and United foreclosed, listing Sasso as a junior lienor, because its claim of lien was filed after United recorded its mortgage.⁷⁶⁹

The appellate court held Sasso had priority due to the notice of commencement being filed by Sita Martin before United filed its mortgage.⁷⁷⁰ The court based this on the fact that United could have performed a title search and “[u]pon finding the earlier filed notice of commencement, United could have required the Martins to file a notice of termination pursuant to section 713.132 prior to United recording the mortgage.”⁷⁷¹ Further, the appellate court noted that Sasso had “a notice of commencement which appeared regular and complete in all respects,” and if the notice of commencement provided the lienor with necessary information enabling it to serve notice to owner, the lienor should be able to rely on this information.⁷⁷² “The law does not require every contractor to conduct a title search to verify that the information contained in the notice is true and correct.”⁷⁷³

XV. PARTITION

*Biondo v. Powers.*⁷⁷⁴ The issue here was whether the trial court properly held that upon the partition and sale of jointly owned property,

764. *Id.*

765. *Id.*

766. *Id.*

767. *Sasso Air Conditioning, Inc.*, 742 So. 2d at 469.

768. *Id.*

769. *Id.*

770. *Id.* at 471.

771. *Id.*

772. *Sasso Air Conditioning, Inc.*, 742 So. 2d at 471; see FLA. STAT. § 713.13(1)(a) (2000).

773. *Sasso Air Conditioning, Inc.*, 742 So. 2d at 471.

774. 743 So. 2d 161 (Fla. 4th Dist. Ct. App. 1999).

where a co-tenant made excess payments towards obligations of the property, it would be proper to increase her equity in the property.⁷⁷⁵

While Biondo and Powers were dating, they purchased real property in Palm Beach for approximately \$650,000.⁷⁷⁶ They obtained a purchase money mortgage from the seller for \$350,000.⁷⁷⁷ Both parties paid the balance due at closing equally.⁷⁷⁸ However, the deed named only Biondo as the grantee.⁷⁷⁹ At closing Biondo executed a handwritten note, also signed by Powers, saying he had received half of the closing money from Powers and that all monies received from the sale of the property would be divided equally, prorated as to invested amounts paid at closing.⁷⁸⁰ Subsequently, Powers paid off the mortgage.⁷⁸¹ On the same day this occurred, Biondo executed a quitclaim deed of the property to both Powers and himself as joint tenants with right of survivorship, which was later recorded.⁷⁸² Also, it was not disputed that the expenses paid by Powers exceeded those paid by Biondo.⁷⁸³ Biondo issued a note to Powers for \$350,000 payable in five years with six and one-half percent interest and a mortgage on Biondo's interest in the property to secure the note.⁷⁸⁴

In July 1997, Powers brought suit against Biondo to foreclose on the note and mortgage, and to partition the property.⁷⁸⁵ The trial court concluded that Powers' investment in the property totaled \$760,000, figuring that Biondo's investment was only his initial investment at closing of approximately \$134,000.⁷⁸⁶ The trial court then ordered a distribution of the sale proceeds in proportion to the parties' respective investments—eighty-five percent to Powers and fifteen percent to Biondo.⁷⁸⁷

The appellate court held that the sale proceeds should have been divided equally between Powers and Biondo because each had an equal interest in the property.⁷⁸⁸ Biondo was required to reimburse Powers for his

775. *Id.* at 162.

776. *Id.*

777. *Id.*

778. *Id.*

779. *Biondo*, 743 So. 2d at 162.

780. *Id.*

781. *Id.*

782. *Id.*

783. *Id.* at 163.

784. *Biondo*, 743 So. 2d at 163.

785. *Id.*

786. *Id.*

787. *Id.* at 164.

788. *Id.*

proportionate share of the expenses for the property.⁷⁸⁹ It based this on section 64.071(1) of the *Florida Statutes*, which states that the proceeds from such a sale shall be divided among the parties in proportion to their interests.⁷⁹⁰ Further, upon partition, a co-tenant is entitled to a credit from proceeds of the sale for the other co-tenant's proportionate share of expenses.⁷⁹¹

XVI. QUIET TITLE

*Hardemon v. United Companies Lending Corp.*⁷⁹² The issue here was whether the trial court properly entered a final judgment quieting title in favor of United.⁷⁹³

Hardemon and Jacquelyn Harris, his girlfriend, bought a home in 1992 as tenants in common.⁷⁹⁴ Hardemon was incarcerated in 1994 as a result of a violent domestic dispute with Harris and was subsequently charged with attempted kidnapping and aggravated battery.⁷⁹⁵ Hardemon proposed to Harris that she drop the charges and pursue no further action.⁷⁹⁶ In exchange, he would execute a quitclaim deed to the property.⁷⁹⁷ Harris agreed.⁷⁹⁸ On the day he was released from jail, Hardemon conveyed to Harris a notarized quitclaim deed of his one-half interest in the property.⁷⁹⁹ All charges against Hardemon were dropped.⁸⁰⁰ Harris recorded the deed in April 1994.⁸⁰¹ Nearly three months after the recording of the deed, United extended a first mortgage loan to Harris.⁸⁰²

United performed a title search revealing that Harris was the sole and exclusive record owner at that time.⁸⁰³ Next, United recorded the

789. *Biondo*, 743 So. 2d at 164.

790. *Id.*; see FLA. STAT. § 64.071(1) (2000).

791. *Biondo*, 743 So. 2d at 164; see *Whitely v. Whitely*, 329 So. 2d 352, 353 (Fla. 4th Dist. Ct. App. 1976).

792. 746 So. 2d 1231 (Fla. 3d Dist. Ct. App. 1999).

793. *Id.* at 1231.

794. *Id.*

795. *Id.*

796. *Id.*

797. *Hardemon*, 746 So. 2d at 1231.

798. *Id.*

799. *Id.*

800. *Id.*

801. *Id.*

802. *Hardemon*, 746 So. 2d at 1231.

803. *Id.*

mortgage.⁸⁰⁴ In June 1994, almost a month after the mortgage was recorded, Hardemon filed a suit against Harris and obtained a default judgment against her setting aside the quitclaim deed.⁸⁰⁵ Hardemon claimed his signature was forged.⁸⁰⁶ Harris never contested the action.⁸⁰⁷

United initiated the current action seeking to quiet title.⁸⁰⁸ The appellate court held that the trial court was correct when it entered a final judgment quieting title in favor of United.⁸⁰⁹ The evidence showed "United was a bona fide purchaser without notice of any alleged irregularities in the public record chain of title, and it is protected from claims outside that chain of title."⁸¹⁰

XVII. REAL ESTATE BROKERS

The Florida legislature continues to tinker with the chapter that regulates real estate brokers. Chapter 2000-198 of the *Laws of Florida* clarifies that it is not an appraisal when a real estate broker or salesperson gives an opinion regarding the proper price for certain real estate or gives a comparative price analysis.⁸¹¹ It also provides a modification to the escape procedures that protect a real estate broker holding funds in escrow when a dispute arises over those funds.⁸¹² Ordinarily, to be protected from an administrative complaint by the escape procedures, the licensee must get an escrow disbursement order from the Florida Real Estate Commission, or have the matter submitted to litigation, arbitration, or mediation, or get the parties to agree to disbursement.⁸¹³ However, the protection has been expanded to include returning the escrow deposit of the buyer of a new residential condominium who exercises his or her right to statutorily cancel the purchase under section 718.503 of the *Florida Statutes*.⁸¹⁴

804. *Id.*

805. *Id.*

806. *Id.*

807. *Hardemon*, 746 So. 2d at 1231.

808. *Id.*

809. *Id.* at 1232.

810. *Id.*; see FLA. STAT. § 695.01(1)(2000); see also *Koschler v. Dean*, 642 So. 2d 1119 (Fla. 2d Dist. Ct. App. 1994).

811. Ch. 2000-198, § 3, 2000 Fla. Laws 2026, 2034 (codified at FLA. STAT. § 475.612 (2000)).

812. *Id.* § 1, 2000 Fla. Laws. at 2026-27 (codified at FLA. STAT. § 475.25(1)(d) (2000)).

813. FLA. STAT. § 475.25(1)(d) (2000).

814. Ch. 2000-198, § 1, 2000 Fla. Laws 2026, 2027 (codified at FLA. STAT. § 475.25(1)(d) (2000)).

This year's act also changes the disclosure requirements for a licensee who does not have a brokerage relationship with the potential buyer or seller.⁸¹⁵ The licensee must reveal that lack of relationship in writing before showing the property.⁸¹⁶ The disclosure may be incorporated into other documents, but then it must be conspicuous.⁸¹⁷ A number of exceptions to the disclosure requirements have been added. For example, the disclosure requirements do not apply: 1) when the licensee knows that the potential buyer or seller already is represented by a broker or under circumstances when the potential buyer should know from the setting that the licensee represents only the seller, such as the project's sales office; 2) to non-residential transactions; 3) in an "open house" or the showing of a model home that does not involve obtaining confidential information, executing an offer, and the like; and 4) to unanticipated casual conversations.⁸¹⁸

*Cabrerizo v. Fortune International Realty.*⁸¹⁹ The brokerage contract allowed the seller to cancel by giving notice and paying a cancellation fee.⁸²⁰ The seller gave the cancellation notice on May 16 as the contract allowed and on May 29 delivered the cancellation fee to the broker.⁸²¹ On May 20, the seller entered into a sales contract with the buyers.⁸²² The contract showed a sales price of \$140,000.⁸²³ Later the seller sued the buyers alleging that the sales price was actually \$700,000 because part of the price was a check for \$560,000.⁸²⁴ To the seller's consternation, the \$560,000 check had been rejected by the bank.⁸²⁵ In that suit, the seller testified that he first heard the buyers were interested on May 14 and met with them on May 15.⁸²⁶

When the broker learned about the contract and breach of contract suit, it filed suit for the brokerage commission.⁸²⁷ Based upon the seller's testimony in the breach of contract suit, the court granted summary judgment for the broker and awarded the commission based on the sale price of

815. *Id.* § 2, 2000 Fla. Laws at 2032 (codified at FLA. STAT. § 475.278(4)(b) (2000)).

816. *Id.*

817. *Id.*

818. *Id.* at 2033 (codified at FLA. STAT. § 475.278(5)(b)1, 2 (2000)).

819. 760 So. 2d 228 (Fla. 3d Dist. Ct. App. 2000).

820. *Id.* at 229.

821. *Id.*

822. *Id.*

823. *Id.*

824. *Cabrerizo*, 760 So. 2d at 229.

825. *Id.*

826. *Id.*

827. *Id.*

\$700,000.⁸²⁸ The seller appealed claiming his affidavits in the current case contradicted his testimony in the breach of contract suit, so there was a genuine issue of fact as to when the sales contract was entered into and the amount of the sale price.⁸²⁹ The district court disagreed.⁸³⁰ It found that the seller's conduct, attempting to contradict his own sworn testimony, was inherently wrongful and he should not be allowed to benefit from it.⁸³¹

*Harris v. Schickedanz Bros.-Riviera Ltd.*⁸³² Harris apparently was licensed as a salesman but not as a broker.⁸³³ He signed a contract with a developer under which he was to attempt to procure buyers for the developer's residential units (thereby earning a commission), market the development, and, if he kept expenses below a certain percentage of gross sales, earn a bonus.⁸³⁴ The developer terminated the contract and Harris sued.⁸³⁵

The first count of the complaint was dismissed because it sought a brokerage commission and Harris was not a broker.⁸³⁶ That ruling seemed unassailable, so Harris did not appeal that ruling.⁸³⁷ But Harris appealed the dismissal of the other counts.⁸³⁸ Count three was based on "quantum meruit for the marketing services rendered under the original [written] contract."⁸³⁹ However, quantum meruit is available only when there is no express contract.⁸⁴⁰ So this count was properly dismissed and the district court affirmed.⁸⁴¹ Counts two and four sought compensation for marketing the development and the bonus for keeping marketing expenses low in relation to sales.⁸⁴² This was an action for breach of contract.⁸⁴³ Since the services

828. *Id.*

829. *Cabrerizo*, 760 So. 2d at 229.

830. *Id.* at 230.

831. *Id.*

832. 746 So. 2d 1152 (Fla. 4th Dist. Ct. App. 1999).

833. *See id.* at 1153-54.

834. *Id.* at 1153.

835. *Id.*

836. *Id.*; *see* FLA. STAT. § 475.41 (2000).

837. *Harris*, 746 So. 2d at 1153.

838. *Id.* Count five involved the claim by another plaintiff, ReMac, for the recovery of sums advanced to the developer who had agreed to repay. *Id.* at 1155. The trial court incorrectly held that this claim was barred by the Statute of Frauds provisions found in section 671.206 of the *Florida Statutes*, which applies only to the sale of goods, and section 687.0304 of the *Florida Statutes*, which applies only to credit agreements. *Id.* at 1155-56.

839. *Id.* at 1155.

840. *Harris*, 746 So. 2d at 1155.

841. *Id.* at 1156.

842. *Id.* at 1153, 1155.

843. *Id.*

provided were not the direct procurement of customers, they were not brokerage services under the statutory definition,⁸⁴⁴ and, therefore, this recovery was not prohibited by the brokerage act.⁸⁴⁵ The developer had, however, successfully raised a Statute of Frauds defense in the trial court.⁸⁴⁶ The claim was based on an unwritten reaffirmation of a written contract that had been terminated.⁸⁴⁷ The district court rejected the defense because the services had already been performed, taking the contract out of the Statute of Frauds.⁸⁴⁸ On these counts, the district court reversed.⁸⁴⁹

XVIII. REFORMATION

*Florida Masters Packing, Inc. v. Craig.*⁸⁵⁰ The common grantors acquired the land, identified as the “parent tract.”⁸⁵¹ Out of that, they conveyed the “outparcel” to Wright.⁸⁵² Unfortunately, the legal description in the deed was inaccurate.⁸⁵³ When Wright subsequently conveyed the outparcel to Haffield, the same erroneous description was used.⁸⁵⁴ Haffield lost the property through foreclosure.⁸⁵⁵ Throughout the foreclosure, the same erroneous description was used.⁸⁵⁶ The plaintiff was the buyer at the foreclosure sale.⁸⁵⁷ By the time the error was discovered, the common grantor had sold the parent tract to the defendants using a deed that described the land as the parent tract minus the outparcel according to the same erroneous description.⁸⁵⁸

The plaintiff sued to reform its deed and to quiet its title.⁸⁵⁹ At the conclusion of the plaintiff’s case, the trial court dismissed the case with prejudice and the plaintiff appealed.⁸⁶⁰ The district court focused upon

844. *Id.*; see FLA. STAT. § 475.01(1)(c), (d) (2000).

845. *Harris*, 746 So. 2d at 1155; see FLA. STAT. § 475.41 (2000).

846. *Harris*, 746 So. 2d at 1155; see FLA. STAT. § 725.01 (2000).

847. *Harris*, 746 So. 2d at 1154.

848. *Id.* at 1155.

849. *Id.* at 1156.

850. 739 So. 2d 1288 (Fla. 4th Dist. Ct. App. 1999).

851. *Id.* at 1289.

852. *Id.*

853. *Id.*

854. *Id.*

855. *Craig*, 739 So. 2d at 1289–90.

856. *Id.* at 1290.

857. *Id.*

858. *Id.*

859. *Id.*

860. *Craig*, 739 So. 2d at 1290.

reformation.⁸⁶¹ Since it is an equitable remedy, it would not be available against a subsequent bona fide purchaser for value without notice.⁸⁶² Here, the defendants did not have actual notice because no information revealing the problem had been communicated to them.⁸⁶³ The defendants did not have constructive notice because there was nothing in the record that might reveal the problem.⁸⁶⁴ According to the record, the common grantor could convey the title to the defendants that the deed purported to convey.⁸⁶⁵ Nor did the defendants have implied actual notice, i.e., actual notice of facts that would have led a prudent person to inquire and, consequently, discover the problem.⁸⁶⁶ Thus, defendants having paid for the land and taken without notice were bona fide purchasers and the plaintiff's reformation action should have failed.⁸⁶⁷

The court did not, however, explain why the defendants were not on inquiry notice.⁸⁶⁸ They did not have a survey done or even have the old one checked.⁸⁶⁹ The defendants did not even go to the land to check the boundaries.⁸⁷⁰ Monuments had been placed there by the surveyor and a minimal inspection might have raised doubts about the boundaries.⁸⁷¹ The defendants never took any steps to check the physical boundaries.⁸⁷² Their inaction would seem to be at odds with what a reasonably prudent person would do under the circumstances. Consequently, it seems that the burden should have shifted to the defendants to show that they were not negligent and, even if they were, that the problem would not have been discovered by their exercise of due diligence.⁸⁷³

861. *Id.*

862. *Id.*

863. *Id.*

864. *Id.* at 1291.

865. *Craig*, 739 So. 2d at 1291.

866. *Id.*

867. *Id.*

868. *Id.*

869. *Id.*

870. *Craig*, 739 So. 2d at 1291.

871. *Id.*

872. *Id.*

873. *Id.*

XIX. RULE AGAINST PERPETUITIES

New legislation modifies the rule against perpetuities as it relates to trusts. The former ninety-year provision is modified to 360 years, thereby extending the permissible life of a trust.⁸⁷⁴

XX. SALES

*Attanasio v. Excel Development Corp.*⁸⁷⁵ Land buyers sued the developer based on a number of alleged misrepresentations.⁸⁷⁶ These included misrepresentations that: 1) each lot on the canal would have an easement across the land at the rear; 2) each lot would have the use of the canal; 3) the wooded area at the back of each lot would be a natural buffer; and 4) the maintenance fees paid to the association would cover the costs of water usage in the underground sprinkler system.⁸⁷⁷ The defendant pointed out that the sales contract contained an integration clause providing that the writing constituted the entire agreement.⁸⁷⁸ Then, it raised the defense that the plaintiffs' claims were barred by the Statute of Frauds.⁸⁷⁹ The trial court agreed, but the district court reversed.⁸⁸⁰

The Statute of Frauds requires any contract for the sale of any interest in land to be in writing.⁸⁸¹ This case did not involve the breach of a promise to do something in the future, and it did not involve the transfer of an interest in land.⁸⁸² The allegation here was that the defendant misrepresented a state of existing facts as an inducement to enter into a contract.⁸⁸³ Thus, the trial court should not have held the Statute of Frauds was a bar to the recovery of damages.⁸⁸⁴

*Engle Homes, Inc. v. Krasna.*⁸⁸⁵ The buyers signed a contract to have a custom home built in 1994.⁸⁸⁶ A year later, they closed on the contract,

874. Ch. 2000-245, § 1, 2000 Fla. Laws 2392, 2392 (codified at FLA. STAT. § 689.255(2)(f), (7) (2000)).

875. 757 So. 2d 1253 (Fla. 4th Dist. Ct. App. 2000).

876. *Id.* at 1253.

877. *Id.* at 1253-54.

878. *Id.* at 1254.

879. *Id.*

880. *Attanasio*, 757 So. 2d at 1255.

881. *Id.* at 1254; FLA. STAT. § 725.01 (2000).

882. *Attanasio*, 757 So. 2d at 1254.

883. *Id.* at 1254-55.

884. *Id.* at 1256.

885. 766 So. 2d 311 (Fla. 4th Dist. Ct. App. 2000).

886. *Id.* at 312.

accepted title, and moved in.⁸⁸⁷ Almost two years later, they learned that they might have a statutory right to rescission under the Interstate Land Sales Full Disclosure Act.⁸⁸⁸ They quickly decided to rescind, tendering title to the home back to the seller and demanding a full refund of the purchase price.⁸⁸⁹ Whether these buyers could rescind presented the court with a case of first impression.⁸⁹⁰

The seller conceded that the Act applied.⁸⁹¹ The Act required the buyers be given notice of their statutory right of rescission, and the seller conceded that buyers had not been given such notice.⁸⁹² The Act also required that an action to enforce the rights it provided must be brought within three years after the contract is signed.⁸⁹³ These buyers gave the seller notice of rescission less than thirty-one months after signing the contract, yet the seller claimed that the action was barred by the statute of limitations.⁸⁹⁴ The court rejected the statute of limitations defense based on the plain language of the Act.⁸⁹⁵ The court similarly rejected the seller's waiver defense.⁸⁹⁶ These buyers did not know they had a right to rescission when they accepted the deed or started living in the house.⁸⁹⁷ Rescission is a knowing act, so these actions could not be the basis for rescission.⁸⁹⁸

The court also rejected the seller's attempt to limit the buyers' recovery by invoking the liquidated damages clause in the contract and claiming a set-off for the buyers' use of the premises.⁸⁹⁹ Admittedly, the buyers had lived in the house for two years, but the statute was very clear that a rescinding buyer was entitled to "all money paid by him or her" if the property was returned substantially unchanged.⁹⁰⁰ The Act simply did not provide for any set-off for use and occupancy and it did not allow the seller to limit its liability by a liquidated damages clause.⁹⁰¹

887. *Id.*

888. *Id.*; see 15 U.S.C.A. §§ 1700–1720 (West 1995 & Supp. 2000).

889. *Krasna*, 766 So. 2d at 312.

890. *Id.*

891. *Id.*

892. *Id.*

893. *Id.*

894. *Krasna*, 766 So. 2d at 313.

895. *Id.*

896. *Id.*

897. *Id.*

898. *Id.*

899. *Krasna*, 766 So. 2d at 313.

900. *Id.* (quoting 15 U.S.C. § 1703(e) (1994)).

901. *Krasna*, 766 So. 2d at 313.

*Grosseibl v. J. Chris Howard Builders, Inc.*⁹⁰² When the buyer purchased the home, he got a warranty from the Preferred Builders Warranty Corporation.⁹⁰³ The warranty contained an arbitration clause that required any dispute “*arising out of or related to this warranty*” be submitted to arbitration.⁹⁰⁴ Problems did arise. The buyer claimed that the home was poorly built of substandard materials, not up to code, and on “improper and insufficient soil.”⁹⁰⁵ The buyer apparently attributed the problems to the builder’s improperly filling the land after removing the swimming pool that had previously been on the property.⁹⁰⁶ The buyer did not file a claim against the warrantor.⁹⁰⁷ Instead, he filed this action against the builder/seller seeking damages for breach of contract, rescission of the sale, and damages for fraud based on alleged misrepresentations made in the seller’s disclosure statement.⁹⁰⁸ On the seller’s motion, the trial court stayed his suit pending arbitration, but the Second District Court of Appeal reversed.⁹⁰⁹

In Florida, arbitration clauses are valid and enforceable.⁹¹⁰ A party who has agreed to arbitration has no choice but to arbitrate.⁹¹¹ However, the critical question here was whether the buyer had agreed to arbitrate the controversies involved in this suit.⁹¹² “In determining whether a dispute must be submitted to arbitration, the scope of the arbitration provision governs.”⁹¹³ This arbitration provision only covered disputes “*arising out of or related to this warranty*.”⁹¹⁴ The warranty revealed that it specifically excluded from coverage defects caused by soil problems, and it did not warrant that the home complied with any building code.⁹¹⁵ Nor did it cover misrepresentations that the builder might have made, and that formed the basis for the rescission and fraud claims.⁹¹⁶ Attempts to avoid an arbitration

902. 739 So. 2d 1255 (Fla. 5th Dist. Ct. App. 1999).

903. *Id.* at 1256.

904. *Id.*

905. *Id.*

906. *Id.*

907. *Grosseibl*, 739 So. 2d at 1256.

908. *Id.*

909. *Id.* at 1256–57.

910. *Id.* at 1256.

911. *Id.*

912. *Grosseibl*, 739 So. 2d at 1256.

913. *Id.*

914. *Id.*

915. *Id.*

916. *Id.*

clause by adding a fraud claim failed in cases involving an agreement to arbitrate all disputes, but this limited arbitration clause was clearly different.⁹¹⁷ This plaintiff's claims went far beyond what the warranty covered, and the agreement to arbitrate only related to claims under the warranty.⁹¹⁸

XXI. SPECIAL ASSESSMENTS

*Pomerance v. Homosassa Special Water District.*⁹¹⁹ The issue here was whether the trial court erred when it granted a final judgment in favor of the district for its special assessment for water lines by owners of property, which consisted primarily of wetlands that could not be developed.⁹²⁰

In 1988, the District annexed Halls River Estates, located north of the Pomerance property.⁹²¹ After annexing the property, the District ran water lines to serve Halls River Estates and to serve land that includes the Pomerance property which was previously within district boundaries.⁹²² The District specially assessed the Pomerance property and other properties which abutted the water lines.⁹²³ The Pomerances sued for relief contending that their property would not be benefited by the water line because the property consisted mostly of wetlands which were not able to be developed.⁹²⁴ The trial court concluded that the Pomerances "did not prove by a preponderance of the evidence that there was no benefit to the property from the extension of water service to it."⁹²⁵

The Fifth District held that the trial court properly found that the property owners did not prove by a preponderance of the evidence that they did not receive a benefit to their property from the extension of the water lines.⁹²⁶ The appellate court noted that the burden is on the property owner to overcome the rebuttable presumption that its property benefited from the improvement and the presumption that the district court correctly determined

917. *Grosseibl*, 739 So. 2d at 1257.

918. *Id.*

919. 755 So. 2d 732 (Fla. 5th Dist. Ct. App. 2000).

920. *Id.* at 733.

921. *Id.*

922. *Id.*

923. *Id.*

924. *Pomerance*, 755 So. 2d at 733.

925. *Id.* at 734.

926. *Id.*

that the property received a special benefit.⁹²⁷ The court stated that the trial court's finding was supported by the evidence and that the Pomerances did not overcome the presumptions.⁹²⁸

XXII. SUBMERGED LANDS

*West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund.*⁹²⁹ The issue here was whether the Fourth District Court of Appeal properly concluded that the city's dredging of submerged land did not constitute a permanent improvement under the Butler Act and, therefore, title to the submerged lands did not vest in the city.⁹³⁰

In 1946, the city "obtained a permit to construct a municipal marina on state sovereignty lands submerged under the intracoastal waterway."⁹³¹ "The marina was built between 1947 and 1949, pursuant to the Butler Act and its predecessor Riparian Rights Act of 1856, which divested the State of . . . fee simple title to submerged lands upon which upland owners constructed certain improvements in the interest of encouraging" the development and improvement of Florida's waterfront.⁹³²

The Supreme Court of Florida held that dredging submerged lands did not constitute a permanent improvement and that fee simple ownership of submerged lands is properly confirmed in the Board of Trustees of the Internal Improvement Trust Fund.⁹³³ The court stated that "divestiture of sovereign lands under the Butler Act is in derogation of the public trust and the Butler Act 'must be strictly construed in favor of the sovereign.'"⁹³⁴

The reenacted Butler Act of 1921 added the condition that the submerged land was "*actually* bulk-headed or filled in or permanently improved continuously from high water mark in the direction of the channel."⁹³⁵ Further, the Supreme Court of Florida stated that "permanently improved" denotes, at the very least, significant structures which are the

927. *Id.*; see *Ass'n of Cmty. Orgs. for Reform Now/Acorn v. Fla. City*, 444 So. 2d 37, 38-39 (Fla. 3d Dist. Ct. App. 1983) (citing *Meyer v. Oakland Park*, 219 So. 2d 417 (Fla. 1969)).

928. *Pomerance*, 755 So. 2d at 734.

929. 746 So. 2d 1085 (Fla. 1999).

930. *Id.* at 1087.

931. *Id.* at 1086.

932. *Id.*

933. *Id.* at 1091-92.

934. *Bd. of Trs. of the Internal Improvement Trust Fund.*, 746 So. 2d at 1089 (citing *Trs. of Internal Improvement Fund v. Claughton*, 86 So. 2d 775, 786 (Fla. 1956)).

935. *Id.*; see Ch. 21-8537, § 1, 1921 Laws of Florida 332, 333.

functional equivalent of the “wharves . . . warehouses, dwellings, or other buildings,” which are referred to in the first paragraph of section one of the Act.⁹³⁶ Finally, the court rejected the case by case basis which the district court of appeal adopted in *State Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc.*⁹³⁷

XXIII. TAXATION

*Bullock v. Houston Realty & Investment, Inc.*⁹³⁸ The issue here was whether the trial court properly concluded that certain tax deeds were valid to Houston regardless of any interest by Bullock.⁹³⁹

Houston filed suit to quiet title on property it had acquired by a quitclaim deed from PB Horizons, Inc., an entity which had purchased the property by a tax deed.⁹⁴⁰ Houston was aware that Bullock might have had an interest in the property by virtue of certain recorded final judgments.⁹⁴¹ Bullock raised the affirmative defense that prior to the tax deed sale she had not received proper statutory notice of the sale.⁹⁴² Notice of the sale should have been sent to her attorneys whose names and addresses appeared on the face of the final judgment.⁹⁴³ Bullock also counter-claimed “seeking cancellation of the tax deed and foreclosure of her final judgment.”⁹⁴⁴ Further, the court “ordered Bullock to deposit \$28,900 with the clerk of the court within thirty days ‘as preliminary costs’” required by section 197.602 of the *Florida Statutes* to invalidate a tax deed.⁹⁴⁵ Bullock failed to make the required deposit, and the court entered an Order on Validity of Tax Deeds.⁹⁴⁶ Further, it deemed Bullock had received notice of the tax sale prior to the sale and adjudged the tax deed held by Houston to be valid.⁹⁴⁷

The appellate court held that Bullock had received notice of the tax sale.⁹⁴⁸ This was based on section 197.522(1)(a) of the *Florida Statutes*,

936. *Bd. of Trs. of the Internal Improvement Tr. Fund*, 746 So. 2d at 1090.

937. *Id.* at 1091-92.

938. 739 So. 2d 1251 (Fla. 4th Dist. Ct. App. 1999).

939. *Id.* at 1252.

940. *Id.*

941. *Id.*

942. *Id.*

943. *Bullock*, 739 So. 2d at 1252.

944. *Id.*

945. *Id.* at 1253.

946. *Id.*

947. *Id.*

948. *Bullock*, 739 So. 2d at 1253.

stating that if no address is listed in the tax collector's statement then no notice is required.⁹⁴⁹ Further, Bullock subsequently received notice by virtue of the filing of Houston's action to quiet title.⁹⁵⁰ Finally, though there is nothing in section 197.602 of the *Florida Statutes* that expressly imposes a requirement on a lienor to deposit the tax arrearage with the clerk of the court, the procedure was not inconsistent with the statute.⁹⁵¹

*Department of Revenue v. Race.*⁹⁵² The issue here was whether the trial court properly held that taxes are not due when a husband files a quitclaim deed of his residence from himself to himself and his wife as tenants by the entireties where his wife's name was left off the deed by error.⁹⁵³

In 1991, the Races moved from California and purchased a home in Maitland, Florida.⁹⁵⁴ Karen, the wife, was pregnant at the time and it was anticipated she would not attend the closing.⁹⁵⁵ Therefore, "the deed, mortgage and note were prepared solely in David's, the husband's, name."⁹⁵⁶ However, at the last moment Karen attended the closing.⁹⁵⁷ Her name was added to the signature page of the mortgage and its balloon rider but left off the promissory note and deed.⁹⁵⁸ Therefore, title to the property was not conveyed to Karen.⁹⁵⁹ To cure this, David executed a quitclaim deed and paid the minimum documentary stamp taxes.⁹⁶⁰ The deed recited that the transfer was "for and in consideration of the sum of \$10.00."⁹⁶¹ Four months after this the Department of Revenue claimed documentary stamps were due, based on the value of the mortgage on the residence.⁹⁶²

The court held that taxes were not due under section 201.02(1) of the *Florida Statutes* when a deed merely corrects an error and no new purchaser or new or additional consideration is involved.⁹⁶³ Further, the court held that

949. *Id.*

950. *Id.* at 1254.

951. *Id.* at 1254-55.

952. 743 So. 2d 169 (Fla. 5th Dist. Ct. App. 1999).

953. *Id.* at 169.

954. *Id.* at 170.

955. *Id.*

956. *Id.*

957. *Race*, 743 So. 2d at 170.

958. *Id.*

959. *Id.*

960. *Id.*

961. *Id.*

962. *Race*, 743 So. 2d at 170.

963. *Id.*; see *Am. Foam Indus. v. Dep't of Revenue*, 345 So. 2d 343 (Fla. 3d Dist. Ct. App. 1977).

tax laws are to be construed strongly in favor of taxpayers and against the government, with all ambiguities resolved in favor of taxpayers.⁹⁶⁴ Here, Karen was already liable on the mortgage together with her husband, and documentary stamp taxes had already been paid on this encumbrance.⁹⁶⁵ Karen's name was left off due to error and there was no new, additional, or previously nonexistent encumbrances which would have required a new documentary tax due under section 201.02(1).⁹⁶⁶ Further, the Department's Rule 12A-4.014(3) provided that conveyances made to correct a deficiency in a previous deed are subject only to the minimum tax due.⁹⁶⁷

Fuchs v. Robbins.⁹⁶⁸ The issue before this court dealt with whether the lower court improperly upheld the property appraiser's original assessment and improperly declared section 192.042 of the *Florida Statutes* unconstitutional.⁹⁶⁹

In 1992, Joel W. Robbins, a Miami Dade County property appraiser, assessed the property in question.⁹⁷⁰ He assessed the land at a value of \$2,277,000 and the building at \$3,790,227.⁹⁷¹ The taxpayer appealed the assessment to the value adjustment board, which reduced the assessment of the building to a value of \$50,000.⁹⁷² Robbins brought an action in the circuit court to defend the original assessment.⁹⁷³

At trial, Robbins established that he conformed to the eight factors provided in section 193.011 of the *Florida Statutes* and when the taxpayer argued that the value of the building set by the value adjustment board was correct pursuant to section 192.042, Robbins alleged that section 192.042 was unconstitutional.⁹⁷⁴ The general master found that section 192.042 was unconstitutional because the section improperly creates a class of property not enumerated in Article VII, section 4 of the Florida Constitution.⁹⁷⁵ The taxpayer challenged the order, alleging the property appraiser, as a

964. *Race*, 743 So. 2d at 171; see *Dep't of Revenue v. Ray Constr.*, 667 So. 2d 859 (Fla. 1st Dist. Ct. App. 1996).

965. *Race*, 743 So. 2d at 171.

966. *Id.*

967. *Id.*

968. 738 So. 2d 338 (Fla. 3d Dist. Ct. App. 1998).

969. *Id.* at 339.

970. *Id.*

971. *Id.*

972. *Id.*

973. *Fuchs*, 738 So. 2d at 339.

974. *Id.*

975. *Id.*

constitutional officer, does not have standing to challenge the constitutionality of section 192.042.⁹⁷⁶

Robbins did have standing because when a statute is brought into issue by another party, such as it was in the case at hand, an officer may question the validity of the statute as a defense.⁹⁷⁷ In *Fuchs*, the taxpayer introduced section 192.042.⁹⁷⁸ Section 192.042 provides that real property be assessed on January 1 of each year, with the exception that portions not substantially completed on January 1 shall not have any value.⁹⁷⁹

In 1968 there was an amendment to the Florida Constitution which required that regulations secure a "just valuation" of all property.⁹⁸⁰ This court found that section 192.042 is constitutional.⁹⁸¹ The statute in the case at hand treats all property not substantially completed the same, and therefore, a just valuation is present.⁹⁸² Therefore, this court reversed the lower court's decision holding that the property was not substantially completed and should not have been assessed pursuant to section 192.042.⁹⁸³

Gulf Coast Recycling, Inc. v. Turner.⁹⁸⁴ The issue here was whether the trial court erred when it entered a judgment reinstating the property appraiser's original ad valorem tax assessment that the property had a value of \$1,704,166.⁹⁸⁵

The property at issue here was the Normandy Park apartment complex.⁹⁸⁶ Following receipt of the property appraiser's 1997 assessment of the property, Gulf Coast filed a petition with the value adjustment board to have the assessment reviewed.⁹⁸⁷ Its argument was that the property was contaminated and that the cost of the cleanup required by the Environmental Protection Agency exceeded the value of the property.⁹⁸⁸ Therefore, no potential purchaser would buy the property and it was without present cash value.⁹⁸⁹ After an evidentiary hearing, the hearing master found that the

976. *Id.*

977. *Id.* at 340; see *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982).

978. *Fuchs*, 738 So. 2d at 340.

979. FLA. STAT. § 192.042 (2000).

980. *Fuchs*, 738 So. 2d at 340.

981. *Id.*

982. *Id.*

983. *Id.* at 341.

984. 753 So. 2d 712 (Fla. 2d Dist. Ct. App. 2000).

985. *Id.*

986. *Id.*

987. *Id.*

988. *Id.*

989. *Turner*, 753 So. 2d at 712.

property appraiser had failed to consider all of the factors required in section 193.011 of the *Florida Statutes* when he made his assessment.⁹⁹⁰ He further found that Gulf Coast's evidence concerning the cost of the required cleanup was convincing and reduced the assessed value of the property to a nominal \$100.⁹⁹¹ The value adjustment board later adopted these findings.⁹⁹² The property appraiser filed suit under section 194.036 of the *Florida Statutes* requesting that the original assessment be reinstated because the property was currently being used as an apartment complex, and therefore, pursuant to section 193.011 of the *Florida Statutes*, its use had not been reduced due to the contamination.⁹⁹³ The trial court agreed and reinstated the original assessment.⁹⁹⁴

The appellate court held that the trial court erred when it reinstated the original assessment by the property appraiser.⁹⁹⁵ The court based its opinion on the requirement by section 193.011 to consider all the factors listed in that section when reaching an assessment.⁹⁹⁶ The property appraiser failed to consider the property's present cash value, which is the amount a willing purchaser would pay a willing seller for the property.⁹⁹⁷ Gulf Coast presented several experts that testified that the property had no present cash value.⁹⁹⁸ The presumption of the correctness of the property appraiser's assessment is lost when he or she fails to consider all the factors in section 193.011, which occurred here.⁹⁹⁹

*Havill v. Lake Port Properties, Inc.*¹⁰⁰⁰ The question before this court was whether the trial court properly concluded that the property appraiser's exclusive reliance on the cost approach was not appropriate and that the income approach was superior.¹⁰⁰¹

Lake Port contended that its 1995 ad valorem tax assessment on Lake Port Square was in excess of "just value" and that the property appraiser failed to follow the requirements of section 193.011 of the *Florida*

990. *Id.*

991. *Id.*

992. *Id.* at 713.

993. *Id.*

994. *Turner*, 753 So. 2d at 713.

995. *Id.*

996. *Id.*

997. *Id.*; see FLA. STAT. § 193.011(1), (6) (2000).

998. *Turner*, 753 So. 2d at 713.

999. *Id.*

1000. 729 So. 2d 467 (Fla. 5th Dist. Ct. App. 1999).

1001. *Id.* at 467.

*Statutes.*¹⁰⁰² In particular, it contested the correctness of the assessment of the independent living facility.¹⁰⁰³ The property appraiser contended that the trial court erroneously placed the burden on him to prove the validity of his assessment, incorrectly placed emphasis on methodology, instead of proof of correctness of the value, failed to treat the assessment as presumptively correct, and made its determination on evidence insufficient to overcome that presumption.¹⁰⁰⁴

There are three traditional approaches to value—cost, income, and market—that will individually, or in any combination, support an assessment.¹⁰⁰⁵ The property appraiser decides the weight given to each approach depending on the type of property being assessed.¹⁰⁰⁶

In this case, both sides agreed that the market approach was inappropriate because of the unique nature of the property and lack of comparable sales.¹⁰⁰⁷ Lake Port argued, and the trial court agreed, that the only valid way to appraise the facility was the income approach.¹⁰⁰⁸ The property appraiser stated that he considered but rejected the income approach for several reasons including: 1) a lack of comparable properties; 2) he did not believe he had been given all needed information; 3) the information supplied was incomplete or incorrect; and 4) the complex and unorthodox “income stream” of Lake Port Square made it difficult to accurately assess using the income method.¹⁰⁰⁹ Further, he pointed out that information supplied did not accurately reflect the integrated nature of the facility, but attempted to separate income related only to the living center.¹⁰¹⁰ Indeed, Lake Port’s expert testified at trial that he had only conducted an appraisal of the living center.¹⁰¹¹ Royce said that in his opinion this was a “special purpose” property, best valued using the cost approach.¹⁰¹² Finally,

1002. *Id.* at 468–69.

1003. *Id.* at 469.

1004. *Id.* at 469–70.

1005. *Id.*; see *Bystrom v. Equitable Life Assurance Soc’y*, 416 So. 2d 1133, 1144 (Fla. 3d Dist. Ct. App. 1982).

1006. *Havill*, 729 So. 2d at 470; see *Atlantic Int’l Inv. Corp. v. Turner*, 383 So. 2d 919, 921 (Fla. 5th Dist. Ct. App. 1980).

1007. *Havill*, 729 So. 2d at 470.

1008. *Id.*

1009. *Id.*

1010. *Id.* at 471.

1011. *Id.*

1012. *Havill*, 729 So. 2d at 471.

Royce testified the county may make a fifteen percent reduction based on the "eighth criteria adjustment" but this is done on a case by case basis.¹⁰¹³

The appellate court held that it is not for the trial court to determine which method is superior, as long as the property appraiser's valuation takes into account the statutory factors.¹⁰¹⁴ The property appraiser must rely on his judgment as to the best method and is given "great leeway" as long as he follows the requirements of the law.¹⁰¹⁵ Finally, the trial court overlooked the Second District's holding in *Daniel v. Canterbury Towers, Inc.*¹⁰¹⁶ The court held that the county appraiser was within his authority to use the cost approach to value a "nursing home" and treat it as a "special purpose" property.¹⁰¹⁷

*Kerr v. Broward County.*¹⁰¹⁸ The issue in this appeal was whether a party claiming entitlement to property as an assignee of a judgment against the prior owner of the property can be denied his right to participate in a surplus, which existed after a tax sale was overbid, and where the party's address was not placed on the assignment of judgment.¹⁰¹⁹

A tax sale was conducted on certain real property located in Broward County, for which there existed a surplus after all tax obligations on the property were paid.¹⁰²⁰ The excess funds were placed in the court registry since both the county and Kerr made claims to the surplus funds.¹⁰²¹ Kerr, who claimed entitlement to the funds as the assignee of a judgment against the prior owner, did not have her address placed on the assignment of judgment or the assignment of note and mortgage, and therefore, Kerr's name was not in the tax collector's statement pursuant to section 197.502 of the *Florida Statutes*.¹⁰²² The county replied that Kerr did not qualify as a person entitled to excess proceeds of a tax sale under sections 197.582(2) or 197.522(1)(a) of the *Florida Statutes*.¹⁰²³ The county further asserted that it

1013. *Id.*

1014. *Id.*; see *Walker v. Trump*, 549 So. 2d 1098, 1103 (Fla. 4th Dist. Ct. App. 1989).

1015. *Havill*, 729 So. 2d at 471 (citing *Walker*, 549 So. 2d at 1103).

1016. *Id.* (citing *Daniel v. Canterbury Towers, Inc.*, 462 So. 2d 497 (Fla. 2d Dist. Ct. App. 1984)).

1017. *Id.*

1018. 718 So. 2d 197 (Fla. 4th Dist. Ct. App. 1998).

1019. *Id.* at 197.

1020. *Id.*

1021. *Id.* at 198.

1022. *Id.*

1023. *Kerr*, 718 So. 2d at 198.

had two judgment liens against the prior owner of the property which were recorded in July and December of 1988.¹⁰²⁴

Both parties filed motions for summary judgment for declaratory relief to determine the rights of each party.¹⁰²⁵ The appellate court looked to sections 197.582, 197.522, and 197.502 of the *Florida Statutes* and found that the appellant, who had superior lien rights, should not be denied her right to participate in the excess funds merely because the instrument that created her liens did not contain her address.¹⁰²⁶

Furthermore, this court referenced two cases, *Dawson v. Saada*¹⁰²⁷ and *DeMario v. Franklin Mortgage & Investment Co.*¹⁰²⁸ In *Dawson*, the Supreme Court of Florida emphasized that only "notice reasonably calculated to apprise landowners of the pending deprivation of their property" is required.¹⁰²⁹ The *DeMario* court held that the clerk of the court is required to assemble all interested parties when there are excess funds so that the funds may be distributed according to the legal priorities of the claims.¹⁰³⁰ Therefore, this court reversed and remanded the grant of summary judgment with directions for the trial court to determine the priorities of the parties.¹⁰³¹

*Metropolitan Dade County v. Brothers of the Good Shepherd, Inc.*¹⁰³² The issue presented was whether the assignee of a ninety-nine year lease, who uses the property for charitable purposes, is entitled to a charitable exemption from ad valorem taxation under sections 196.012(1), 196.196, and 196.192(1) of the *Florida Statutes*.¹⁰³³ The appellate court found that, although the property was used for charitable purposes, the assignee was not the "equitable owner" of the property, and therefore was not entitled to the exemption.¹⁰³⁴

*Northcutt v. Balkany.*¹⁰³⁵ The issue presented before this court was whether tax certificates issued for unpaid ad valorem taxes were

1024. *Id.*

1025. *Id.*

1026. *Id.* at 199.

1027. 608 So. 2d 806 (Fla. 1992).

1028. 648 So. 2d 210 (Fla. 4th Dist. Ct. App. 1994).

1029. *Dawson*, 608 So. 2d at 808.

1030. *DeMario*, 648 So. 2d at 213.

1031. *Kerr*, 718 So. 2d at 199.

1032. 714 So. 2d 573 (Fla. 3d Dist. Ct. App. 1998).

1033. *Id.*

1034. *Id.* at 573-74; see *Leon County Educ. Facilities Auth. v. Hartsfield*, 698 So. 2d 526, 530 (Fla. 1997); *Gautier v. Lapof*, 91 So. 2d 324 (Fla. 1956).

1035. 727 So. 2d 382 (Fla. 5th Dist. Ct. App. 1999).

unenforceable when the owner of the tax certificates, who was involved in a bankruptcy proceeding for twenty months, failed to apply for a tax deed within the seven year limit under section 197.482(1) of the *Florida Statutes*.¹⁰³⁶ The tax collector asserted that the bankruptcy tolled the seven year period.¹⁰³⁷

The landowner involved failed to pay ad valorem taxes in 1987 and 1988 and two certificates were issued.¹⁰³⁸ The landowner filed for bankruptcy in 1991.¹⁰³⁹ In 1992, the bankruptcy court ordered the property involved to be conveyed to the appellee, as trustee.¹⁰⁴⁰ In 1992, the landowner was discharged from bankruptcy.¹⁰⁴¹ In February of 1997, the landowner, who was still the holder of the certificates, applied for tax deeds.¹⁰⁴² In order to avoid losing the property, the appellee paid for the tax deeds.¹⁰⁴³ The appellee then filed a complaint against the tax collector for the expenses incurred in purchasing the tax deeds, attorneys' fees, and court costs.¹⁰⁴⁴ The appellee alleged that the tax collector's refusal to declare the tax certificates null and void violated his duty under section 197.482 of the *Florida Statutes*.¹⁰⁴⁵ The trial court granted summary judgment to the appellee.¹⁰⁴⁶

Section 197.482 provides that after seven years, if a tax deed is not applied for and no other legal proceeding has existed of record, the tax collector shall cancel the tax certificate.¹⁰⁴⁷ The tax collector argued that the bankruptcy was a legal proceeding affecting the property covered by the certificates.¹⁰⁴⁸ The appellate court agreed.¹⁰⁴⁹

Until 1973, the limitation time for applying for a tax deed was twenty years.¹⁰⁵⁰ The former statute, section 197.430, provided a twenty year statute

1036. *Id.* at 383.

1037. *Id.*

1038. *Id.*

1039. *Id.*

1040. *Balkany*, 727 So. 2d at 383.

1041. *Id.*

1042. *Id.*

1043. *Id.*

1044. *Id.*

1045. *Balkany*, 727 So. 2d at 384.

1046. *Id.*

1047. FLA. STAT. § 197.482(1) (2000).

1048. *Balkany*, 727 So. 2d at 384.

1049. *Id.* at 386.

1050. *Id.* at 384.

of limitations but was very strict.¹⁰⁵¹ When the legislature changed the twenty year time period to seven years, it also expanded the scope of exceptional circumstances in which the normal limitation period would not apply.¹⁰⁵² The exceptions included a situation where a legal proceeding “has existed” affecting the property.¹⁰⁵³ The appellate court found that since the legislature used the words “has existed” rather than “is pending” it provided for a tolling of the seven year limitation for periods where the property was the subject of a legal proceeding of record.¹⁰⁵⁴ Therefore, since the court found that the bankruptcy proceeding acted as a stay of any legal actions regarding the property, and was never lifted, the seven year statute of limitations in section 197.482 was tolled during the period in which the property was subject to the bankruptcy’s stay.¹⁰⁵⁵ The final judgment was vacated and remanded for further proceedings consistent with the court’s opinion.¹⁰⁵⁶

*Sartori v. Department of Revenue.*¹⁰⁵⁷ The issue that was decided by this court was whether it was correct to dismiss James Sartori’s declaratory judgment action against the Department of Revenue (“DOR”) and the Brevard County Tax Collector as untimely.¹⁰⁵⁸

Sartori brought suit hoping to obtain an order directing the DOR to refund ad valorem taxes, which had been paid on pollution control equipment located on his dairy farm.¹⁰⁵⁹ Sartori asserted that he filed the action within the applicable four year statute of limitations provided in section 197.182(1)(c) of the *Florida Statutes*.¹⁰⁶⁰ In 1990, Sartori installed pollution control equipment on his dairy farm and three years later the tax collector claimed that the equipment was subject to real estate taxes.¹⁰⁶¹ Sartori disagreed and asserted that he was not obligated to pay the taxes on the equipment pursuant to section 193.621 of the *Florida Statutes* because his equipment was subject to taxation at salvage value rather than its fair market value.¹⁰⁶² However, the tax collector assessed taxes against Sartori’s

1051. *Id.*

1052. *Id.*

1053. *Balkany*, 727 So. 2d at 385.

1054. *Id.*

1055. *Id.*

1056. *Id.* at 386.

1057. 714 So. 2d 1136 (Fla. 5th Dist. Ct. App. 1998).

1058. *Id.* at 1137.

1059. *Id.*

1060. *Id.* at 1138.

1061. *Id.* at 1137.

1062. *Sartori*, 714 So. 2d at 1137.

property based upon the fair market value.¹⁰⁶³ In June 1993, Sartori was directed to pay taxes for the years of 1990 through 1993.¹⁰⁶⁴ Sartori first filed a petition with the county's value adjustment board, which was never presented.¹⁰⁶⁵ Thereafter, in October 1993 the taxes were certified for collection.¹⁰⁶⁶

In the meantime, pursuant to section 193.621(6) of the *Florida Statutes*, the tax collector filed a request with the state Department of Environmental Regulation ("DER") for a recommendation concerning the equipment and section 193.621.¹⁰⁶⁷ Sartori paid the bill and in July 1994 the DER advised the tax collector that Sartori's argument was correct and that the equipment was subject to assessment at salvage value.¹⁰⁶⁸ The tax collector requested that the DOR refund Sartori, however, the DOR denied the request as untimely.¹⁰⁶⁹ Therefore, Sartori filed a declaratory judgment action requesting that DOR be directed to refund the taxes paid.¹⁰⁷⁰ The trial court concluded that Sartori's suit was untimely filed pursuant to section 194.171 of the *Florida Statutes* because the August 1996 suit constituted a "contest to a tax assessment" and that Sartori only had until December 18, 1993 to file the lawsuit.¹⁰⁷¹ Sartori argued that section 194.171 was not applicable because he was not asserting a "contest to a tax assessment," but rather was requesting a tax refund since the tax collector had improperly classified his equipment.¹⁰⁷² Further, Sartori asserted that under section 197.182 of the *Florida Statutes* and rule 12D-8.021 of the *Florida Administrative Code*, he had four years to institute a lawsuit for a refund.¹⁰⁷³ This court looked to both of these authorities and section 95.11(3)(m) of the *Florida Statutes*, which provides a four year statute of limitation for actions regarding money paid to a governmental authority by mistake or inadvertence.¹⁰⁷⁴

The DOR brought this court's attention to *Department of Revenue v. Goembel*.¹⁰⁷⁵ In that case, the Fifth District found that *Goembel* did not

1063. *Id.*

1064. *Id.*

1065. *Id.*

1066. *Id.*

1067. *Sartori*, 714 So. 2d at 1137.

1068. *Id.*

1069. *Id.*

1070. *Id.* at 1138.

1071. *Id.*

1072. *Sartori*, 714 So. 2d at 1138.

1073. *Id.*

1074. *Id.* at 1138-39.

1075. 382 So. 2d 783 (Fla. 5th Dist. Ct. App. 1980).

discuss the specific issue that was presented in this case and was not controlling.¹⁰⁷⁶ Therefore, the appellate court found for Sartori stating that his claim was not barred by the statute of limitation in section 194.171, since the suit did not challenge the tax collector's valuation of his property.¹⁰⁷⁷ In the past, courts had distinguished cases involving suits that contest tax assessments and suits contesting property classifications.¹⁰⁷⁸ This court looked at past cases and the legislature's intent to afford favorable tax status to owners of pollution control equipment.¹⁰⁷⁹ This intent is seen in section 403.021 of the *Florida Statutes*.¹⁰⁸⁰ Further, both section 193.621 and section 193.441 of the *Florida Statutes* explain that pollution control equipment is classified as a special class of property.¹⁰⁸¹

The appellate court also answered the DOR's argument that the refund sought was based upon the retroactive application of a tax exemption and that such request falls within the limitation of time in section 194.171 of the *Florida Statutes*.¹⁰⁸² However, the court stated that the tax status accorded to pollution control equipment is not by a tax exemption, but rather a favorable tax status because of the equipment's classification.¹⁰⁸³ Therefore, the appellate court reversed and remanded the case in favor of Sartori.¹⁰⁸⁴

Schultz v. Love PGI Partners.¹⁰⁸⁵ The issue before the Supreme Court of Florida was whether the Fifth District Court of Appeal decision, which conflicted with *Robbins v. Yusseem*,¹⁰⁸⁶ was correct that zoned use of land is not determinative of actual, good faith agricultural use of land for ad valorem tax assessment purposes.¹⁰⁸⁷

The Fifth District Court of Appeal held that when determining the actual, good faith use of the land for tax purposes, the zoned use is but one factor that an assessor or reviewing court may consider along with other factors specified in section 193.461(3)(b) of the *Florida Statutes*, and that

1076. *Sartori*, 714 So. 2d at 1139.

1077. *Id.*

1078. *See* Dep't of Revenue v. Gerald Sohn, P.A., 654 So. 2d 249 (Fla. 1st Dist. Ct. App. 1995); *see also* Dep't of Revenue v. Stafford, 646 So. 2d 803, 804 (Fla. 4th Dist. Ct. App. 1994).

1079. *Sartori*, 714 So. 2d at 1139.

1080. *Id.* at 1140.

1081. *Id.* at 1140-41.

1082. *Id.* at 1141.

1083. *Id.*

1084. *Sartori*, 714 So. 2d at 1141.

1085. 731 So. 2d 1270 (Fla. 1999).

1086. 559 So. 2d 1185 (Fla. 3d Dist. Ct. App. 1990).

1087. *Shultz*, 731 So. 2d at 1271.

zoning alone is not determinative as a matter of law.¹⁰⁸⁸ The Fifth District reasoned that the assessment must be based on an evaluation of the various factors as provided in section 193.461(3)(b), which include: 1) the duration and continuity of the use; 2) the purchase price and size of the land; 3) whether the land is cared for in a manner to support the alleged use; 4) whether there is a lease, and, if so, its terms; and 5) "such other factors" as may be apparent.¹⁰⁸⁹ Since the zoned use of land was not included as a specific factor by the legislature, it enters the analysis in the catch-all category contained in section 193.461(3)(b)7.¹⁰⁹⁰ The Fifth District stressed that the key is the actual physical activity being conducted on the land and a determination based exclusively on zoned use as a matter of law would violate the broad examination required by the statute.¹⁰⁹¹

The Supreme Court of Florida held that the Fifth District Court of Appeal's reasoning was sound and consistent with *Greenwood v. Oates*.¹⁰⁹² Therefore, it approved the Fifth District's decision below and disapproved *Robbins* to the extent it was inconsistent with its opinion.¹⁰⁹³

Sebring Airport Authority v. McIntyre.¹⁰⁹⁴ This case addressed the constitutionality of section 196.012(6) of the *Florida Statutes*.¹⁰⁹⁵ The raceway applied for an ad valorem tax exemption under section 196.199 of the *Florida Statutes* and was denied.¹⁰⁹⁶ The trial court granted summary judgment to the property appraiser and the DOR under a declaratory judgment action.¹⁰⁹⁷

The property was owned by the City of Sebring and leased to the raceway.¹⁰⁹⁸ It was used as a racetrack with permanent seating and annual races.¹⁰⁹⁹ Section 196.012(6) of the *Florida Statutes* provides that the use of property as a sports facility with permanent seating by a lessee is deemed a use that serves a governmental, municipal, or public purpose when it is open to the general public.¹¹⁰⁰

1088. *Id.*

1089. *Id.*; see FLA. STAT. § 193.461(3)(b) (2000).

1090. *Shultz*, 731 So. 2d at 1271.

1091. *Id.*

1092. 251 So. 2d 665 (Fla. 1971).

1093. *Shultz*, 731 So. 2d at 1272.

1094. 718 So. 2d 296 (Fla. 2d Dist. Ct. App. 1998).

1095. *Id.* at 297.

1096. *Id.*

1097. *Id.*

1098. *Id.*

1099. *McIntyre*, 718 So. 2d at 297.

1100. *Id.*; FLA. STAT. § 196.012(6) (2000).

The raceway fell within this provision, but the question before this court was whether the legislature can by statutory enactment change the meaning of the terms in Article VII, section 3(a) of the Florida Constitution.¹¹⁰¹ The state constitution permits the legislature to provide exemptions by general law in certain situations, however, there is nothing in Article VII, section 3 that allows the legislature to make such an exemption as it did in this case.¹¹⁰² Other than what is provided in the Florida Constitution, the legislature cannot enact general laws that permit exemptions from ad valorem taxation.¹¹⁰³ The Supreme Court of Florida in *Franks v. Davis*¹¹⁰⁴ stated that the state's constitution is a limitation on the power of the legislature.¹¹⁰⁵ The specifications of permissible exemptions in the constitution excludes other exemptions.¹¹⁰⁶ The legislature cannot alter the tax exemption provisions of the constitution.¹¹⁰⁷

The Florida Constitution in Article VII, section 3 clearly establishes that exemptions are permissible for municipal property owned and used by the municipality.¹¹⁰⁸ In the present case, the property was owned by the municipality but not used by the municipality and therefore should not have been entitled to an exemption.¹¹⁰⁹ Therefore, the appellate court held that the statute was unconstitutional, since the legislature cannot by statutory enactment change or alter the meaning of a provision in the state constitution, as it did in *McIntyre*.¹¹¹⁰

*Turner v. Tokai Financial Services, Inc.*¹¹¹¹ The issue here was whether the property appraiser was required to make a deduction for the cost of sales when determining the fair market value.¹¹¹²

In this case, Turner and Fuchs were sued by Tokai.¹¹¹³ Turner and Fuchs assessed the value of some 500 pieces of office equipment.¹¹¹⁴ Tokai

1101. *McIntyre*, 718 So. 2d at 297.

1102. *Id.* at 298.

1103. *Id.*

1104. 145 So. 2d 228 (Fla. 1962).

1105. *McIntyre*, 718 So. 2d at 298.

1106. *Id.*; see *Hillsborough County Aviation Auth. v. Walden*, 210 So. 2d 193 (Fla. 1968).

1107. *McIntyre*, 718 So. 2d at 298.

1108. *Id.* at 299.

1109. *Id.* at 299–300.

1110. *Id.* at 300.

1111. 767 So. 2d 494 (Fla. 2d Dist. Ct. App. 2000).

1112. *Id.* at 497.

1113. *Id.* at 496.

1114. *Id.*

disagreed with the value Turner and Fuchs appraised the equipment and based its claim under section 193.011(8) of the *Florida Statutes*, which identifies the net proceeds of the sale of property as one factor to be considered when determining just valuation or market value.¹¹¹⁵

The appellate court found that from the title of the section itself that the property appraiser need only consider the factors but does not have to apply them.¹¹¹⁶ Further, the method used for valuation and the weight given to the individual factors is left to the discretion of the tax appraiser.¹¹¹⁷ Therefore, the appellate court reversed the portion of the trial court's opinion that required a twenty percent reduction from the fair market value of Tokai's equipment.¹¹¹⁸

XXIV. TIMESHARES

New legislation impacts timeshares in various ways. There is no longer a prior review by the Department of Business Regulation of timeshare advertising.¹¹¹⁹ Liability of concurrent or successor timeshare developers is reduced.¹¹²⁰ Additionally, timeshare disclosures are now simplified.¹¹²¹

XXV. TITLE INSURANCE

*Department of Insurance v. Keys Title & Abstract Co.*¹¹²² The issue here was whether the trial court properly held that section 627.782(8) of the *Florida Statutes* is unconstitutional on its face, because it imposes a burden on nonlawyer title insurance agents that is not also imposed on lawyers who sell title insurance.¹¹²³

Title insurance can be sold in Florida either by a title insurance agent who is licensed by the Department of Insurance or by a lawyer who is in good standing with the Florida Bar.¹¹²⁴ Title insurance rates are regulated by

1115. *Id.* (quoting FLA. STAT. § 193.011(8) (1997)).

1116. *Turner*, 767 So. 2d at 497.

1117. *Id.* (citing Valencia Ctr., Inc. v. Bystrom, 543 So. 2d 214, 216 (Fla. 1989)).

1118. *Id.* at 500.

1119. Ch. 2000-302, § 17, 2000 Fla. Laws 3031, 3085-3086 (codified at FLA. STAT. § 721.11 (2000)).

1120. *Id.* § 9, 2000 Fla. Laws at 3049 (codified at FLA. STAT. § 721.05 (2000)).

1121. *See id.* § 6, 2000 Fla. Laws at 3039-41 (codified at FLA. STAT. § 719.503 (2000)).

1122. 741 So. 2d 599 (Fla. 1st Dist. Ct. App. 1999).

1123. *Id.* at 600.

1124. *Id.* at 600-01.

the Department of Insurance under chapter 627 of the *Florida Statutes*.¹¹²⁵ Section 627.782(8) authorizes the department to promulgate a rule requiring its licensees to provide relevant information for use in setting rates.¹¹²⁶ Based on this authority, the department adopted Rule 4-186.013 of the *Florida Administrative Code*, which requires all licensees under chapter 626 to provide statistical data for use in setting rates.¹¹²⁷ However, section 626.8417(4)(a) of the *Florida Statutes* provides that lawyers who are in good standing are exempt from licensure requirements under chapter 626.¹¹²⁸ Therefore, since lawyers are not “licensees” of the department, they are not subject to the department’s reporting requirements authorized by section 627.782(8) and required by Rule 4-186.013.¹¹²⁹ Keys challenged the statute arguing that it violated the constitutional guarantee of equal protection of the law.¹¹³⁰ Keys maintained the statute made an arbitrary distinction between lawyers and nonlawyers who sell title insurance.¹¹³¹ The trial court declared the statute unconstitutional as a violation of the right to equal protection of the law.¹¹³²

The appellate court held that the statute was constitutional because it serves a legitimate governmental purpose and the legislature had valid reasons to exclude lawyers from the reporting requirement.¹¹³³ First, an equal protection challenge to a statute that does not involve a fundamental right or a suspect classification is evaluated by the rational basis test.¹¹³⁴ A proper application of the test requires consideration of two distinct issues, whether the statute serves a legitimate governmental purpose and whether it was reasonable for the legislators to believe that the challenged classification would promote the purpose.¹¹³⁵ There is no doubt that the first requirement is met in that the statute serves a legitimate purpose in enabling the

1125. *Id.* at 601; see FLA. STAT. § 627.782 (2000).

1126. *Keys Title & Abstract Co.*, 741 So. 2d at 601; see FLA. STAT § 627.782(8) (2000).

1127. *Keys Title & Abstract Co.*, 741 So. 2d at 601.

1128. *Id.*

1129. *Id.*

1130. *Id.*

1131. *Id.*

1132. *Keys Title & Abstract Co.*, 741 So. 2d at 601.

1133. *Id.* at 602.

1134. *Id.*; see *Hodel v. Indiana*, 452 U.S. 314 (1981); *Idaho Dep’t of Employment v. Smith*, 434 U.S. 100 (1977); *State v. Bales*, 343 So. 2d 9 (Fla. 1977).

1135. *Keys Title & Abstract Co.*, 741 So. 2d at 602; see *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981); see also *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

Department of Insurance to make informed decisions regarding the premium rates for title insurance.¹¹³⁶ Second, the legislature had valid reasons to exclude lawyers from the reporting requirement.¹¹³⁷ Some of these reasons include: 1) that the inclusion of lawyers would make the reporting requirement more difficult because it is difficult to identify those Bar members who sell title insurance; 2) that the information provided by the lawyers would not be as accurate because many lawyers who sell title insurance do it as part of a broader legal practice; and 3) the expense information provided may not be limited to that involved in selling title insurance.¹¹³⁸

XXVI. TRUTH IN LENDING

*Essex Home Mortgage Servicing Corp. v. Fritz.*¹¹³⁹ The issue here was whether the trial court properly awarded damages to the Fritzes for each interest rate change that occurred during the term of the loan.¹¹⁴⁰

This case involved an original variable rate loan from Essex's predecessor in interest, Financial Security Savings and Loan Association, for the purchase of the Fritzes' residence.¹¹⁴¹ The Fritzes were provided with a truth in lending disclosure statement for variable rate mortgages which advised them that interest rates may increase when the index increased.¹¹⁴² In actuality, the interest rates could also increase in the second year even if the index decreased because of the effect of the interest rate discount applicable to only the first year.¹¹⁴³ The Fritzes defaulted on the loan and Essex sued for foreclosure with the Fritzes countersuing for damages under the Truth in Lending Act ("TILA") for statutory damages.¹¹⁴⁴ The trial court entered a final judgment in foreclosure against the Fritzes, but awarded a set off in the amount of \$22,000, finding that the original lender had "'misstated the effect of the index on the APR of the variable rate loan,' and that '[e]ach successive change in the interest rate resulted in a new transaction and an additional violation.'"¹¹⁴⁵

1136. *Keys Title & Abstract Co.*, 741 So. 2d at 602.

1137. *Id.*

1138. *Id.* at 603.

1139. 740 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1999).

1140. *Id.* at 1225.

1141. *Id.*

1142. *Id.*

1143. *Id.*

1144. *Fritz*, 740 So. 2d at 1225.

1145. *Id.*

The appellate court held that the trial court erred in awarding statutory damages for each interest rate change that occurred during the term of the loan.¹¹⁴⁶ It based this on the fact that the TILA states at Title 15 of the *United States Code* section 1640(a)(2) that if a lender fails to comply with the requirements of TILA, the lender is liable to the borrower for statutory damages equal to twice the amount financed, but not less than \$200 and not more than \$2000.¹¹⁴⁷ Further, section 1640(g) limits statutory damages in cases of multiple failures to disclose to a single recovery unless the lender continues to fail to disclose after recovery has been granted.¹¹⁴⁸ This case did not involve post-recovery disclosure violations.¹¹⁴⁹ Further, there were no subsequent rate changes that constituted new transactions.¹¹⁵⁰ “[A]fter the first rate change, the statement that ‘the interest rate may increase if the index increased’ would be correct because the previous year’s interest rate would no longer be a discounted rate.”¹¹⁵¹ Further, increases in interest rates are not considered new transactions when a creditor, as was done in this case, gives prior disclosure that rates are subject to change.¹¹⁵² Therefore, the Fritzes’ total recovery was limited to \$2000.¹¹⁵³

XXVII. UTILITY FRANCHISES

*Central Waterworks, Inc. v. Town of Century.*¹¹⁵⁴ The issue here was who has the right to provide water to the Department of Juvenile Justice (“DJJ”) when one party has an exclusive franchise agreement and the other has been given the right to purchase its water from others.¹¹⁵⁵ In this case, Central Waterworks was granted an exclusive franchise in 1966 to provide water within a certain geographic location.¹¹⁵⁶ In 1996, the town leased land for the DJJ which provided that it could purchase water from the town.¹¹⁵⁷

1146. *Id.*

1147. *Id.*

1148. *Id.*; see Truth in Lending Act, 15 U.S.C.A. § 1640(a)(2) (West 1995 & Supp. 2000).

1149. *Fritz*, 740 So. 2d at 1225.

1150. *Id.*

1151. *Id.* at 1226.

1152. *Id.*; see *Key Sav. Bank, F.S.B. v. Dean*, 695 So. 2d 808, 810 (Fla. 4th Dist. Ct. App. 1997).

1153. *Fritz*, 740 So. 2d at 1227.

1154. 754 So. 2d 814 (Fla. 1st Dist. Ct. App. 2000).

1155. *Id.* at 816.

1156. *Id.*

1157. *Id.*

The court began by restating that a franchise constitutes a private property right.¹¹⁵⁸ If the franchisee has the ability to meet its obligations and provide the service proscribed, the franchisee's right can only be alienated by consent, unless full compensation is paid.¹¹⁵⁹ The first thing the court looked at was the element of consent by Central.¹¹⁶⁰ The appellate court found that the trial court did not base its determination on this issue on competent, substantial evidence, and therefore, was incorrect in its decision for the town.¹¹⁶¹

The appellate court further found that the trial court erred when it ruled in regards to sections 958.41(14), (16), and (19) of the *Florida Statutes*.¹¹⁶² The trial court interpreted the statute so that it authorized the DJJ to contract with whomever it chooses and to ignore Central's franchise rights.¹¹⁶³ The appellate court stated this was a misinterpretation of the statute and that it merely provided that the siting of juvenile facilities was to be given priority by other affected governmental agencies and that such provisions did not authorize the abrogation of Central's vested franchise rights in the manner determined by the trial court.¹¹⁶⁴

Finally, the appellate court determined that the trial court erred in its application of law.¹¹⁶⁵ The appellate court, following *City of Mount Dora v. JJ's Mobile Homes, Inc.*,¹¹⁶⁶ stated:

When each of two public service entities, whether governmental or private, has a legal basis for the claim of a right to provide similar services in the same territory, and each has the present ability to do so promptly and efficiently, the entity with the earlier acquired legal right has the exclusive legal right to provide service in that territory without interference from the entity with the later acquired right.¹¹⁶⁷

Therefore, the appellate court reversed and remanded the case.¹¹⁶⁸

1158. *Id.*

1159. *Cent. Waterworks, Inc.*, 754 So. 2d at 816.

1160. *Id.*

1161. *Id.* at 816–17.

1162. *Id.* at 817.

1163. *Id.*

1164. *Cent. Waterworks, Inc.*, 754 So. 2d at 817.

1165. *Id.*

1166. 579 So. 2d 219, 223–24 (Fla. 5th Dist. Ct. App. 1991).

1167. *Cent. Waterworks, Inc.*, 754 So. 2d at 817.

1168. *Id.*

XXVIII. CONCLUSION

The foregoing survey presents selected cases and legislation of significance to real estate professionals. Florida real estate law is not static, and there seems to be no consistent pattern to its development. The Florida courts and the legislature are actively involved in its continuing evolution. We hope that this survey proves interesting and useful to professionals who may ponder what will happen next.

2000 Survey of Florida Public Employment Law

John Sanchez*

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I. INTRODUCTION

Public sector employment law overlaps and diverges from the law governing private employment. Several federal laws governing private employment, such as collective bargaining, occupational health and safety, and employee benefits and pensions do not apply to public employees. For this reason, the State of Florida has enacted laws that govern only public employees in these areas. At the same time, public employees may bring

claims under the federal and state constitutions that are unavailable to private sector employees. As for overlap, a wide array of federal and state statutes govern both private and public employment in the areas of civil rights, wages and hours, and family medical leave.

This article explores the several stages of public employment, beginning with the law governing the hiring of employees. Part I outlines the law governing civil service examinations. Related issues include whether public employers are prohibited from hiring relatives and whether cities and counties may face liability if they fail to check the criminal background of applicants for employment. Finally, this section discusses some local governments that require certain public employees to live in the same county in which they work.

Part II explores the law governing public officials who are often held to higher standards than rank and file public employees. For example, state and local ethics commissioners regulate the behavior of public officials who break the law in a variety of ways: from flawed financial disclosures; violations of campaign finance laws; lobbying by former public officials; conflicts of interest; and unfair campaign tactics. This section also examines the new state task force aimed at policing public corruption. Wrongdoing on the part of public officials is broken down by job title, judges, city and county officials, police officials, government inspectors, legislators, and others.

Part III examines the law governing the terms of public employment. For example, this section discusses the efforts that are underway to remedy the wage gap between men and women. Under the Equal Pay Act men and women must receive equal pay for equal work, however gender gap has yet to be bridged. Some courts have even questioned Congress' authority to extend the Equal Pay Act to the states, a question the United States Supreme Court may soon be called upon to sort out. This section also examines issues raised under federal, state, and local prevailing wages law. In addition, Part III looks at efforts to regulate the way public employees dress. A wide array of employee benefits is examined including: jury duty release; domestic partnership benefits; family medical leave rights, health benefits; public pension issues; and unemployment compensation benefits. Employee privacy is also addressed in this section, including issues of drug testing, financial disclosures, and prying into the private lives of public employees.

Part IV surveys the wide range of legal issues surrounding the disciplining and discharging of public employees. While it is harder to dismiss an employee for off-duty misconduct than for on-the-job wrongdoing, both categories are addressed. Public employers are advised to take care in the disciplining of whistleblowers who report public wrongdoing to ensure that any punishment meted out is not in retaliation for expressing views protected, for example, by the First Amendment. This section also

canvasses federal, state, and local anti-discrimination laws that protect public employees from being singled out on the basis of race, gender, religion, age, or disability. Part IV additionally discusses what remains of affirmative action in public employment. Finally, this section ends with a review of the array of remedies available for wrongful discipline or dismissal, including money damages, attorneys' fees, and reinstatement.

Part V looks at the law governing collective bargaining in the public sector. This section sums up the largest public employee union vote taken in South Florida in over a decade at four public hospitals after a bitter campaign. In addition, Part V offers statistical data on public sector unions and ends with a brief discussion of labor disputes involving public school teachers and police officers after negotiations over terms of a labor contract reached an impasse.

II. HIRING

A. *Housing for Public Employees*

The United States Department of Housing and Urban Development ("HUD") launched a program aimed at selling HUD-owned homes to police at half-price.¹ The initiative was expanded to public and private school teachers.² Two Miami-Dade school teachers have already purchased foreclosed homes at half-price.³ Under the federal program, known as the "Teacher Next Door" project,⁴ the half-price offer is only open to those teachers willing to buy in "revitalization areas," meaning low to middle income neighborhoods.⁵ Under the program, "[t]eachers must live in the county in which they work."⁶

The Hollywood City Commission is contemplating a similar program, known as the "Officer Next Door," that taps drug forfeiture money to pay police officers to live in neighborhoods singled out for redevelopment.⁷ Under the program, officers would live rent-free in four neighborhoods.⁸ For

1. Andrea Robinson, *Teachers Get Homes Under HUD Program*, MIAMI HERALD (Broward), June 7, 2000, at 10B.

2. *Id.*

3. *Id.*

4. *Id.*

5. Frank Davies & Susan Ferrechio, *Half-price Homes Offered to Teachers*, MIAMI HERALD (Broward), Mar. 14, 2000, at 1B.

6. *Id.*

7. Erika Bolstad, *Hollywood Plan Gives Some Cops Free Rent*, MIAMI HERALD (Broward), May 3, 2000, at 1B.

8. *Id.*

their part, officers must sign three-year leases and agree to pay utility bills and maintain the premises.⁹

By contrast, four correctional officers suspected of beating an inmate to death are under investigation.¹⁰ As a result, the officers are being evicted from state-owned housing.¹¹ Accordingly, “[b]ecause they are not able to come into work, there’s no more reason for [the Department of Corrections] to keep them in state housing.”¹²

The Monroe County Sheriff’s Office is losing personnel primarily due to the shortage of affordable housing.¹³ Since the turnover rate among deputy sheriffs has doubled over the past few years, short staffing has led to mandatory overtime and twelve-hour shifts over extended periods.¹⁴ A deputy who pays \$1200 a month for a two-bedroom apartment pays more than half of his \$2250 monthly salary in rent.¹⁵

B. *Nepotism and Cronyism in Hiring*

Hiring people to fill positions solely by reason of their blood or marital relationship has become an increasing problem in Florida. For example, the Miami-Dade County School District has been accused of hiring unqualified relatives to fill open slots in a program aimed at helping welfare recipients move into the work-force.¹⁶ Although Florida’s public school districts are not covered by anti-nepotism laws, the county will seek corrective action if the allegations turn out to be true.¹⁷ In response, top school administrators insisted their relatives received no special treatment.¹⁸ Similarly, the Florida Commission on Ethics found probable cause to believe that a Miami-Dade Fire Rescue official may have violated the state’s anti-nepotism law and

9. *Id.*

10. Steve Bousquet, *State Evicts Prison Guards Probed in Death*, MIAMI HERALD (Broward), Sept. 23, 1999, at 12B.

11. *Id.*

12. *Id.*

13. Nancy Klingenier, *Deputies Hit Hard by Costs of Living*, MIAMI HERALD (Broward), Aug. 22, 1999, at 6B.

14. *Id.*

15. *Id.*

16. Jack Wheat & Analisa Nazareno, *Dade Officials Investigate Possible School District Nepotism*, MIAMI HERALD (Broward), Feb. 8, 2000, at 8B.

17. *Id.*

18. Tom Dubocq, *Dade Schools Executives Defend Hiring of Relatives*, MIAMI HERALD (Broward), Feb. 9, 2000, at 12B.

abused his office by aiding his brother.¹⁹ If the charges are sustained, the top official could face dismissal or a \$10,000 fine.²⁰

Some Broward judges have come under criticism for selecting public defenders from the ranks of relatives and friends.²¹ Judges are left with total discretion in selecting public defenders when the public defender's office is unable to represent a defendant owing to a conflict.²² Such specially appointed public defenders receive \$700 for every felony case, no matter how much time is invested.²³

C. *Hiring Restrictions and Hiring Strategies*

Although it has been seven years since Florida voters imposed term limits on state lawmakers, it was not until September 1999, that the Supreme Court of Florida sustained the cap.²⁴ The per curiam ruling turned back a challenge from long-term state senators who claimed that voters were targeting members of Congress, not state legislators.²⁵ About half the state house and a quarter of state senators will be affected by the term limits amendment to the Florida Constitution in 2000.²⁶ After eight years, state lawmakers face mandatory retirement.²⁷ By contrast, the United States Supreme Court concluded in 1995 that efforts to set term limits for members of Congress were unconstitutional.²⁸

An affirmative action officer was dismissed after writing critical accounts of Fort Lauderdale's poor record on hiring minority and female employees.²⁹ Shortly after being fired, the officer sought another job with

19. Don Finefrock, *Nepotism Charges Reviewed*, MIAMI HERALD (Broward), June 11, 2000, at 3B.

20. *Id.*

21. Larry Lebowitz & Sabrina L. Miller, *Friends of the Court*, MIAMI HERALD (Broward), Jan. 23, 2000, at 1A.

22. *Id.*

23. *Id.*

24. *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999).

25. *Id.* at 1278.

26. Lesley Clark, *Florida Term Limits Upheld*, MIAMI HERALD (Broward), Sept. 3, 1999, at 1A.

27. *Id.*

28. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that a term limit amendment to the Arkansas Constitution was unconstitutional).

29. Brad Bennett, *Fired Official Wants New Post*, MIAMI HERALD (Broward), May 8, 2000, at 1B.

the city.³⁰ Fort Lauderdale, however, has a rule that prohibits rehiring employees the city has previously terminated.³¹

The tight job market has left the Broward Sheriff's Office ("BSO") with 100 open positions.³² In an effort to quickly fill the vacant positions, the BSO held a job fair.³³ The BSO, however, required applicants to be United States citizens, over age nineteen, have a high school diploma or equivalent, and have no felony or misdemeanor convictions involving certain crimes.³⁴

D. *Civil Service Examinations*

Police officers complained to the Miramar Civil Service Board after the first half of a two-part sergeant's exam was rescored.³⁵ With only seventy-five questions, the regraded exam enabled sixteen police officers, who had initially failed, to qualify for the second round of testing.³⁶ Some of the questions on the exam were eliminated after test takers grumbled that they covered subject matter not found in the study guides.³⁷

E. *Background Checks*

Eighty-five percent of all employers undertake no background investigation of job applicants.³⁸ For example, an investigation by the BSO revealed that Broward County's district hiring chief failed to disclose a twenty-year-old shoplifting arrest.³⁹ As a result, the BSO has recommended that the school district revamp the way it investigates backgrounds of potential employees.⁴⁰ Similarly, the *St. Petersburg Times* ran a background check on 511 state correctional officers and learned that eighty-nine had arrest records for such crimes as shoplifting, marijuana possession, and

30. *Id.*

31. *Id.*

32. Johnny Diaz, *Sheriff's Office Hosts Job Fair to Help Fill Deputy Openings*, MIAMI HERALD (Broward), Aug. 25, 1999, at 11B.

33. *Id.*

34. *Id.*

35. Juan Carlos Rodriguez, *Rescored Tests Create Flap for Miramar Police*, MIAMI HERALD (Broward), May 27, 2000, at 1B.

36. *Id.*

37. *Id.*

38. Bea Garcia, *Background? Check it Out*, MIAMI HERALD (Broward), Oct. 12, 1999, at 1C.

39. Elena Cabral, *Review: Hiring Process Flawed*, MIAMI HERALD (Broward), Nov. 2, 1999, at 1B.

40. *Id.*

hunting out of season.⁴¹ In a similar situation, eleven guards, including two repeat offenders, were arrested for violent crimes.⁴² However, state law governing guards only rules out hiring applicants convicted of a felony or first-degree perjury.⁴³ Additionally, the BSO background check on its new police chief cleared the new head of the police department of rumors that she fired her gun in a domestic dispute ten years earlier when she was a major with the Miami Police Department.⁴⁴

F. *Negligent Hiring*

Failure by a public employer to undertake a reasonable background check on prospective employees may leave it open to the charge of negligent hiring, a fairly recent tort claim.⁴⁵ Worse, the employer who knows it is hiring an individual with a record of sexual harassment, for example, may wind up liable for damages along with the harasser who strikes again.⁴⁶

G. *Residency*

Some cities and counties require that certain public employees and public officials reside in the city or county in which they work. For example, Hialeah has a one year residency requirement for candidates running for city council.⁴⁷ In October 1999, Hialeah's mayor claimed that a candidate who was challenging the mayor's ally on the council violated the city's residency rule.⁴⁸ In response, the candidate criticized the mayor for

41. The Associated Press, *Report Says One in Six Guards at Florida State Prison has Record*, MIAMI HERALD (Broward), Aug. 30, 1999, at 8B.

42. *Id.*

43. *Id.*

44. David D'Addio, *Miramar Employees to See Increase in Insurance Payments*, MIAMI HERALD (Broward), Aug. 19, 1999, at 3B.

45. *See, e.g.*, Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744, 751-52 (Fla. 1st Dist. Ct. App. 1991).

46. *See, e.g.*, Ajowa Nzinga Ifateyo, *Receptionist Wins Sex-Assault Suit*, MIAMI HERALD (Broward), Apr. 5, 2000, at 10B. (reporting case in which Miami federal jury held Opa-locka liable in the negligent hiring of a former city manager who sexually harassed and assaulted a city receptionist and awarded a two million dollar judgment against both the harasser and the city).

47. Karen Branch, *Hialeah Mayor Uses Police Files to Challenge Candidate*, MIAMI HERALD (Broward), Oct. 8, 1999, at 9B.

48. *Id.*

asking the police to investigate the candidate's background.⁴⁹ The candidate claimed that police surveillance of his private life was improper.⁵⁰

In order to sit on Miramar's commission board, which oversees hiring practices for city employees, the candidate generally must be a resident of the city.⁵¹ State law requires Miami-Dade School Board candidates to live in the voter district on the date they file to run for the board.⁵² Questions cropped up in one case examining whether a candidate for the District Seven School Board seat lived in District Six or in District Seven.⁵³

H. *Workforce Development Bill*

Privatization may be Governor Jeb Bush's key legacy as governor. Under his administration, efforts are underway aimed at privatizing public pensions, state prisons and county jails,⁵⁴ work-release facilities,⁵⁵ state hospitals,⁵⁶ and public schools. Most recently, a bill before the 2000 Legislature was aimed at transferring many of the Department of Labor's job-creation duties to a public-private entity known as Workforce Florida Inc., a corporation with a board of directors.⁵⁷ Democrats and labor unions opposed the measure after a House Appropriations Subcommittee approved the bill, claiming that the bill removes some of organized labor's guaranteed seats on boards that regulate job-training programs.⁵⁸

I. *Selection of Trial Judges: November 2000 Ballot Measure*

The Legislature debated, but ultimately failed to enact, a bill aimed at giving Governor Jeb Bush more power and clout on the commissions that submit nominations to the governor for all appellate judges and for midterm

49. *Id.*

50. *Id.*

51. See D'Addio, *supra* note 44.

52. Analisa Nazareno, *Residency Again Issue in Race*, MIAMI HERALD (Broward), July 25, 2000, at 7B.

53. *Id.*

54. Editorial, *Open Door to Jail*, MIAMI HERALD (Broward), Aug. 11, 1999, at 10A.

55. Jacqueline Charles & Sue Corbett, *Providing Sex Can Bring Favors at Work-Release Facility, Inmate Says*, MIAMI HERALD (Broward), Aug. 17, 1999, at 4A.

56. See Shari Rudavsky, *State Hospital's Privatization Goes Smoothly—So Far*, MIAMI HERALD (Broward), Aug. 17, 1999, at 4A.

57. Editorial, *House Amends Workforce Florida Bill*, MIAMI HERALD (Broward), May 5, 2000, at 9B.

58. Robert Sanchez, *House Bill Criticized as Hostile to Unions*, MIAMI HERALD (Broward), Apr. 27, 2000, at 10B; see also CS/SB 2050, 2000 Leg. (Fla. 2000).

vacancies on trial courts.⁵⁹ A *Miami Herald* editorial criticized these measures as eroding the independence of the judiciary.⁶⁰ Moreover, Floridians voted on November 7, 2000 to keep the current system of electing trial judges rather than handing that power over to the government.⁶¹

III. REGULATION OF PUBLIC OFFICIALS

A. Ethics

The Florida Commission on Ethics is “the state board that recommends punishment for public officials who violate ethics laws.”⁶² Formed in 1974, the commission reviews complaints filed by individual citizens against public officials.⁶³ The governor appoints its members.⁶⁴

In May 2000, the Florida House of Representatives defeated a package of reforms that had been approved by the Senate, aimed at strengthening the state’s ethics, campaign finance, and anti-corruption laws.⁶⁵ Recommendations by the Study Commission on Public Corruption included stiffer financial disclosure laws and longer criminal sanctions for public corruption.⁶⁶ The proposal also contains an exemption to the state’s Sunshine Laws aimed at preserving the confidentiality of whistleblowers.⁶⁷ An editorial in the *Miami Herald* labeled the House’s inaction as “an outrage and insult to voters and taxpayers.”⁶⁸

The Florida Commission on Ethics has faced a number of issues this past year. In March 2000, the commission issued a special waiver for five former state lawmakers holding top posts in the governor’s administration, enabling them to lobby their former colleagues during the 2000 session.⁶⁹ The waiver undercuts the Sunshine Amendment aimed at stopping influence

59. See H.R. 1035, 2000 Leg. (Fla. 2000); S. 826, 2000 Leg. (Fla. 2000).

60. Editorial, *Stacking, Packing the Bench: Leave the Nominating Process Alone*, MIAMI HERALD (Broward), Apr. 3, 2000, at 12B.

61. Jay Weaver, *County Voters Reject Bid to Allow Governor to Appoint Trial Judges*, MIAMI HERALD (Broward), Nov. 8, 2000, at 14B.

62. Steve Bousquet, *Broward Clergymen Named to State Ethics Commission*, MIAMI HERALD (Broward), Aug. 21, 1999, at 3B.

63. *Id.*

64. *Id.*

65. Editorial, *How About Zero Tolerance for Public Corruption?*, MIAMI HERALD (Broward), May 9, 2000, at 10B.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Lobbyist Rules Eased for Ex-legislators*, MIAMI HERALD (Broward), Mar. 17, 2000, at 9B.

peddling by barring lawmakers from lobbying for two years after leaving office.⁷⁰

In another ethics violation case, the commission levied its largest fine in twenty-five years, \$20,000, against a college professor who hid his financial interest in a privately operated state prison system he openly promoted while a professor of criminology at the University of Florida.⁷¹ In spite of the violation, the professor received a \$3 million consulting fee for brokering a merger concerning the Corrections Corporation of America.⁷² The professor was hired by the state to serve as a consultant on a study to privatize the state prison system.⁷³

Florida's Commission on Ethics also found probable cause to fine public employees in other situations. One example concerned a Pembroke Pines mayor who had a conflict of interest when he took part in a vote to modify an agreement for advertising involving a man with whom the mayor had a consulting arrangement.⁷⁴ Another example was a Miami-Dade Fire Rescue official who may have violated the state's anti-nepotism law.⁷⁵ The commission also found that a Miami state representative had failed to report "a \$22,000 debt for unpaid child support during an election campaign"—a special legislative committee was convened to determine his fate.⁷⁶ On the other hand, the commission found no probable cause when Davie's vice mayor had a conflict of interest arising from his association with a law firm which represented a firefighters' union.⁷⁷ Despite the commission's efforts to fine public employees for ethical violations, the court has imposed a standard of clear and convincing evidence that must be met before any penalty can be imposed.⁷⁸

The Florida Commission on Ethics exonerated public officials in many cases. For example, Miramar's mayor was cleared of claims that she secured a discount on her new residence as quid pro quo for favorable votes for a

70. *Id.*

71. Steve Bousquet, *Ex-professor Gets Largest Ethics Fine*, MIAMI HERALD (Broward), Oct. 22, 1999, at 9B.

72. *Id.*

73. *Id.*

74. *Ethics Panel Frowns on Pines Mayor's Vote*, MIAMI HERALD (Broward), Sept. 9, 1999, at 6B.

75. Finefrock, *supra* note 19, at 3B.

76. Lesley Clark, *Panel to Decide Penalty for Barreiro's Ethics Breach*, MIAMI HERALD (Broward), Jan. 28, 2000, at 8B.

77. Adam Ramirez, *Charges Against Davie Official Dropped*, MIAMI HERALD (Broward), June 7, 2000, at 3B.

78. *Latham v. Fla. Comm'n on Ethics*, 694 So. 2d 83, 84 (Fla. 1st Dist. Ct. App. 1997); see also FLA. STAT. §§ 112.313–.316 (2000).

developer.⁷⁹ Also, a Sunrise city commissioner was cleared of allegations that she omitted to report a free gym membership.⁸⁰ Miramar's city commissioner, another exonerated public official, was cleared of charges that he lobbied commissioners while receiving money from developers.⁸¹

Not every conflict of interest involving public officials, however, is unethical. For example, in one case a state representative from Dania Beach doubled as the city's code enforcement attorney.⁸² The conflict arose over code enforcement of a local convenience store owned by the state representative's uncle by marriage.⁸³ Even so, the state ethics commission did not find a conflict of interest violation.⁸⁴

In January 2000, Broward county commissioners enacted an ordinance urging candidates for elected office to voluntarily agree not to make race, religion, gender, national origin, or sexual orientation a campaign issue.⁸⁵ Further, those running for public office pledged not to publish anonymous campaign literature.⁸⁶ Violators of the ordinance will face censure by the Fair Campaign Practices Committee ("FCPC").⁸⁷ Elected officials are prohibited from serving as members of the committee.⁸⁸ Although fines and removal of candidates from ballots have been ruled out as remedies, the FCPC may still alert the media of unfair campaign tactics.⁸⁹ Regulating campaign rhetoric walks a fine line between maintaining fair elections and interfering with the First Amendment rights of candidates for public office.⁹⁰

79. Caroline J. Keough, *Moseley Cleared of Ethics Complaint*, MIAMI HERALD (Broward), Dec. 3, 1999, at 1B.

80. Lisa Arthur, *Ethics Panel Clears Sunrise Commissioner*, MIAMI HERALD (Broward), June 8, 2000, at 1B.

81. Juan Carlos Rodriguez, *Panel Clears Lewis of Ethics Complaints*, MIAMI HERALD (Broward), Mar. 16, 2000, at 1B.

82. Steve Harrison, *Dania Official Cries Uncle, Says Lawyer has Conflict of Interest*, MIAMI HERALD (Broward), Aug. 19, 1999, at 1B.

83. *Id.*

84. *Id.*

85. Jacqueline Charles, *Campaign Ethics Pledges Approved*, MIAMI HERALD (Broward), Jan. 26, 2000, at 1B. Judicial elections are already governed by Canon 7 of the *Florida Code of Judicial Conduct*. See generally Charles J. Kahn, Jr., *Judicial Elections: Canon 7, Politics, and Free Speech*, 72 FLA. BAR J. 22 (1998).

86. See Charles, *supra* note 85.

87. *Id.*

88. Erika Bolstad, *Ethics Panel Chooses Officers*, MIAMI HERALD (Broward), July 1, 2000, at 3B.

89. *Id.*

90. See Cleveland Ferguson III, *The Politics of Ethics and Elections: Can Negative Campaign Advertising Be Regulated in Florida?*, 24 FLA. ST. U. L. REV. 463 (1997).

The system may also be abused by individuals filing a flurry of false charges against a candidate.⁹¹

In April 2000, Fort Lauderdale city commissioners adopted a measure prohibiting former city commissioners and former city managerial employees from lobbying the commission within two years of leaving office.⁹² Under a different proposal, ex-city officials would also be prevented from lobbying against advisory boards and city staff members.⁹³ The new proposed rule, however, will not apply to unpaid lobbyists.⁹⁴

The Miami-Dade Commission on Ethics and Public Trust made clear in a case that the perception of impropriety comes close to unethical behavior.⁹⁵ Several members of the Jackson Memorial Hospital's board of directors had business dealings with the hospital they regulate.⁹⁶ While such business dealings may not amount to a conflict of interest, in the view of an ethics official, it may still be improper.⁹⁷ In another case, the Commission ruled that a Miami-Dade commissioner and her husband collected federal rent subsidies from the county housing agency, the same entity the commissioner regulates.⁹⁸ Local law bars county employees or members of their immediate families from having a stake in the county's Section Eight Housing Program.⁹⁹ As a result, the ethics commission ordered the commissioner to end the arrangement.¹⁰⁰

B. *Public Corruption*

A new state task force is reviewing public corruption.¹⁰¹ Governor Jeb Bush has asked the group to find better ways to crack down on this problem.¹⁰² The group is considering the following proposals: asking state lawmakers for a "strong and clear" anti-public corruption law modeled on

91. *See generally id.*

92. Brad Bennett, *Proposal Would Make Ex-Officials Wait to Lobby*, MIAMI HERALD (Broward), Apr. 19, 2000 at 2B.

93. *Id.*

94. Ronnie Greene, *Hospital Trust Members Face Ethics Scrutiny*, MIAMI HERALD (Broward), Oct. 5, 1999, at 10B.

95. *Id.*

96. *Id.*

97. *Id.*

98. Don Finefrock, *Dade Commissioner's Conflicts of Interest Cited*, MIAMI HERALD (Broward), Sept. 10, 1999, at 10B.

99. *Id.*

100. *Id.*

101. Sue Reisinger, *Bush Leads Way in Corruption Fight*, MIAMI HERALD (Broward), Oct. 28, 1999, at 1B.

102. *Id.*

the Federal Hobbs Act—Florida has not had an anti-corruption law since the state's highest court knocked out key sections in 1978 and 1985.¹⁰³ The group is also considering more stringent criminal penalties for public corruption, and authorizing the state ethics commission to launch investigations.¹⁰⁴ On the agenda is strengthening contracting laws, regulating privatization, lobbying, voter fraud, and campaign financing.¹⁰⁵

After three months of proposal development, the group made its recommendations to Governor Jeb Bush and to the state Legislature.¹⁰⁶ Proposals included making corruption charges serious felonies rather than misdemeanors, strengthening state ethics commissions, and requiring lawmakers to take ethics classes.¹⁰⁷ The most controversial recommendation called for concealing corruption probes that do not lead to criminal charges for three years after the case is closed.¹⁰⁸

The 2000 Legislative session ended without action on the task force's proposals.¹⁰⁹ Several high profile corruption cases this past year include a state senator who pleaded guilty to federal charges of Medicare fraud, a former House Speaker who is in prison for income tax evasion, and a county commissioner who was ousted from office by the state attorney's public corruption unit.¹¹⁰

At the local level, Miami-Dade has developed anti-corruption proposals of its own.¹¹¹ Some of the recommendations include: increasing county commissioners' salaries; prohibiting commissioners from voting on matters involving big campaign contributors; setting up a "lifestyle audit" of former elected officials to ensure they have not benefitted illegally; and framing a lobbyist code of ethics, among other things.¹¹²

103. *Id.*

104. *Id.*

105. *Id.*

106. Lesley Clark, *Task Force Recommends Crackdown on Corruption*, MIAMI HERALD (Broward), Dec. 16, 1999, at 11B.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*; see also Arnold Markowitz, *State Attorney in Fight for Police Vote for Reelection*, MIAMI HERALD (Broward), Mar. 27, 2000, at 8B.

111. Karen Branch-Brioso, *Anti-corruption Group Unveils its Proposals for Miami-Dade*, MIAMI HERALD (Broward), June 22, 2000, at 11B.

112. *Id.* The code is modeled after the Greater Miami Chamber of Commerce Model Code of Business Ethics which requires executives to sign this statement: "We will not, directly or indirectly, offer to give a bribe or otherwise channel kickbacks from contracts awarded, to government officials, their family members or business associates. We will not seek or expect preferential treatment on bids based on our participation in political campaigns." *Id.*; see generally MODEL CODE OF BUSINESS ETHICS (2000).

C. Campaign Finance

A bill passed by the State Senate but defeated in the House included a "\$5000 limit on 'soft money contributions' to political parties."¹¹³ Miami-Dade's chief public corruption prosecutor sought enactment of an ordinance that would bar individuals doing business with the county from giving money to the election campaigns of county commissioners and the mayor.¹¹⁴ Earlier, a state grand jury proposed a ban on fund-raising by County Hall lobbyists.¹¹⁵ But in March 2000, the Miami-Dade County Commission voted seven to four to reject proposed campaign finance reform.¹¹⁶

In the past year, the Florida Division of Elections investigated several allegations of violations of campaign finance laws. For example, a Broward County commissioner received more than the \$500 limit on contributions from a corporation or individual donor per election cycle;¹¹⁷ a Broward County commissioner used campaign money for personal expenses and as loans to friends and family;¹¹⁸ and, another former county commissioner agreed to one year of probation for accepting contributions over the \$500 cap and other campaign finance reporting lapses.¹¹⁹ In another campaign finance case, a losing candidate in a state senate race accused his rival of violating state laws banning contributions five days before an election and requiring candidates to reveal campaign income four days before the election.¹²⁰ A Broward County commissioner is contemplating pleading

113. Editorial, *Rescue Florida Ethics Package, Senate-Passed Reforms Languish in House*, MIAMI HERALD (Broward), May 5, 2000, at 10B.

114. Don Finefrock, *Prosecutor Calls for Campaign Reform*, MIAMI HERALD (Broward), Feb. 2, 2000, at 11B.

115. *Id.*

116. Don Finefrock, *Miami Officials Reject Campaign Finance Reforms*, MIAMI HERALD (Broward), Mar. 10, 2000, at 9B.

117. Charles Savage, *Abramowitz Returns Cash to Seven Backers*, MIAMI HERALD (Broward), June 23, 2000, at 3B. Violations can result in fines of up to \$1000 if committed willfully. *Id.*

118. Beth Reinhard, *Broward Official is Set to Dispute Alleged Violations*, MIAMI HERALD (Broward), Dec. 18, 1999, at 3B. State law makes clear that candidates can give back unused money to donors, pay for campaign expenses, or donate it to charity, government agencies, or political parties. *Id.*

119. Frances Robles, *Hardemon Gets Probation for Campaign Violations*, MIAMI HERALD (Broward), Mar. 21, 2000, at 8B. In his defense, the former county commissioner estimated that 90% of all candidates make technical violations of campaign finance laws. *Id.*

120. Karen Branch, *Rival Questions Source of Funds for Candidate's 11th-hour Push*, MIAMI HERALD (Broward), Dec. 20, 1999, at 8B.

guilty to six misdemeanor election law violations.¹²¹ The commissioner, who faces up to six years in jail, is accused of a number of illegalities including writing campaign checks to imaginary people, then cashing the checks and using the money to buy furniture for his home.¹²² The *Miami Herald* has called for the embattled commissioner's resignation.¹²³ Under Florida's Constitution, "the governor can suspend a public official charged with a felony or for 'malfeasance, misfeasance, and neglect of duty.'"¹²⁴ A former Miami-Dade County commission aide, sentenced to a year of probation after breaking state campaign finance laws, but cleared of federal bribery charges, returned to his former job with back pay.¹²⁵

D. *Public Official Misconduct*

1. Judges

Operation Court Broom, an extensive Federal Bureau of Investigation and Florida Department of Law Enforcement undercover investigation, wrapped up its work in April 2000 when the last of the judges and attorneys found guilty of corruption were sentenced.¹²⁶ All together, three judges, two former judges, six lawyers, and one businessman were convicted.¹²⁷ Over the last year, judicial misconduct has included: a Manatee County judge who was accused of orchestrating a trade with another judge so he could preside at a hearing for a driving under the influence case he reported;¹²⁸ the Supreme Court of Florida publicly reprimanded a Broward Circuit Court judge for "accepting free Marlins tickets from a law firm that argued cases before him;"¹²⁹ the chief judge of Miami's Third District Court of Appeal was publicly reprimanded by the court for making "rude, sarcastic remarks

121. Beth Reinhard, *Cowan Explores a Change of Plea*, MIAMI HERALD (Broward), Apr. 29, 2000, at 1B.

122. *Id.*

123. Editorial, *Resign, Scott Cowan: Admissions Reflect Poorly on Broward Politics*, MIAMI HERALD (Broward), Apr. 28, 2000, at 10B.

124. Beth Reinhard, *Governor Mum on Cowan's Fate*, MIAMI HERALD (Broward), Apr. 1, 2000, at 1B.

125. Don Finefrock, *Ex-aide Reinstated Despite Plea*, MIAMI HERALD (Broward), June 12, 2000, at 9B.

126. Elaine De Valle, *Court Broom Runs its Course*, MIAMI HERALD (Broward), Apr. 3, 2000, at 8B.

127. *Id.*

128. *Judge Accused of Ethics Violation*, MIAMI HERALD (Broward), Apr. 2, 2000, at 7B.

129. Lesley Clark, *Judge Scolded for Taking Freebies From Attorneys*, MIAMI HERALD (Broward), June 7, 2000, at 1B.

to two college interns trying a case” in his court;¹³⁰ the Supreme Court of Florida publicly reprimanded a Miami-Dade County judge for behavior “unbecoming a member of the judiciary” during his arrest for soliciting an undercover prostitute;¹³¹ and Broward’s top judge undertook a review of whether a longtime judge acted improperly when he excused two influential and rich individuals from jury duty.¹³² In one case, a Miami-Dade County judge unsuccessfully requested that the Supreme Court of Florida postpone his public reprimand for conduct “unbecoming a member of the judiciary” until after the November 2000 elections.¹³³

2. City and County Officials

A group of individuals from the Citizens For A Better Miami launched an effort to recall the mayor of Miami.¹³⁴ A former South Miami vice mayor was charged with conspiracy to launder \$150,000 in drug money.¹³⁵ A jury found a former Hialeah Gardens mayor guilty of asking a hairdresser and council aide to shoot her husband and to set his car on fire.¹³⁶ Miami’s city manager accused Miami’s mayor of ordering him to investigate four city commissioners and the publisher of the *Miami Herald*.¹³⁷ Fort Lauderdale city officials were cleared of allegations that they destroyed a public record that undermined the city’s position in an employee discrimination claim.¹³⁸ And, Fort Lauderdale’s employees’ union president was cleared of wrongfully withholding dues from the state union.¹³⁹

130. Lesley Clark, *State’s Top Court to Give Scolding to Appeals Judge*, MIAMI HERALD (Broward), Mar. 31, 2000, at 10B.

131. Lesley Clark, *State Justices to Reprimand Dade Judge for Misbehavior*, MIAMI HERALD (Broward), June 2, 2000, at 7B.

132. Lisa Arthur, *Top Judge to Review VIP Jurors Controversy*, MIAMI HERALD (Broward), Dec. 3, 1999, at 1B.

133. Lesley Clark, *Court Won’t Hurry Judge’s Reprimand*, MIAMI HERALD (Broward), July 25, 2000, at 9B.

134. Charles Rabin, *Carollo-recall Group Faces Tough Task*, MIAMI HERALD (Broward), May 22, 2000, at 7B.

135. David Kidwell, *Informant Testifies Against Former Mayor*, MIAMI HERALD (Broward), Mar. 24, 2000, at 6B.

136. Frances Robles, *Ex-Hialeah Gardens Mayor Guilty*, MIAMI HERALD (Broward), July 1, 2000, at 7B.

137. Tyler Bridges, *Warshaw Loses Bid to Stay on Job Longer*, MIAMI HERALD (Broward), May 5, 2000, at 7B.

138. Brad Bennett, *2 Probes of City Workers Fizzle*, MIAMI HERALD (Broward), Nov. 18, 1999, at 8B.

139. *Id.*

3. Fire Officials

Davie's interim town administrator dismissed the town's besieged deputy fire chief and is negotiating an early retirement package with the fire chief after reprimanding him for tolerating racist and sexist comments by his deputy.¹⁴⁰ The sanctions came after the town's firefighter's union compiled four years of complaints against the two top fire officials.¹⁴¹ The complaints accused the two of professional incompetence and safety violations, improper sexual and racial comments, and unprofessional behavior.¹⁴² In July 2000, Davie's town clerk was dismissed after a Davie police probe discovered that she gave the results of the psychological evaluation of a firefighter applicant to her boyfriend, the former deputy fire chief.¹⁴³

4. Police Officials

An internal police investigation report accused Opa-locka's former police chief of misusing his officers as political henchmen to be set loose against city commission candidates and their supporters, and abusing the civil rights of some citizens.¹⁴⁴ Moreover, the former police chief was accused of retaliating against officers who refused to do his bidding.¹⁴⁵ Miramar's police captain was terminated more than a year after he was demoted.¹⁴⁶ The ex-captain sued the city, claiming he was demoted for blowing the whistle about how a towing firm had secured the city's contract unfairly.¹⁴⁷ The ex-captain was replaced by a new chief who faced problems of her own.¹⁴⁸ As previously referred to in the background check discussion of this article, the BSO cleared Miramar's new police chief of allegations contained in an anonymous letter, claiming that while she was a major with the Miami Police Department, she fired a gun during a domestic dispute with

140. Adam Ramirez, *New Davie Town Chief on Hot Seat*, MIAMI HERALD (Broward), July 4, 2000, at 1B.

141. *Fire Department Probe to End in January*, MIAMI HERALD (Broward), Dec. 23, 1999, at 2B.

142. Marianne M. Armshaw, *Davie Police Wrapping Up Investigation*, MIAMI HERALD (Broward), Oct. 26, 1999, at 3B.

143. Steve Harrison, *Another Official Loses Job in Davie*, MIAMI HERALD (Broward), July 21, 2000, at 1B.

144. Ajowa Nzinga Ifateyo, *Opa-locka Ex-Police Chief Abused Power, Report Says*, MIAMI HERALD (Broward), Dec. 25, 1999, at 7B.

145. *Id.*

146. *City Fires Captain Who Sued Over Demotion*, MIAMI HERALD (Broward), Nov. 17, 1999, at 2B.

147. *Id.*

148. *Id.*

her former husband.¹⁴⁹ A former Miami police chief's payroll and travel records were subpoenaed by a federal grand jury looking into the looting of a police pension fund.¹⁵⁰

5. Inspectors: Building, Electrical, and Customs

Public employees must report each time they earn a sum greater than five percent of their annual pay.¹⁵¹ Technically, however, if each payment is less than five percent of the employee's pay, he or she need not disclose the sum.¹⁵² A Miami-Dade building official, accused of omitting to report \$62,000 in unaccounted extra pay, was cleared of felony charges owing to this loophole in financial disclosure laws.¹⁵³ Prosecutors were unable to identify the source of the extra pay.¹⁵⁴ The same building official was later accused of altering building records so a woman could install a sliding glass door in her home without following the usual procedure.¹⁵⁵ Removed from his job and indicted last year, the official was ultimately cleared of all wrongdoing.¹⁵⁶ A former Cooper City building department director was sentenced to twenty-seven months in prison and a \$5000 fine for conspiring to extort \$10,000 from a residential contractor.¹⁵⁷ In essence, the building official was shaking down the home builder for cash as quid pro quo for foregoing inspections.¹⁵⁸

A Pembroke Pines electrical inspector was suspended for five days without pay for neglecting to follow through on an inspection and for looking the other way at building violations at another site.¹⁵⁹ Earlier, another Pembroke Pines building inspector had resigned over claims that he

149. David D'Addio, *Probe of Miramar Police Chief Over*, MIAMI HERALD (Broward), Aug. 11, 1999, at 8B; see discussion *supra* Part II.E.

150. Manny Garcia, *Warshaw's Records are Subpoenaed*, MIAMI HERALD (Broward), June 23, 2000, at 7B.

151. Frances Robles, *Case Against Building Official Unravels*, MIAMI HERALD (Broward), Aug. 11, 1999, at 9B.

152. *Id.*

153. *Id.*

154. *Id.*

155. Don Finefrock, *Former Building Official Cleared of Wrongdoing*, MIAMI HERALD (Broward), Dec. 23, 1999, at 7B.

156. *Id.*

157. Paul Brinkley-Rogers, *Building Chief Gets 27 Months for Extortion*, MIAMI HERALD (Broward), Aug. 28, 1999, at 1B.

158. *Id.*

159. Elena Cabral, *Electrical Inspector in Pines Suspended*, MIAMI HERALD (Broward), Apr. 3, 2000, at 3B.

was loafing on the job.¹⁶⁰ As a consequence, the city manager ordered the city's fire department to investigate such inaction in the building division.¹⁶¹

A veteran customs inspector was dismissed for marking an unopened box of cargo as if he had inspected it and denied the charge when confronted.¹⁶² It turned out there were six pounds of cocaine inside the box.¹⁶³ A wide-ranging newspaper review of the United States Customs Service in Miami found "how careers have flourished at Customs after such transgressions as tampering with evidence, soliciting prostitutes in Customs cars, soliciting underage boys for sex, dating drug smugglers, falsifying timecards, lying on job applications, burglary, theft and sexual harassment."¹⁶⁴ The new chief of the United States Customs Service, brought in to redress wrongdoing at the agency, has himself been accused of dismissing whistleblowers along with cleaning house.¹⁶⁵

6. Legislators

In the past year, state lawmakers have also come under criticism in a number of cases. For example, Florida TaxWatch, a taxpayer advocacy group, has criticized state and local public officials for billing taxpayers for their personal travel and entertainment.¹⁶⁶ In other cases, lawmakers have been accused of a wide range of wrongdoing: a Central Florida state representative apologized to the House for commenting that a former speaker's official House portrait "should be hanging in a post office, not on the walls of the hallowed chamber, because he's a convicted felon"¹⁶⁷; a Fort Lauderdale state senator was reprimanded by the senate president for missing forty-nine roll call votes on five of the twelve days the senate had been in session;¹⁶⁸ and a former state senator was sentenced to five years in federal prison for Medicare fraud committed while he served as chair of the

160. *Id.*

161. *Id.*

162. David Kidwell, *Inspector Loudly Critical of Customs Fights Firing*, MIAMI HERALD (Broward), Nov. 19, 1999, at 1A.

163. *Id.*

164. *Id.*

165. Editorial, *Reform in U.S. Customs Service?*, MIAMI HERALD (Broward), Dec. 4, 1999, at 12B.

166. Caroline J. Keough, *Politicians: Travel Vital, Necessary to Job*, MIAMI HERALD (Broward), Dec. 12, 1999, at 1B.

167. Lesley Clark, *Legislator's Dig at Imprisoned Speaker Creates Sparks*, MIAMI HERALD (Broward), Mar. 10, 2000, at 10B.

168. Steve Bousquet, *Broward Lawmaker Chastised*, MIAMI HERALD (Broward), Apr. 7, 2000, at 1B.

Senate Criminal Justice Committee.¹⁶⁹ In addition, the former senator was fined \$50,000, ordered to pay \$98,174 restitution to Medicare, and to make honest financial disclosures after he leaves prison.¹⁷⁰ An editorial in the *Miami Herald* criticized the practice of politicians doubling as public school officials.¹⁷¹ As a result of these dual roles, these politicians/employees are absent multiple days each year from their taxpayer-paid job without ever having their pay reflect such rampant absenteeism.¹⁷²

7. Prison Chief

Florida's corrections chief came under fire from the state legislature.¹⁷³ One state lawmaker, a member of the committee that regulates the prison system, accused the corrections chief of failing to put up video cameras to catch wrongdoing within the prisons.¹⁷⁴ The legislature controls the prison system's budget and pay raises for prison guards.¹⁷⁵ Later, legislators from both parties alleged that the state prisons chief had "muzzled" his employees to keep them from talking about the decision by the Department of Corrections to close a North Florida prison without conferring with lawmakers.¹⁷⁶ Moreover, an angry lawmaker complained to Governor Jeb Bush about the job performance of the number two man at the embattled Department of Corrections.¹⁷⁷

8. Teacher's Duty to Report Suspected Cases of Child Abuse

A state law that took effect July 1, 1999, requires teachers, doctors, and judges to report suspected cases of child abuse to the Department of Children and Family Services' abuse hot line.¹⁷⁸ As a result of this new law,

169. David Kidwell, *Ex-Senator Gutman Gets 5 Years for Fraud*, MIAMI HERALD (Broward), Apr. 29, 2000, at 10B.

170. *Id.*

171. Editorial, *When Educators Are Also Politicians*, MIAMI HERALD (Broward), Nov. 16, 1999, at 14B.

172. *Id.*

173. Lesley Clark, *Lawmaker Blasts Corrections Chief*, MIAMI HERALD (Broward), Aug. 14, 1999, at 13B.

174. *Id.*

175. *Id.*

176. Lesley Clark, *Legislators from Both Parties Criticize State Prisons Chief*, MIAMI HERALD (Broward), Dec. 8, 1999, at 1B.

177. Lesley Clark, *Legislator Complains About Deputy Prison Secretary*, MIAMI HERALD (Broward), Nov. 17, 1999, at 13B.

178. FLA. STAT. § 39.201 (2000) (this statute is known as the "Kayla McKean Act").

thousands of alleged cases of child abuse have swamped a state system that is already overloaded.¹⁷⁹

IV. TERMS OF EMPLOYMENT

A. *Wages and Hours*

The Bureau of Labor Statistics reported that women earned 76.5 cents for every dollar men earned last year doing the same full-time work.¹⁸⁰ Since 1979, women have closed the pay gap by 14 cents.¹⁸¹ In 1999, African-American and Hispanic women earned 64.1 and 54.5 cents respectively for every dollar earned by white men.¹⁸² A bill introduced in April 2000 would require employers of fifteen or more people to document that employees who do equal work receive equal pay.¹⁸³ The Department of Labor would serve as the depository for such records and employees would be entitled to sue employers who failed to keep such records or turn over annual statements identifying how their salary was computed.¹⁸⁴ Lobbyists for business owners, however, helped defeat the senate bill.¹⁸⁵ Another bill passed a Senate Committee in April 2000 that would entitle abused women who are afraid that their husbands or boyfriends will hurt them at work to resign and still be eligible for state unemployment benefits.¹⁸⁶

In *Hundertmark v. Florida Department of Transportation*,¹⁸⁷ the Eleventh Circuit ruled that Congress had the power, under section 5 of the Fourteenth Amendment, to extend the protections of the Equal Pay Act¹⁸⁸ to the states.¹⁸⁹ In essence, Congress constitutionally abrogated states'

179. Shari Rudavsky & Amy Driscoll, *Calls Pour in to Florida's Child Abuse Line*, MIAMI HERALD (Broward), Nov. 23, 1999, at 1A.

180. *Pay Disparity Between Sexes Persists*, MIAMI HERALD (Broward), May 30, 2000, at 11B. *But see* Matthew Barakat, *Study: Women Narrow Pay Gap*, MIAMI HERALD (Broward), July 4, 2000, at 1C (a survey by *Working Woman* magazine found that women's salaries equal and even exceed men's salaries in some occupations such as advertising CEO's).

181. *See Pay Disparity Between Sexes Persists*, *supra* note 180.

182. *Id.*

183. Beth Reinhard, *Equal-pay Bill Defeated in Committee*, MIAMI HERALD (Broward), Apr. 5, 2000, at 6B.

184. *Id.*

185. *Id.*

186. Beth Reinhard, *Jobless Benefits Sought for Abused Women*, MIAMI HERALD (Broward), Apr. 5, 2000, at 6B.

187. 205 F.3d 1272 (11th Cir. 2000).

188. 29 U.S.C. § 206(d) (1994).

189. *Hundertmark*, 205 F.3d at 1274.

sovereign immunity so that the Eleventh Amendment does not bar suits against the State of Florida in federal court.¹⁹⁰

Teachers' salaries were much in the news during 1999–2000. At the state level, teachers won an eight percent increase in salaries in the Senate's final budget and also the possibility of huge cash bonuses to keep and recruit teachers in low-performing schools.¹⁹¹ In September 1999, the State Commissioner of Education unveiled an incentive plan for Florida teachers under which the best public school teachers could hike up their salaries by fifty percent—to \$80,000 a year.¹⁹² The proposed salary incentive plan aims both at rewarding teachers based on student performance and at remedying the statewide teacher shortage.¹⁹³ Over 500 teachers statewide earned certification from the National Board for Professional Teaching Standards in the 1998–1999 academic year.¹⁹⁴ Certification increased those teachers' "annual income by as much as \$9000 per year."¹⁹⁵ Teacher certification is akin to preparing for a bar exam.¹⁹⁶ Fewer than half the applicants succeed the first time. The process includes having teachers' classroom performance videotaped and scrutinized.¹⁹⁷ At the local level, the Broward School District and union officials reached agreement on a two-year teacher contract that secures a 4.5% increase in 1999 and an average 3.7% raise in 2000–2001.¹⁹⁸ A proposed agreement would make Miami-Dade's first time teachers the highest paid in the state, would increase salaries 5.35%, and would entitle teachers to speak more freely about school matters.¹⁹⁹

190. *Id.*

191. Steve Bousquet, *8% Raises Offered for Florida Teachers: Senate Plan Also Features Bonuses*, MIAMI HERALD (Broward), Mar. 18, 2000, at 1A. *But see* Steve Bousquet, *Helmets Are Off, Tax Breaks Are On*, MIAMI HERALD (Broward), July 1, 2000, at 1B. Florida teachers' salaries fall about \$5000 a year below the national average. *Id.* While the budget containing these raises was enacted July 1, 2000, pay raises do not begin until Oct. 1, 2000. *Id.*

192. Sabrina Walters, *Incentive Plan Unveiled for Florida Teachers*, MIAMI HERALD (Broward), Sept. 14, 1999, at 9B.

193. *Id.*

194. Daniel de Vise, *Teacher Incentive Program a Success*, MIAMI HERALD (Broward), Nov. 23, 1999, at 1B.

195. *Id.*

196. *Id.*

197. Editorial, *To Reward Good Teachers*, MIAMI HERALD (Broward), Nov. 23, 1999, at 10B.

198. Beth Reinhard, *Tentative Deal Would Give Schoolteachers 4.5% Pay Raise*, MIAMI HERALD (Broward), Sept. 16, 1999, at 3B.

199. Analisa Nazareno, *Teachers Get Solid Raise in Contract Offer*, MIAMI HERALD (Broward), July 4, 2000, at 6B.

The Hollywood City Commission announced that construction companies that secure building contracts over \$500,000 with the city must pay fair wages to its employees, no less than the prevailing rate of wages and fringe benefits set by the federal government.²⁰⁰ Besides Hollywood, Broward County, Sunrise, and Dania Beach have modeled their “prevailing wages” law on the Davis-Bacon Act,²⁰¹ a federal law aimed at setting minimum wages that contractors with the federal government must pay to their workers.²⁰²

Governor Jeb Bush was sued by the public union that represents the state’s 20,000 probation and corrections officers, alleging that the state legislature reneged on the governor’s promise to increase officers’ pay five percent, receiving, instead, only half of that sum recommended by the governor.²⁰³ The state legislature is considering the largest overall pay increase for about 4000 state police officers in ten public agencies.²⁰⁴ Despite the \$51 billion budget passed in May 2000, the largest in Florida’s history, tens of thousands of the lowest-paid state employees received the smallest raise in three years—two and a half percent.²⁰⁵ By contrast, police officers and teachers received eight percent raises.²⁰⁶ The state’s chief prison boss was roundly criticized in October 1999 for raising mid-level managers’ salaries by as much as seventy percent in one case.²⁰⁷

Several public officials have gone to court over the amount of severance pay they think they are entitled to.²⁰⁸ The former head of Broward’s Housing Authority, who lost his job after he was convicted in 1996 for income tax fraud, will also lose about \$157,000 in severance pay for the eighteen months left on his contract.²⁰⁹

200. Pedro Acevedo, *New Hollywood Law Requires Contractors to Pay Fair Wages*, MIAMI HERALD (Broward), Sept. 23, 1999, at 8B.

201. 40 U.S.C. § 276(a)(b) (1994 & Supp. 1998).

202. See Acevedo, *supra* note 200.

203. Phil Long, *Probation, Corrections Union Sues Bush*, MIAMI HERALD (Broward), June 25, 2000, at 6B.

204. Phil Long, *Officers May Get Pay Raise*, MIAMI HERALD (Broward), Jan. 23, 2000, at 6B.

205. Phil Long, *Lowest-paid State Employees Receive the Smallest Raises*, MIAMI HERALD (Broward), May 5, 2000, at 8B.

206. *Id.*

207. Steve Bousquet & Lesley Clark, *Top Prison Boss Battles Tide of Criticism*, MIAMI HERALD, Oct. 18, 1999, at 1B.

208. Beth Reinhard, *Imprisoned Housing Chief Won’t Get Pay*, MIAMI HERALD (Broward), Sept. 4, 1999, at 1B.

209. *Id.*

B. *Regulation of Dress and Grooming*

The Broward County School District decided to crack down on casual wear by school personnel during summer sessions.²¹⁰ At bottom, employees were told to dress in a professional manner.²¹¹ Beach or sportswear, sun dresses, slip-ons, tank tops, T-shirts, flip flops, and sandals were deemed inappropriate attire while lightweight summer suits, jackets, stockings, and ties pass muster.²¹²

C. *Benefits*

1. Jury Duty Release

A county judge ruled that Broward County public school teachers who are prepping students for the Florida College Aptitude Test and other key tests may be excused from serving on juries.²¹³ As Broward County's School Superintendent noted, "teachers are really needed in the classroom."²¹⁴ Other public employees who by law are excused from jury duty are Governor Jeb Bush and his cabinet, judges, their clerks, and law enforcement officers.²¹⁵

2. Domestic Partner Benefits

Last year, Broward County enacted a domestic partners ordinance, that, among other benefits, entitled the unmarried partner of county employees to be treated the same as any spouse of a county employee.²¹⁶ Opponents of the measure, defeated at the ballot box and in a series of court battles testing the ordinance's constitutionality, tried again to get the measure repealed.²¹⁷ This time the case is before the Fourth District Court of Appeal in West Palm Beach.²¹⁸ Miami-Dade's 1998 ordinance banning discrimination on grounds

210. Daniel de Vise, *Summer Fashion Police Strike*, MIAMI HERALD (Broward), Aug. 10, 1999, at 3B.

211. *Id.*

212. *Id.*

213. Daniel de Vise, *County Teachers With Excuse Can Skip Jury Duty*, MIAMI HERALD (Broward), Mar. 23, 2000, at 3B.

214. *Id.*

215. *Id.*

216. *Id.*

217. Jacqueline Charles, *Foes of Domestic-Partners Law Back in Court*, MIAMI HERALD (Broward), Feb. 24, 2000, at 3B.

218. *Id.*

of sexual orientation in housing, employment, and public accommodations also faces repeal efforts by the Christian Coalition and its supporters.²¹⁹ If opponents of the gay-rights ordinance garner four percent of the county voters' signatures, the issue would be placed on a countywide ballot.²²⁰ The same group has lost twice in efforts to overturn Tampa, Florida's gay rights ordinance, but won in Alachua County in 1994.²²¹

3. Family Medical Leave Act

Under the Family and Medical Leave Act ("FMLA"),²²² public employees may take up to twelve weeks of unpaid leave in a twelve month period when faced with family medical problems.²²³ President Clinton has proposed allowing states the option of granting unemployment insurance benefits for new parents.²²⁴ This initiative, wholly voluntary, would allow states to subsidize a leave following the birth or adoption of a child.²²⁵ While Vermont, Maryland, and Washington are considering legislation to extend unemployment benefits to parental leave, Florida has not.²²⁶ The national Chamber of Commerce, however, has sought to enjoin the Labor Department from promulgating regulations that would execute Clinton's proposal.²²⁷ In California, meanwhile, Governor Gray Davis vetoed a measure aimed at expanding that state's family care and medical leave act to allow employees time off to care for ill siblings, adult children, grandparents, or domestic partners.²²⁸ The Clinton administration has also proposed extending the FMLA to many small businesses, but many Floridians are opposed to this measure, including the editorial board of the *Miami Herald*.²²⁹ In *O'Connor v. PCA Family Health Plan*,²³⁰ the Eleventh Circuit addressed the circumstances under which an employer may deny an employee the right to

219. Don Finefrock, *Struggle Over Gay-Rights Ordinance Drawing Near*, MIAMI HERALD (Broward), Feb. 3, 2000, at 13B.

220. *Id.*

221. *Id.*

222. 29 U.S.C. §§ 2601–2654 (1994).

223. Editorial, *Paid Leave for Parents*, N.Y. TIMES, Dec. 1, 1999, at A30.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Group Sues to Block Paid Parental Leave*, N.Y. TIMES (Nat'l ed.), June 27, 2000, at A20.

228. *Gov. Davis Vetoes Bill to Expand Family Leave*, N.Y. TIMES (Nat'l ed.), May 25, 2000, at 24A.

229. Editorial, *Family Leave Act Needs Fine Tuning*, MIAMI HERALD (Broward), Feb. 8, 1999, at 10A.

230. 200 F.3d 1349 (11th Cir. 2000).

reinstatement upon return from FMLA leave.²³¹ As a matter of first impression, the court ruled that the employer has the opportunity to prove it would have dismissed the employee on FMLA leave, even had she not been on leave.²³²

4. Vacation, Sick Pay, and Teacher Absenteeism

A former mayor of Plantation ended up reimbursing the city \$38,000 he received for unused vacation and sick pay in the 1990s.²³³ Earlier, the city council ruled that the city charter classifies the mayor as a public official and not a city employee.²³⁴ For this reason, he was ineligible for vacation and sick leave benefits.²³⁵

A study undertaken by the *Miami Herald* revealed that “the average Broward County student spent twenty-two days of the past school year under the tutelage of an educational temp.”²³⁶ The typical Broward County teacher was absent eighteen days in 1999.²³⁷ Teacher absenteeism has risen eighteen percent in Broward County in the last four years.²³⁸ Some cite the FMLA for the increase in teacher absenteeism.²³⁹ High rates of teacher absenteeism also exist in Miami-Dade public schools.²⁴⁰ Miami-Dade County Public Schools has also drawn criticism for paying local politicians for roles in which they did not always have to do anything.²⁴¹ One politician missed 121 days of work as a social worker but was paid a \$61,112 salary.²⁴²

231. *Id.* at 1353.

232. *Id.* at 1353–54.

233. William McGee, *Plantation Ex-Mayor Pays Back \$38,442*, MIAMI HERALD (Broward), Aug. 10, 1999, at 1B.

234. *Id.*

235. *Id.*

236. Daniel de Vise, *Broward Teacher Absences on Rise*, MIAMI HERALD (Broward), Nov. 14, 1999, at 1A.

237. *Id.*

238. *Id.*

239. *Id.*

240. Editorial, *Find What's Ailing Teachers*, MIAMI HERALD (Broward), Nov. 16, 1999, at 14B.

241. Analisa Nazareno, *Legislators Draw Criticism for Absences in School Roles*, MIAMI HERALD (Broward), Nov. 15, 1999, at 8B.

242. *Id.*

5. Health Benefits

a. *Mental Health Benefits*

Under the 1996 Mental Health Parity Act, group health plans may not set annual or lifetime dollar limits on an employee's mental health care below the amount for general medical and surgical services.²⁴³ However, a congressional investigation has found that thousands of employers are violating the federal law by providing lower mental illness coverage than for physical illness.²⁴⁴ A new study found that the government receives more disability-act complaints from employees with emotional or psychiatric problems than from employees with any other type of ailment.²⁴⁵

b. *Prescription Drug Benefits*

A proposal by Governor Jeb Bush and some lawmakers, that would have reduced the state's spending on prescription drugs for its 97,000 employees, was withdrawn last year after testimony that complained of hardships if the measure were enacted.²⁴⁶ The repealed plan would have provided doctors with a list of state approved prescription drugs.²⁴⁷ A similar proposal involving Medicare drug limits for poor people is also being considered by the legislature.²⁴⁸

c. *Health Benefits for Disabled Workers*

A new federal law expanding Medicaid and Medicare will enable disabled individuals to return to work without losing their health insurance benefits.²⁴⁹ The new law has been heralded as the most important development for the disabled since the Americans with Disabilities Act ("ADA") became law in 1990.²⁵⁰ This law may especially help

243. Robert Pear, *Many Employers Found to Violate Law Requiring Parity for Mental Health Coverage*, N.Y. TIMES (Nat'l ed.), May 18, 2000, at A26.

244. *Id.*

245. Barbara Whitaker, *For Employers, Pitfalls in Treating Workplace Depression*, N.Y. TIMES (Nat'l ed.), Nov. 7, 1999, at sec. 3, p. 4.

246. The Associated Press, *State Eyes Medicare Drug Limits Dropped from Employees' Plan*, SUN SENTINEL (Ft. Lauderdale), Nov. 28, 1999, at B1.

247. *Id.*

248. *Id.*

249. Robert Pear, *Bill Expands Health Benefits for Disabled People Who Work*, N.Y. TIMES (Nat'l ed.), Nov. 19, 1999, at A29.

250. *Id.*

asymptomatic HIV positive individuals by allowing Medicaid to help pay for powerful drugs that inhibit the virus, thereby allowing infected individuals to continue working.²⁵¹

d. *Costs of Health Insurance*

Miramar city employees saw their health insurance rates rise more than eleven percent under an agreement brokered by Miramar commissioners with HIP Health Plan.²⁵² At the same time, benefits will remain the same.²⁵³

e. *Health Insurance Fraud*

The head of Hollywood's employee health-care plan was accused of lying to city commissioners and neglecting to alert officials that a key health care contract was about to expire.²⁵⁴ The city risk manager, who runs a \$14 million self-insurance fund, is also accused of overstepping his authority by making decisions about the plan without consulting superiors.²⁵⁵ The official is on paid leave pending resolution of outstanding claims.²⁵⁶ Soon after the story broke, the employee health care plan administrator was dismissed.²⁵⁷ Three months later, three City of Hollywood employees claimed they were victims of retaliation and discrimination over testimony they gave in a police investigation into whether unauthorized health benefits were given to city employees and dependents.²⁵⁸

f. *Public Employee Health*

In other health and safety matters, the Miami-Dade School Board was sued after a ten-year-old became ill with tuberculosis, allegedly contracted

251. *Id.*

252. David D'Addio, *Miramar Employees to See Increase in Insurance Payments*, MIAMI HERALD (Broward), Aug. 19, 1999, at 3B.

253. *Id.*

254. Neil Reisner, *City Lists Claims Against Manager*, MIAMI HERALD (Broward), Mar. 22, 2000, at 1B.

255. *Id.*

256. *Id.*

257. Neil Reisner & Wanda Demarzo, *Health Plan Boss Fired*, MIAMI HERALD (Broward), Mar. 24, 2000, at 1B.

258. Wanda J. DeMarzo, *Health Benefits Scandal Broadens*, MIAMI HERALD (Broward), June 28, 2000, at 1B.

from a school employee.²⁵⁹ As a result, a school board member tried unsuccessfully to make tuberculosis testing for school employees mandatory.²⁶⁰ In March 2000, union organizers through out Florida protested further budget cuts in worker safety programs in the state Department of Labor and Employment Security.²⁶¹ Studies indicate the number of employee deaths is on the rise in Florida, unlike the trend in the rest of the country.²⁶² A bill was introduced in the state Senate that would make it a felony for an inmate to fling bodily fluids at a corrections officer, potentially exposing guards to serious health risks, including the AIDS virus.²⁶³

6. Public Pensions

a. *Public Pension Legislation*

Under new legislation, state employees' pensions now vest in six years instead of ten while state employees' insurance rates stay the same.²⁶⁴ Surpluses in the state's \$77 billion retirement fund led lawmakers to reduce annual contributions and improve benefits for the more than 600,000 public employees in Florida.²⁶⁵ Moreover, calculating pension benefits is changing from a "high-five," the best in five years of earnings, to a "high-three" system.²⁶⁶ The pension plan overhaul will allocate over \$3 billion of the plan's \$9 billion surplus to sweeten benefits while cutting premiums paid by state, counties, cities, school districts and law enforcement agencies.²⁶⁷ Pension reform came over the protests of Governor Jeb Bush who wanted lawmakers to include a reserve fund before tapping into the pension plan

259. Jay Weaver, *Suit: Girl Got TB From School Worker*, MIAMI HERALD (Broward), Mar. 15, 2000, at 11B.

260. *Id.*

261. Jay Ducassi, *Labor Protests Safety Programs' End*, MIAMI HERALD (Broward), Mar. 22, 2000, at 13B.

262. *Id.*

263. Steve Bousquet, *Senate Acts to Protect Prison Guards*, MIAMI HERALD (Broward), Apr. 7, 2000, at 1B; *see also* S. 88, 2000 Leg. (Fla. 2000).

264. Phil Long, *Lowest-paid State Employees Receive the Smallest Raises*, MIAMI HERALD (Broward), May 5, 2000, at 8B.

265. Steve Bousquet, *Robust Economy Fuels Call for Pension Overhaul*, MIAMI HERALD (Broward), Apr. 19, 2000, at 7B.

266. *Id.*

267. Steve Bousquet, *Senate Approves Pension Plan Hike*, MIAMI HERALD (Broward), Apr. 12, 2000, at 11B.

surplus.²⁶⁸ In addition, the Governor recommended restoring lost pension credits to police and firefighters.²⁶⁹

Surpluses in the public pension fund owe much to the stock market where Florida invests its pension funds in a wide array of investments, including private equity funds and real estate.²⁷⁰ Public pension fund profits from stock market investments have been rising more than eight percent a year.²⁷¹

Just as President George W. Bush has proposed partial privatization of Social Security, his brother, Governor Jeb Bush, has proposed privatizing the state public pension fund.²⁷² In fact, the director of Florida's retirement system was replaced, in light of his opposition to Bush's privatization proposal.²⁷³ Under Bush's plan, public employees would be given the option of managing their own retirement accounts by 2002 and making pensions portable, i.e., movable from job to job, and in and out of government.²⁷⁴ The proposal essentially converts the traditionally defined benefit public pension scheme in to a so-called defined contribution system.²⁷⁵

b. *Severance Pay and Rules Against Double Dipping*

In May 2000, the Plantation City Council enacted an ordinance aimed at barring former elected officials, who subsequently re-enter public office, from receiving retirement benefits and salary simultaneously.²⁷⁶

A recurring issue over the granting of severance pay to public officials who resign under a legal cloud came to the forefront when the executive director of Miami's agency that regulates Bayfront Park, under investigation

268. *Governor Stands Firm on Retirement Fund*, MIAMI HERALD (Broward), Apr. 14, 2000, at 13B.

269. Steve Bousquet, *In Pension Battle, Law Officials Win*, MIAMI HERALD (Broward), Apr. 20, 2000, at 9B.

270. Steve Bousquet, *Pension Profits Tempt Lawmakers*, MIAMI HERALD (Broward), Mar. 17, 2000, at 9B.

271. *Id.*

272. See Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421 (1998).

273. Steve Bousquet, *State Pension Fund Director Ousted, Opposed System's Privatization*, MIAMI HERALD (Broward), May 25, 2000, at 9B.

274. *Id.*

275. *Id.*

276. Robyn Meadows, *Plantation City Council: Officials May Take Salary or Retirement Pay, Not Both*, MIAMI HERALD (Broward), May 4, 2000, at 7B.

for alleged misspending, agreed to resign in exchange for a \$20,000 severance package.²⁷⁷

c. *Widow's Annuity*

The surviving widow of the public school teacher killed by one of his students has agreed not to sue the Palm Beach County School Board in exchange for a \$245,000 annuity.²⁷⁸ The annuity will provide a source of income equal to the amount the widow's wife would have earned until her retirement at sixty-two years of age.²⁷⁹ The settlement is in addition to life insurance proceeds and worker's compensation benefits due to the widow.²⁸⁰

d. *SEC Regulation of Political Contributions to Public Pensions*

The Securities and Exchange Commission has proposed a rule, G-37, aimed at limiting political contributions to individuals who run public pension funds in an effort to combat a practice known as pay-to-play in the municipal finance arena.²⁸¹ The proposed rule prohibits a firm from soliciting asset management contracts for two years after it or its members make a political contribution.²⁸² Moreover, firms may not contribute over \$250 to state and local officials with authority to grant government contracts.²⁸³ Rule G-37 has been criticized on First Amendment grounds, specifically, the right to make and solicit political contributions, but the Supreme Court rejected a challenge to the rule.²⁸⁴

e. *Public Pension Plan Misconduct*

Miami's city manager was accused of using his police pension fund credit card to purchase \$16,775 worth of hockey tickets.²⁸⁵ Calling it an

277. Tyler Bridges, *Park Trust Chief to Get Big Severance*, MIAMI HERALD (Broward), Feb. 15, 2000, at 7B.

278. The Associated Press, *Widow Takes Annuity Over Teacher's Slaying*, MIAMI HERALD (Broward), June 23, 2000, at 9B.

279. *Id.*

280. *Id.*

281. *Limits Urged For Managers of Pensions*, N.Y. TIMES, (Nat'l ed.), Aug. 5, 1999, at C6.

282. *Id.*

283. *Id.*

284. *Id.*

285. Manny Garcia & Tom Dubocq, *Accountant, Not Warshaw, Wrote Check to Police Fund*, MIAMI HERALD (Broward), Sept. 3, 1999, at 9B.

innocent mistake, he later reimbursed the pension fund for the cost of the six Panthers season tickets.²⁸⁶ It turns out, however, that an accountant, who seemingly committed suicide over claims that he looted the pension fund, reimbursed the \$500,000 he allegedly took from the fund.²⁸⁷

f. *New State Public Pension Board Regulations*

A recent change in Florida law forces cities to create separate public pension boards: one for police officers and one for fire rescue employees.²⁸⁸ As a result of this change in the law, cities like Tamarac are restructuring their pension boards.²⁸⁹ Also, a 1997 state law imposed new reporting and paperwork requirements on city police and fire pension boards.²⁹⁰ Failure to comply, as the Town of Davie found out, can result in the state withholding its contributions to the town's police and fire pension boards.²⁹¹

g. *Supreme Court Ruling Affecting Public Pensions*

In *Crosby v. National Foreign Trade Council*,²⁹² the Supreme Court unanimously struck down a Massachusetts law boycotting companies that do business in Myanmar owing to that Asian country's repressive military government.²⁹³ The Court made clear, however, that under the Supremacy Clause of the Constitution, Congress has exclusive power to regulate foreign policy, and the state law stood in the way of Congress' diplomatic aims.²⁹⁴ Yet, a state might achieve roughly the same outcome, the Court said, through seeking divestment by public pension funds of the stock of companies that do business in Myanmar.²⁹⁵

286. *Id.*

287. Manny Garcia & Tom Dubocq, *Feds Probe Books of Group Once Run by Warsaw*, MIAMI HERALD (Broward), Sept. 19, 1999, at 3B.

288. See FLA. STAT. § 175.041 (2000).

289. Jeremy Milarsky, *Pension Boards Seek New Members in City*, SUN SENTINEL (Broward), Nov. 28, 1999, at CP19.

290. Marianne M. Armshaw, *Davie Pension Funds in Question*, MIAMI HERALD (Broward), Oct. 9, 1999, at 3B.

291. *Id.*

292. 120 S. Ct. 2288 (2000).

293. *Id.* at 2290–91.

294. *Id.* at 2293–94.

295. Linda Greenhouse, *Justices Overturn a State Law on Myanmar*, N.Y. TIMES (Nat'l ed.), June 20, 2000, at A23.

h. *Suits for Back Pension Benefits*

A ten-year City of Hollywood employee, who was told he was not entitled to pension benefits at age fifty-five, but must wait until age sixty-two, sued the city for back pension benefits.²⁹⁶ A state circuit court ruled in the employee's favor and an appellate court affirmed the lower court's decision.²⁹⁷ Earlier, five other former Hollywood employees sued the city for back pension benefits and the city ended up owing \$78,000 in legal fees and \$500,000 in back pension benefits to the employees.²⁹⁸

7. Unemployment Compensation Benefits

As part of its tax relief program, the 1999 Legislature approved, for the second year in a row, a reduction of one-half percent of the unemployment compensation tax that most employers pay, costing the unemployment fund \$187 million.²⁹⁹ The Legislature also approved an increase in unemployment compensation benefits for people out of work.³⁰⁰

D. *Privacy*

1. Drug Testing

Fewer employees are using illicit drugs in the workplace, except at medium-sized firms, according to a new study by the federal Substance Abuse and Mental Health Services Administration.³⁰¹

Relying on the Fourth Amendment's ban on government searches absent probable cause, a United States District Judge overturned the City of Hollywood's practice of testing all prospective employees in April 2000.³⁰² To warrant drug testing, the court held, the city needs to prove a "special

296. Wanda J. DeMarzo, *City's Lawyers Losing Big Suits*, MIAMI HERALD (Broward), May 28, 2000, at 1BR; *see also* City of Hollywood v. Rozos, 745 So. 2d 44 (Fla. 4th Dist Ct. App. 2000).

297. *Id.*

298. *Id.*

299. Mark Silva, *Legislature Ready to Approve \$1 Billion in Tax Cuts*, MIAMI HERALD (Broward), Apr. 16, 1999, at 1A.

300. *Id.*

301. Mike Hudson, *Mixed Results on Workplace Drug Use*, MIAMI HERALD (Broward), Sept. 9, 1999, at 3C.

302. Steve Harrison, *Judge Throws Out Drug Test Rule*, MIAMI HERALD (Broward), Apr. 14, 2000, at 1A.

need” such as safety.³⁰³ Presumably, those applying for jobs as police officers, firefighters, and arguably even public school teachers,³⁰⁴ might fall within this “special need” category.³⁰⁵ The city’s drug testing policy, the judge ruled, was “overbroad because it applies to applicants of all positions with the City of Hollywood, without regard to the particular job classification/duties involved, or distinguishing between jobs that are safety sensitive and those that are not.”³⁰⁶ The ruling will likely lead many Florida cities that currently have drug testing in place to review their practices.³⁰⁷ For example, Fort Lauderdale and Pembroke Pines have drug testing for all of their city workers as well as the Broward County School Board.³⁰⁸

2. Financial Disclosures by Public Officials

Many public officials are required by law to file income statements as part of the job.³⁰⁹ Some nominees for public office think this is too high a price to pay.³¹⁰ For example, an appointee to the Property Advisory Board of Coral Gables turned down the appointment, finding the financial disclosure requirement an unreasonable intrusion into his private life.³¹¹

3. Surveillance of Public Employees’ Private Lives

The Florida Department of Law Enforcement disclosed that a private investigator hired by an insurance firm followed a Department of Insurance employee in an effort to find out embarrassing information that would force the Insurance Commissioner to fire the employee who happens to be the state official charged with overseeing the Joint Underwriting Association.³¹² The insurance company that hired the private eye was upset over losing a \$16 million contract.³¹³ The public employee was followed to a gay bar, had his friends investigated, and had his bank account and telephone records

303. *Id.*

304. See Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, BYU EDUC. & L.J. 71 (1999).

305. *Id.*

306. See Harrison, *supra* note 302.

307. *Id.*

308. *Id.*

309. Nick F. De Martino, letter to the editor, *Appointment Has a Disturbing Price*, MIAMI HERALD (Broward), Feb. 19, 2000, at 13B.

310. *Id.*

311. *Id.*

312. Lucy Morgan, *Bankers Insurance Forced to Disclose Secret Records*, MIAMI HERALD (Broward), Sept. 3, 1999, at 1C.

313. *Id.*

scrutinized.³¹⁴ The state employee sued the insurance company for invasion of privacy.³¹⁵

4. Gag Orders

A group of Miami-Dade narcotics detectives and their supervisor, accused of confiscating drugs illegally, asked a court to keep their pictures out of the media, including newspaper and television.³¹⁶ In defense of their petition, the officers claim their lives are at risk after their booking photos and addresses were released to the media.³¹⁷ Under state law, police officers' personal addresses are exempt from public records laws.³¹⁸ The *Miami Herald* claimed a First Amendment right to publish the officers' pictures.³¹⁹ The judge ordered the officers' home addresses and Social Security numbers be omitted from their court files and enjoined the media from broadcasting the officers' pictures.³²⁰ In a similar matter, an attorney for four guards accused in the beating death of a death row inmate asked for an emergency court order to prevent the release of fourteen boxes of reports, pictures, and transcripts.³²¹ The attorney argued that the four guards could not get a fair trial if the contents of the boxes were released to the news media.³²²

A former Hollywood police chief sued the police officers' union, claiming, among other things, that the union: "engaged in a public records witch hunt" by applying for the ex-chief's confidential psychological test results, e-mail messages, and cell phone records.³²³ In another invasion of privacy case involving public employment, a former Broward County School Board candidate and part-time teacher recovered \$850,000 in damages against the school district for disclosing his confidential psychological records.³²⁴

314. *Id.*

315. *Id.*

316. Frances Robles, *Officers Want Limit on Publicity*, MIAMI HERALD (Broward), Sept. 8, 1999, at 10B.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. Phil Long, *Guard Wants Prison-Death Files Sealed*, MIAMI HERALD (Broward), July 20, 2000, at 9B.

322. *Id.*

323. Caroline Keough & Wanda De Marzo, *Ex-Chief Sues Police Union*, MIAMI HERALD (Broward), Apr. 14, 2000, at 1B.

324. Beth Reinhard, *Bills Seek More Cash for Plaintiff*, MIAMI HERALD (Broward), Dec. 1, 1999, at 3B.

However, a public employee cannot recover more than \$100,000 from the district unless the Florida legislature agrees.³²⁵

V. DISCIPLINE AND DISCHARGE

A. *Off-Duty Misconduct*

In the past year, public employees have been arrested for misconduct committed while away from the workplace. Offenses ranged from: drug possession;³²⁶ traffic offenses;³²⁷ credit card theft;³²⁸ tax fraud;³²⁹ insurance fraud;³³⁰ selling stolen property;³³¹ moonlighting;³³² guns;³³³ fighting;³³⁴

325. *Id.*

326. David Green, *Sheriff's Deputy Among 8 Men Accused of Running Drug Ring*, MIAMI HERALD (Broward), June 17, 2000, at 1B; David Green, *BSO Deputy Arrested in Drug Sting*, MIAMI HERALD (Broward), Mar. 22, 2000, at 8B; Steve Bousquet, *State Prison Guard Fired After Arrest in Drug Sting*, MIAMI HERALD (Broward), Sept. 25, 1999, at 11B; Arnold Markowitz, *Miami Police are Charged in Drug Case*, MIAMI HERALD (Broward), Oct. 29, 1999, at 10B; Sabrina Walters, *Dade Teacher's Drug Arrest Latest in Recent Trend*, MIAMI HERALD (Broward), Aug. 31, 1999, at 10B; David Kidwell, *Broward Deputy Among 58 Held in 2-year Sting*, MIAMI HERALD (Broward), Aug. 26, 1999, at 1A; Adam Ramirez & Wanda DeMarzo, *Dania Mom: Teacher Gave Son Drugs, Booze*, MIAMI HERALD (Broward), Aug. 25, 1999, at 1B.

327. Caroline J. Keough, *Ambulance Driver Once a 'Habitual Traffic Offender'*, MIAMI HERALD (Broward), Feb. 15, 2000, at 1A; Johnny Diaz, *Hollywood Cop Busted for DUI Keeps Job—Barely*, MIAMI HERALD (Broward), Dec. 23, 1999, at 3B; Johnny Diaz, *Review Board: Suspended Officer Should be Fired*, MIAMI HERALD (Broward), Oct. 30, 1999, at 3B (Oakland police officer fired for driving drunk while off-duty); David Green, *Twain Officers Accused in Hit-and-Run Scam*, MIAMI HERALD (Broward), Oct. 13, 1999, at 3B.

328. Brad Bennett, *Officer Charged in Credit Card Theft*, MIAMI HERALD (Broward), Apr. 22, 2000, at 1A; Joan Fleischman, *If the Shoe Fits*, MIAMI HERALD (Broward), Dec. 22, 1999, at 4A (clerk for City of Miami, moonlighting as cashier, caught putting money in her shoe).

329. Wanda J. DeMarzo & Lisa Arthur, *Firefighters Refused to Pay Taxes for Years*, MIAMI HERALD (Broward), Feb. 9, 2000, at 1B.

330. Arnold Markowitz, *Public Workers Hauled Off to Jail for \$300,000 Insurance Scam*, MIAMI HERALD (Broward), Feb. 9, 2000, at 12B.

331. Manolo Barco, *Arrested with Stolen Phones, Cop Fired*, MIAMI HERALD (Broward), Dec. 18, 1999, at 2B.

332. Arnold Markowitz, *Moonlighting Cops in Jam for Working at Club*, MIAMI HERALD (Broward), Aug. 30, 1999, at 6B.

333. Arnold Markowitz, *Weapons Purchase Gets DOT Officers Fired*, MIAMI HERALD (Broward), June 5, 2000, at 8B; Wanda J. DeMarzo, *Jail Guard Charged with Pulling Gun on Driver in Crash*, MIAMI HERALD (Broward), Nov. 24, 1999, at 3B.

334. Sara Olkon, *Bar Brawl May Cost Officer His Job*, MIAMI HERALD (Broward), Sept. 4, 1999, at 11B.

engaging in consensual sex at a sex club;³³⁵ sex with a minor;³³⁶ touching a male police officer's private parts;³³⁷ appearing nude in a magazine;³³⁸ meeting in a hotel for sex during working hours;³³⁹ and soliciting an undercover officer.³⁴⁰

B. *On-the-Job Misconduct*

In the past year, public employees have been disciplined for the following on-the-job categories of misconduct.

335. Beth Reinhard & Daniel de Vise, *Teachers in Sex Club Raid Suspended*, MIAMI HERALD (Broward), Aug. 4, 1999, at 1B. Subsequently, however, the public school teachers' pay was restored, enabling them to go back to work somewhere in the 201-school Broward district—though probably not as teachers. Daniel de Vise, *Sex-Case Teachers' Pay to be Restored*, MIAMI HERALD (Broward), Aug. 18, 1999, at 1A. In June 2000, a Broward judge threw out the lewdness charges, ruling that group sex is not illegal absent intent to offend. Paul Brinkley-Rogers, *Trapeze Sex Club Case Takes a Tumble*, MIAMI HERALD (Broward), June 15, 2000, at 1B. In July 2000, the co-owner of the Trapeze II vowed to sue the Broward County Sheriff for false arrest. *Id.* Paul Brinkley-Rogers, *Angry Swingers Plan Legal Action Against Sheriff*, MIAMI HERALD (Broward), July 19, 2000, at 1B.

336. Judy Odierna, *Accused Coach Gets Lift From Supporters*, MIAMI HERALD (Broward), June 22, 2000, at 12B (coach suspended over allegations he molested two of his players); Johnny Diaz, *Fondling Suspect Has Prior Arrests*, MIAMI HERALD (Broward), Apr. 22, 2000, at 3B (program director at a Broward social service agency suspected of molesting a thirteen-year-old boy); Wanda J. DeMarzo, *Cop in Child-Sex Case Freed on Bail*, MIAMI HERALD (Broward), Nov. 25, 1999, at 2C; Wanda J. DeMarzo, *Sunrise Detective Arrested, Accused of Molesting Girl*, MIAMI HERALD (Broward), Nov. 24, 1999, at 3B; Adam Ramirez, *Schoolteacher Pleads Not Guilty to Sex Assault Charges*, MIAMI HERALD (Broward), Sept. 8, 1999, at 3B.

337. Jay Weaver, *Man Cleared of Sex Charge Wants Job Back*, MIAMI HERALD (Broward), Nov. 4, 1999, at 7B.

338. Nancy Klingener, *Key West Officer Stars in Magazine 'Sex Show'*, MIAMI HERALD (Broward), Aug. 13, 1999, at 11B.

339. Don Finefrock, *'Public Integrity' Issue Prompts Police Probe*, MIAMI HERALD (Broward), Nov. 28, 1999, at 1B.

340. Gail Epstein Nieves, *Decoy Prostitute Recounts Officer's Offer*, MIAMI HERALD (Broward), July 22, 2000, at 7B (Miami police major caught by his own department's decoy prostitute); *A Ranking Police Officer is Reassigned in Miami*, N.Y. TIMES (Nat'l ed.), June 27, 2000, at A20 (Miami police officer who took part in the Elian Gonzalez raid was removed from his job for soliciting sex from an undercover police officer); Elaine De Valle, *Judge Exonerated on Charge of Soliciting Undercover Officer*, MIAMI HERALD (Broward), Sept. 3, 1999 at 9B.

1. Sex

A Hollywood High School marine biology teacher was accused of exposing himself to a student during a field trip and attempting to kiss another student's navel at school.³⁴¹ Three Okaloosa County sheriff's deputies were suspected of having sex with high school interns while on the job and supplying the interns with alcohol.³⁴² North Miami's 1998 Police Officer of the Year was discharged after allegations that he masturbated in front of a female city employee.³⁴³ A Fort Lauderdale police officer was accused of fondling a woman and her two daughters while searching them amid a fake drug raid.³⁴⁴ A guard was accused of raping a Mexican transsexual twice at the Krome Immigration Detention Center.³⁴⁵ Five employees at Broward County's privately run work-release center for nonviolent criminals have quit or been fired after claims they engaged in sexual liaisons with inmates under their control.³⁴⁶

2. Negligence

A firefighter was disciplined for failing to report for his night shift after serving jury duty all day.³⁴⁷ A Fort Lauderdale police officer was suspended thirty days without pay for standing idly by while a fellow officer allegedly committed grand theft.³⁴⁸ A former building inspector was investigated for

341. Adam Ramirez, *Hollywood Teacher Accused of Exposing Himself to Student*, MIAMI HERALD (Broward), Sept. 10, 1999, at 3B; see also Andrew Speranzini, Comment, *Paying for Sex—When is a School District Liable for Teacher-Student Sexual Harassment Under Title IX?*, 51 FLA. L. REV. 589 (1999).

342. *Deputies Linked to Sex Scandal with Interns*, MIAMI HERALD (Broward), Aug. 20, 1999, at 9B.

343. Ivonne Perez, *N. Miami Cop Fired After Masturbation Investigation*, MIAMI HERALD (Broward), Nov. 9, 1999, at 11B.

344. David Green, *Police Officer Charged in Fondling Incidents*, MIAMI HERALD (Broward), Mar. 30, 2000, at 3B.

345. Andres Viglucci, *Krome Detainee Alleges Second Sex Assault by Guard*, MIAMI HERALD (Broward), June 6, 2000, at 8B.

346. Jacqueline Charles, *Sheriff Told to Clean Up Private Jail*, MIAMI HERALD (Broward), Aug. 18, 1999, at 1B.

347. *Hearing Considers Firefighter's Case*, MIAMI HERALD (Broward), Nov. 20, 1999, at 2B.

348. Brad Bennett, *Let One Accused Cop Keep Job, Panel Urges*, MIAMI HERALD (Broward), Apr. 27, 2000, at 7B.

allegedly shoddy inspections at several homes.³⁴⁹ A Pembroke Pines building inspector resigned over allegations he neglected his duties.³⁵⁰ Five state child care agency employees were fired after the death of a two-year-old girl for failing to protect the child.³⁵¹ Finally, a court reporter was jailed after missing deadlines for handing in transcripts in a murder trial.³⁵²

3. Public and Private Records Violations

A jury found an Escambia County School Board member guilty of violating Florida's "Sunshine law" for withholding files from a parent—although, a judge later reversed the conviction.³⁵³ In Broward County, a deputy fire chief was fired over alleged violations of the confidentiality of medical information about a job applicant.³⁵⁴

4. Public School Employee Misconduct

Two school resource officers received written warnings after allegedly transmitting explicit e-mails on school computers.³⁵⁵ A Silver Trail Middle School teacher from Broward County was placed on paid leave for allegedly teaching his science students how to build bombs.³⁵⁶ Finally, allegations

349. Steve Harrison, *Building Inspector is Target of Probe*, MIAMI HERALD (Broward), Mar. 10, 2000, at 3B.

350. Steve Harrison, *Pines Inspector Resigns Amid Loafing Allegations*, MIAMI HERALD (Broward), May 31, 2000, at 3B.

351. *Two Lose State Jobs After Toddler's Death*, MIAMI HERALD (Broward), Sept. 5, 1999, at 6B.

352. Frances Robles, *Ex-Court Reporter Jailed for Failing to do Transcript*, MIAMI HERALD (Broward), Dec. 4, 1999, at 10B.

353. *Ruling May Limit Access to Records*, MIAMI HERALD (Broward), Nov. 9, 1999, at 12B.

354. Elena Cabral, *Davie's Deputy Fire Chief Fired*, MIAMI HERALD (Broward), July 2, 2000, at 1B.

355. *School Officers Get Warning for Explicit E-mail Videos*, MIAMI HERALD (Broward), July 3, 2000, at 9B. Dismissal, not simply a warning, was the punishment meted out to a Miami-Dade prosecutor for receiving sexually explicit e-mail at the office on a state computer. *Id.*; Joan Fleischman, *Prosecutorial Misconduct?*, MIAMI HERALD (Broward), Dec. 8, 1999, at 4A; see James Garrity & Eoghan Casey, *Internet Misuse in the Workplace: A Lawyer's Primer*, 72 FLA. BAR J., (1998), at 22.

356. Lisa Arthur, *Pines Police: No Evidence Teacher Taught Bomb Class*, MIAMI HERALD (Broward), Apr. 5, 2000, at 9B. For an analysis of the law governing public school teacher speech in and out of the classroom, see Rachel E. Fugate, *Choppy Waters Are Forecast for Academic Speech*, 26 FLA. ST. U. L. REV. 187 (1998).

surfaced that Miami-Dade public school teachers changed grades of star athletes.³⁵⁷

5. Phone Calls

A City of Miami audit found that city employees made hundreds of personal long-distance calls on city phones during two months in 1999.³⁵⁸

6. Safety Violations

A Miami-Dade County bus driver lost his job twice for allegedly committing safety violations.³⁵⁹

7. Overtime Violations

Opa-locka police, working on overtime, allegedly protected a private gym owned by a drug kingpin.³⁶⁰

8. Unlawful Compensation

A former Hollywood police officer was acquitted of charges that he promised a motorist that he would not give her a speeding ticket if she agreed to go out with him.³⁶¹

9. Violence

Four veteran corrections officers were charged with a murder seven months after a death row inmate was fatally beaten in his cell at a Florida state prison.³⁶² Two Broward County Sheriff's Office SWAT officers were

357. Ken Rodriguez, *Teachers Silent in Grade Probe*, MIAMI HERALD (Broward), Nov. 17, 1999, at 11B.

358. Charles Rabin, *Audit: Personal Phone Calls Cost Miami Plenty*, MIAMI HERALD (Broward), June 16, 2000, at 7B.

359. Robert Steinback, *Bus Driver's Firing Needs Closer Look*, MIAMI HERALD (Broward), Oct. 3, 1999, at 1B.

360. Joseph Tanfani & Ajowa Nzinga Ifateyo, *Cops: Dealer's Gym Protected*, MIAMI HERALD (Broward), Aug. 29, 1999, at 1B.

361. Wanda J. DeMarzo, *Acquittal Allows Hollywood Ex-Cop to Move Forward*, MIAMI HERALD (Broward), Apr. 21, 2000, at 1B.

362. Phil Long & Steve Bousquet, *4 Charged in Inmate Death*, MIAMI HERALD (Broward), Feb. 3, 2000, at 1A.

on paid leave pending an investigation into their shooting of a hostage taker in Pompano Beach.³⁶³ In Broward County, an assistant state attorney was charged with battery after allegedly slugging a defense attorney over a pending case.³⁶⁴ A former Miami-Dade corrections officer was convicted of beating a veteran jailhouse snitch and lying about it under oath.³⁶⁵

10. Lying, Unbecoming Conduct, and Vulgar Language

In *Department of Business & Professional Regulation v. Doyle*,³⁶⁶ a public employee appealed the decision of the Public Employees Relations Commission's ruling sustaining her dismissal from the Department for lying, unbecoming conduct, and vulgar language.³⁶⁷ In another "lying" case, prosecutors decided not to indict Hialeah's police chief for giving false testimony about his son's auto theft arrest when he sought to join his dad's department.³⁶⁸

11. Health-Care Fraud

Twenty-five Sunrise police officers are under investigation for their alleged role in a medical fraud scheme in which doctors wrote illegal prescriptions for the twenty-five police officers and conspired with them to commit insurance fraud.³⁶⁹

C. Whistleblowing, Retaliatory Discharge, and the First Amendment

While public employees do not shed their First Amendment right to free speech at the workplace door, public employers may place reasonable

363. *2 Officers on Paid Leave After Fatal Shooting*, MIAMI HERALD (Broward), Mar. 3, 2000, at 10B.

364. Sabrina L. Miller, *Judge Grants Mistrial After Attorneys' Brawl*, MIAMI HERALD (Broward), Aug. 25, 1999, at 3B.

365. Frances Robles, *Jail Guard Convicted in Beating of Inmate*, MIAMI HERALD (Broward), Nov. 12, 1999, at 12B.

366. 750 So. 2d 746 (Fla. 1st Dist. Ct. App. 2000).

367. *Id.* at 747.

368. Frances Robles, *Prosecutor: Police Chief Lied, but Won't be Charged*, MIAMI HERALD (Broward), July 20, 2000, at 7B.

369. Herald Staff & Wire Reporter, *Sunrise Police Records Subpoenaed in FBI Health-Care Fraud Investigation*, MIAMI HERALD (Broward), July 23, 2000, at 3BR.

restrictions on speech in the public workplace.³⁷⁰ In a nutshell, speech on matters of private concern receive virtually no protection, but speech on matters of public concern must then be balanced against the public employer's right to run an efficient agency.³⁷¹

In the past year, public employees' First Amendment free speech rights cases took on many different forms. Among them was a proposed agreement reached between Miami-Dade county and public school teachers whereby teachers were given more freedom to speak out on matters involving the school district.³⁷² Additionally, on March 17, 2000, a federal judge ruled that the Miami-Dade County Commission did not infringe on the free speech rights of a member of an advisory board when it removed her for criticizing the county's policy on Cuba.³⁷³ As the judge put it, "Ms. McKinley was removed because the expression of her political views affected her ability to do her job."³⁷⁴ Yet, an assistant to a state senator was dismissed after writing a letter to a newspaper on the state e-mail system, speaking out about the litter left by a Florida plan protester.³⁷⁵

In June 2000, a retired public school teacher successfully challenged the Broward School Board's decision to fire him for refusing to remain in the classroom while his students said the Pledge of Allegiance.³⁷⁶ In yet another key case, the director of the Miami-Dade Community Relations Board was removed from his position for allegedly telling the former board chairman to "kiss my a—."³⁷⁷ Finally, two employees of the Miami-Dade Police

370. See, e.g., FLA. CODE OF JUD. CONDUCT, Canon 7 (spelling out what speech by judges and judicial candidates is permissible).

371. See, e.g., *Judge Dismisses Lawsuit by Fired Assistant County Attorney*, MIAMI HERALD (Broward), Feb. 2, 2000, at 3B. A former interim Broward County attorney's claim that he was discharged in violation of his First Amendment rights was dismissed by a federal court judge.

372. Analisa Nazareno, *Teachers Get Solid Raise in Contract Offer*, MIAMI HERALD (Broward), July 4, 2000, at 6B.

373. Don Finefrock, *Judge: No Free Speech Violation*, MIAMI HERALD (Broward), Mar. 25, 2000, at 8B.

374. Order Granting Defendant's Motion for Summary Judgment at 7, *McKinley v. Kaplan* (S.D. Fla. 2000) (No. 97-CV-3291); see also *McKinley v. Miami-Dade County*, 177 F.3d 1253 (11th Cir. 2000).

375. Steve Bousquet, *Senator Fires Aide Who Wrote E-mail*, MIAMI HERALD (Broward), Mar. 11, 2000, at 10B.

376. Olivier Stephenson, *Leroy Bates, Who Refused to Pledge Allegiance*, MIAMI HERALD (Broward), June 28, 2000, at 4B.

377. Andrea Robinson, *County Official Fired for Remark After a Meeting*, MIAMI HERALD (Broward), Apr. 22, 2000, at 9B.

Department were “counseled” after allegedly speaking out against Miami-Dade’s mayor who talked tough during the Elian Gonzalez affair.³⁷⁸

A whistleblower is an individual who speaks out about illegal or improper activity that he or she has witnessed and who is subsequently punished for blowing the whistle.³⁷⁹ There were a number of whistleblower cases decided in the past year. In *Fields v. United States Department of Labor Administration Review Board*,³⁸⁰ the Eleventh Circuit Court of Appeals ruled that employees who intentionally caused a violation of the Energy Reorganization Act³⁸¹ were not entitled to protection under the Act’s whistleblower provision.³⁸² Also, an administrative judge ordered the United States Customs Service to clear the records of one of the most outspoken critics of the Customs Service in Miami who had been punished for his criticism.³⁸³ In yet another whistleblower case, three City of Hollywood workers claimed they were victims of retaliation and discrimination after they made statements to police probing into whether undue health benefits were wrongfully approved for city employees and their families.³⁸⁴ In another case, a former police officer decided to cross the blue wall of silence and testify against other officers who shot an innocent homeless man in Coconut Grove—a breakthrough in one of Miami’s largest corruption cases.³⁸⁵ Lastly, in *Chase v. Walgreen Co.*,³⁸⁶ an employee claimed his employer violated Florida law by retaliating against him for filing a workers’ compensation claim.³⁸⁷

378. Don Finefrock, *Dade Cops ‘Counseled’ for Remarks*, MIAMI HERALD (Broward), Apr. 19, 2000, at 11B.

379. See generally FLA. STAT. § 448.102 (2000).

380. 173 F.3d 811 (11th Cir. 1999).

381. 42 U.S.C. § 5851(a) (1994).

382. *Fields*, 173 F.3d at 814.

383. David Kidwell, *Judge Slams U.S. Customs Targeting Whistle-Blower*, MIAMI HERALD (Broward), Apr. 17, 2000, at 10B; David Kidwell, *Inside Critics Say Customs Crackdown is Targeting Them*, MIAMI HERALD (Broward), Nov. 29, 1999, at 6B; Editorial, *A Customs Snare?*, MIAMI HERALD (Broward), Nov. 20, 1999, at 12B; Editorial, *Reform in U.S. Customs Service?*, MIAMI HERALD (Broward), Dec. 4, 1999, at 12B.

384. Wanda J. DeMarzo, *Health Benefits Scandal Broadens*, MIAMI HERALD (Broward), June 28, 2000, at 1B; Neil Reisner & Wanda DeMarzo, *Health Plan Boss Fired*, MIAMI HERALD (Broward), Mar. 24, 2000, at 1B.

385. Frances Robles, *Ex-Cop Agrees to Testify Against Fellow Police Officers*, MIAMI HERALD (Broward), Mar. 9, 2000, at 9B.

386. 750 So. 2d 93 (Fla. 5th Dist. Ct. App. 1999).

387. *Id.* at 94.

D. *Employment Discrimination*

1. Statistics

The number of civil rights employment cases filed in federal courts has leveled off in recent years at roughly 23,000 per year.³⁸⁸ By contrast, employee lawsuits claiming their employers retaliated against them for filing or assisting with discrimination claims has risen dramatically: twenty-four percent of all claims lodged with the Equal Employment Opportunity Commission ("EEOC") stem from retaliation, up from fifteen percent in 1992.³⁸⁹ Indeed, Fort Lauderdale's own diversity specialist has spoken out about the increase in retaliation against city employees who file employment discrimination complaints.³⁹⁰ State law prohibits retaliation against employees for filing employment discrimination suits.³⁹¹

Employment discrimination claims in Broward County based on race have doubled, from eighty-eight in 1992, to 194 in 1999, according to the EEOC.³⁹² Similarly, sexual harassment claims in Broward have risen from thirty-two in 1992, to ninety-three in 1999.³⁹³ Despite this rise, Broward County's Human Rights Division Director, charged with investigating discrimination claims by Broward County residents, was dismissed after receiving a vote of "no confidence" last year from Broward's Human Rights Board for inaction in investigating claims of bias over the years.³⁹⁴ The rate of growth of employment discrimination claims in Miami-Dade has been slower: sexual harassment claims have gone from eighty-eight in 1992 to 190 in 1999.³⁹⁵ All told, harassment complaints have increased thirty-three percent in Miami-Dade from 219 in 1992 to 292 in 1999.³⁹⁶

388. Richard A. Oppel Jr., *Retaliation Lawsuits: A Treacherous Slope*, N.Y. TIMES (Nat'l ed.), Sept. 29, 1999, at C8; see generally Bradley R. Johnson & Kevin E. Hyde, *The World of Retaliation After Robinson v. Shell Oil*, 72 FLA. BAR J. 40 (1998).

389. Oppel, *supra* note 388.

390. Brad Bennett, *Memo: Workers Punished for Complaining*, MIAMI HERALD (Broward), Oct. 21, 1999, at 1B.

391. FLA. STAT. § 760.10(7) (2000).

392. Brad Bennett, *Workplace Bias on Rise, Expert Says*, MIAMI HERALD (Broward), June 16, 2000, at 3B.

393. *Id.*

394. Brad Bennett, *County Fires Embattled Anti-Discrimination Leader*, MIAMI HERALD (Broward), Mar. 30, 2000, at 1B.

395. Bennett, *supra* note 392.

396. *Id.*

2. Race

In the past year, a wide range of cases involving employment discrimination on grounds of race have emerged. There have been several articles alleging that Fort Lauderdale discriminates against minority employees.³⁹⁷ In January 2000, the EEOC ruled that the city discriminated against two African-American workers, then retaliated against one of them for complaining.³⁹⁸ The EEOC also sustained a city firefighter's claim of racial and gender bias.³⁹⁹ Even a memorial service held by the city for employees who have died on the job sparked racial protest.⁴⁰⁰ Moreover, hiring the first African-American city manager has done little to quell employment discrimination complaints in Fort Lauderdale.⁴⁰¹ Recently, however, community leaders have drafted a list of recommendations aimed at strengthening fairness for city workers and will submit them to the City Commission.⁴⁰² Fort Lauderdale released a report in July 2000, which showed that the city's work force is twenty-one percent black, which is higher than the percentage of blacks in Broward County, fifteen percent, while admitting that most minority employees fill the lower ranks.⁴⁰³ Black state legislators urged the governor to conduct an outside investigation into the alleged "long history" of racial discrimination against African-American employees in Florida's prisons.⁴⁰⁴ A Miami-Dade teacher, who was dismissed, alleged she was discriminated against for her high-profile work on behalf of South Florida's African-American community.⁴⁰⁵ The NAACP

397. Brad Bennett, *City's Bias Claims Persist*, MIAMI HERALD (Broward), Apr. 10, 2000, at 1A; Brad Bennett, *Finding: Fort Lauderdale Discriminated Again*, MIAMI HERALD (Broward), Apr. 1, 2000, at 1B.

398. Brad Bennett, *Workers' Charges Upheld*, MIAMI HERALD (Broward), Jan. 21, 2000, at 1A.

399. Adrienne Samuels, *U.S. Panel Backs Firefighter's Claims of Bias*, MIAMI HERALD (Broward), Mar. 14, 2000, at 1B.

400. Brad Bennett, *Memorial for Lauderdale Employees Sparks Debate*, MIAMI HERALD (Broward), Apr. 29, 2000, at 3B.

401. Brad Bennett, *Black Activists Criticize Fort Lauderdale*, MIAMI HERALD (Broward), Nov. 17, 1999, at 3B; Brad Bennett, *Lauderdale Leader Committed to Making a Difference*, MIAMI HERALD (Broward), Nov. 21, 1999, at 1BR.

402. Brad Bennett, *Plan Seeks Fairness for City Employees*, MIAMI HERALD (Broward), Nov. 13, 1999, at 1B.

403. Brad Bennett, *Ft. Lauderdale Report Touts City Record for Hiring Blacks*, MIAMI HERALD (Broward), July 22, 2000, at 1B.

404. Lesley Clark, *Prison Racism Probe Demanded by Legislators*, MIAMI HERALD (Broward), Mar. 30, 2000, at 9B.

405. Robert Sanchez, *Race Accusations Fly Over Teacher's Impending Firing*, MIAMI HERALD (Broward), April 10, 2000, at 8B.

characterized Sarasota County's reassignment of the sole black man holding the key post at a county public school as racist.⁴⁰⁶

3. Gender

a. *Sexual Harrasment*

A recurring theme over the last year involving sexual harassment stems from the situation of a public employer rehiring a known sexual harasser.⁴⁰⁷ Less than a year after a Hollywood police officer was dismissed for "leering" at a female officer, he was rehired as a police officer by the Fort Lauderdale Police Department.⁴⁰⁸ A parking enforcement officer for Fort Lauderdale who was warned he would be dismissed for sexually harassing female colleagues got a second chance, but harassment complaints continued.⁴⁰⁹ In another case involving Fort Lauderdale, the city was ordered to pay \$70,000 to a female city employee who filed for harassment that took place after the city had fired, and then rehired the harasser.⁴¹⁰ In yet another incident, a state representative twice pressured the Department of Corrections administrators to rehire a former prison chief earlier dismissed for, among other things, sexual harassment.⁴¹¹

b. *Sexual Assault*

A federal jury found a former Opa-locka City Manager liable for sexual harassment and awarded the receptionist \$1.5 million for assault and \$500,000 for sexual harassment.⁴¹²

406. *Reassignment Questioned*, MIAMI HERALD (Broward), Nov. 26, 1999, at 1C.

407. See Jason L. Gunter & Tammie L. Rattray, *Recent Developments in Employer Liability for Sexual Harassment*; Elerth & Faragher, 72 FLA. BAR J. 94 (1998); see also Graham Penn, "Because I'm the Boss:" *Employer Liability for Supervisors' Hostile Environment Sexual Harassment*, 51 FLA. L. REV. 373 (1999).

408. Pedro Acevedo & David Green, *Cop's Sex Misconduct Record No Secret*, MIAMI HERALD (Broward), Apr. 1, 2000, at 1B.

409. Brad Bennett, *Sex Harassment Case Comes Back to Haunt Fort Lauderdale, Official*, MIAMI HERALD (Broward), Sept. 30, 1999, at 1A.

410. Editorial, *Lauderdale's Slow Learners*, MIAMI HERALD (Broward), Oct. 1, 1999, at 10B.

411. David Cox, *Corrections Says Legislator Taking Revenge on Agency*, SUN SENTINEL (Broward) at 10B.

412. Ajowa Nzinga Ifateyo, *Receptionist Wins Sex-Assault Suit*, MIAMI HERALD (Broward), Apr. 5, 2000, at 10B.

c. *Sexually-Explicit Comments*

The vice mayor of Pembroke Park, located in Broward County, was sued by a former city employee who alleged the vice mayor made sexually explicit comments over a five year period.⁴¹³ The director of Broward Community College's Buehler Planetarium was placed on administrative leave pending an investigation into a secretary's claim of sexual harassment.⁴¹⁴ By one account, the county employee alleges she overheard the director tell a joke containing sexual content.⁴¹⁵ Subsequently, the director's contract with Broward Community College was not renewed, allegedly on grounds unrelated to the sexual harassment complaint.⁴¹⁶ A Miami-Dade county employee sued the county, alleging her boss told sexual jokes, remarked about her attire, invited her to the movies, wrote her about his fantasies, and staged a hotel room tryst on a business trip.⁴¹⁷ A jury found a former Northwestern High School principal liable for sexual harassment and awarded the victim \$500,000 plus \$100,000 for humiliation and \$100,000 in punitive damages.⁴¹⁸ Allegedly, the principal waved a wad of \$100 bills in the victim's face while asking, "Is this enough for you?"⁴¹⁹

What is severe or pervasive conduct? In *Mendoza v. Borden, Inc.*,⁴²⁰ the Eleventh Circuit ruled in a Florida case that a supervisor's persistent following and staring at an employee did not amount to severe or pervasive conduct sufficient to change the employee's terms or conditions of employment.⁴²¹ For this reason, the employee's hostile environment sexual harassment claim was dismissed.⁴²²

413. Andrea Elliott, *Ex-Pembroke Park Worker Charges Sexual Harassment*, MIAMI HERALD (Broward), May 24, 2000, at 11B.

414. Wanda J. DeMarzo, *BCC Planetarium Chief Accused of Sex Harassment*, MIAMI HERALD (Broward), Feb. 19, 2000, at 3B.

415. *Id.*

416. Shari Rudavsky, *BCC Officials Oppose Renewing Contract of Planetarium Director*, MIAMI HERALD (Broward), June 27, 2000, at 3B.

417. Harriet Johnson Brackey, *Sex and Work Mix Poorly*, MIAMI HERALD (Broward), Oct. 8, 1999, at 1C.

418. Editorial, *She Sued, She Won—and Now She Forgives*, MIAMI HERALD (Broward), Jan. 7, 2000, at 12B.

419. *Id.*

420. 195 F.3d 1238 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1674 (2000).

421. *Id.* at 1252.

422. *Id.* at 1253.

4. Religion

Under federal and state anti-discrimination laws, employers bear the duty of reasonable accommodation of their employees' religious beliefs and practices. In a recent case, *Hellinger v. Eckerd Corp.*,⁴²³ a Jewish pharmacist was turned down for employment because his religious beliefs compelled him to refuse to sell condoms.⁴²⁴ The court denied the employer's motion for summary judgment reasoning that a jury must decide whether it is an undue burden for the employer to accommodate Hellinger's religious beliefs by, for example, relocating condoms to another part of the store, or allowing him to direct condom buyers to cashiers at the front of the store.⁴²⁵

5. Age

Since 1995, the United States Supreme Court has struck down twenty-four federal statutes, ruling that in each case Congress had exceeded its authority under the Constitution of the United States.⁴²⁶ The latest casualty in the Court's foray into federalism was congressional efforts to extend the federal Age Discrimination in Employment Act to state employees.⁴²⁷ In a case out of Florida, *Kimel v. Florida Board of Regents*,⁴²⁸ the Court held that neither the Commerce Clause, nor section five of the Fourteenth Amendment enabled Congress to waive states' sovereign immunity.⁴²⁹ As a result of this ruling, state employees have the following options in remedying age discrimination: 1) they can sue under Florida's statute banning age discrimination—although procedures, standards and remedies may not reflect erstwhile protection under the Federal Age Discrimination in Employment Act; 2) the federal government can sue states—but scarce resources make this option illusory; 3) public officials can be sued in their individual capacities for age discrimination—but you can't squeeze blood out of a turnip; 4) the state can waive its immunity—which is highly

423. 67 F. Supp. 2d 1359 (S.D. Fla. 1999).

424. *Id.* at 1361.

425. David Kidwell, *Jewish Pharmacist Battles Eckerd Over Condoms*, MIAMI HERALD (Broward), Feb. 5, 2000, at 11B.

426. See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

427. See Joanne C. Brant, *The Ascent Of Sovereign Immunity*, 83 IOWA L. REV. 767 (1998); see also Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999).

428. 528 U.S. 62 (2000).

429. *Id.* at 78–82.

unlikely; and 5) states can be sued for injunctive relief—arguably allowing reinstatement as a partial remedy, but no recovery of damages.⁴³⁰

6. Disability

The United States Supreme Court has agreed to hear a case calling into question Congress' authority to give state employees the right to sue other state employees in federal court under the ADA.⁴³¹ Judging by the Court's ruling in *Kimel* and its newfound inclination to challenge congressional power under section five of the Fourteenth Amendment, disabled state workers may end up with the same weak options victims of age discrimination that they had before that Supreme Court decision.

In other disability cases, Miami Beach settled an "excessive force-false arrest" lawsuit against an HIV-positive police officer who sustained cuts on his hands during an arrest even though the law denies damages "for the fear of having AIDS, even if you don't get it."⁴³² The plaintiff's attorney claimed it was a health hazard for the city to allow an HIV-positive officer to have contact with the public.⁴³³ The Broward County clerk of records came under fire for not resigning his position despite being disabled and unable to fulfill his official duties.⁴³⁴ A *Miami Herald* editorial urged state lawmakers to find ways to encourage disabled public officials to resign or to provide a means of removing them without disgracing them.⁴³⁵

Another ADA case, *Davis v. Florida Power & Light Co.*,⁴³⁶ addressed the question of what is an essential function of an employee's job for purposes of proving that an employee is a qualified individual under the ADA.⁴³⁷ In this case, the court ruled that mandatory overtime work was an

430. See *Kimel*, 528 U.S. 62.

431. *Garrett v. Univ. of Ala.*, 193 F.3d 1214 (11th Cir. 1999), cert. granted, 120 S. Ct. 1669 (2000) (holding that where state employee sued state after allegedly suffering disability discrimination at the University of Alabama following treatment for breast cancer, states have no constitutional immunity from ADA lawsuits). *Id.* at 1216.

432. Joan Fleischman, *Beach Settles Brutality Suit Filed Against HIV Cop*, MIAMI HERALD (Broward), Apr. 5, 2000, at 11B; see *Bragdon v. Abbott*, 524 U.S. 624 (1998) (providing that asymptomatic HIV disease is a disability under the ADA); see also Joanne L. Wisner, Comment, *Asymptomatic HIV Disease as a Disability Under the Americans With Disabilities Act: A Contrast Between Bragdon v. Abbott and Runnebaum v. Nations Bank of Maryland*, 33 NEW ENG. L. REV. 217 (1998).

433. *Id.*

434. Editorial, *Dignity For Disabled Officials*, MIAMI HERALD (Broward), Jan. 13, 2000, at 10B.

435. *Id.*

436. 205 F.3d 1301 (11th Cir. 2000), cert. denied 121 S. Ct. 304 (2000).

437. *Id.* at 1304; see also 42 U.S.C. § 12111(8) (1994).

essential function of an employee's job and that accommodating the employee's request of no overtime or selective overtime was not required by the ADA, since it entailed violating the collective bargaining agreement's seniority provisions.⁴³⁸

7. Affirmative Action

On July 13, 2000, the Supreme Court of Florida ruled that four proposed constitutional amendments offered by the Florida Civil Rights Initiative that would have ended affirmative action in public employment, as well as in public education and purchasing, were misleading and overbroad.⁴³⁹ The unanimous decision made clear that the proposed amendments were too wide-ranging and would short circuit state efforts aimed at protecting citizens against discrimination, a role mandated by Florida's Constitution.⁴⁴⁰

On the issue of bidding for construction contracts, many municipalities have prescribed so-called "set-aside" laws, which require that a certain percentage of public construction contracts go to minority-owned businesses.⁴⁴¹ As a version of affirmative action on grounds of race and gender, these laws have been challenged as violations of equal protection.⁴⁴² Despite the trend of striking down this version of preferential treatment, some laws have survived judicial scrutiny.⁴⁴³

In *United States v. City of Miami*,⁴⁴⁴ a public employees' union sued the City of Miami, claiming that promotions of two African-American police officers violated a consent decree ordering the city to set promotional goals for members of minority groups.⁴⁴⁵ While the federal district court held the city in contempt and awarded full relief to white and Hispanic police officers who were injured by the city's action, the court of appeals ruled that the

438. *Davis*, 205 F.3d at 1305.

439. In re Amendment to Bar Gov't from Treating People Differently Based on Race in Pub. Educ., 25 Fla. L. Weekly S546 (Fla. July 13, 2000).

440. *Fla. Court Rejects Measures Against Affirmative Action*, LOS ANGELES TIMES, July 14, 2000, at A15.

441. See Steven A. Holmes, *What is a Minority-Owned Business*, N.Y. TIMES (Nat'l ed.), Oct. 12, 1999, at C6 ("Some say 51% ownership; others go with 30%.").

442. Fred Grimm, *Low-Income Housing it Isn't*, MIAMI HERALD (Broward), Oct. 19, 1999, at 1B.

443. Don Finefrock, *Judge Refuses to Stop Minority Set-Asides*, MIAMI HERALD (Broward), Oct. 5, 1999, at 10B (a Miami federal judge sustained Miami-Dade County's set-aside program for minority architects and engineers).

444. 195 F.3d 1292 (11th Cir. 1999).

445. *Id.* at 1294.

proper remedy was pro rata share, not full share, of the monetary value of the promotion for which each injured officer was eligible.⁴⁴⁶

E. Remedies for Wrongful Discharge

1. Money Damages

After eight years of legal wrangling, a former Broward County School Board candidate recovered \$600,000 from the school board for leaking confidential psychological reports of the candidate to the news media.⁴⁴⁷ Transcripts of interviews described the former Oakland Park teacher as plotting to kill his aunt in an inheritance dispute.⁴⁴⁸ Five hundred thousand dollars of the total damage award needed legislative approval since state law requires legislative approval of large negligence claims against government agencies.⁴⁴⁹ The jury had awarded the successful litigant \$750,000, but the full Senate only approved an additional \$500,000.⁴⁵⁰ Finally, a jury awarded a former Hollywood police chief \$200,000 in damages and attorneys' fees against the city for discharging him in violation of whistleblower laws, after he reported hiring problems in his department to the state attorney's office.⁴⁵¹

2. Attorneys' Fees

The City of Fort Lauderdale was ordered to pay \$31,000 in legal fees incurred by an African-American city employee who sued the city for destroying documents that would have helped his employment discrimination case against the city.⁴⁵² Similarly, the City of Hollywood was ordered to pay its wrongfully dismissed police chief \$269,000 in legal

446. *Id.* at 1300.

447. Daniel de Vise, *Oakland Park Teacher May Get \$600,000*, MIAMI HERALD (Broward), Mar. 21, 2000, at 3B.

448. *Id.*

449. Daniel de Vise, *Teacher Awarded an Extra \$500,000*, MIAMI HERALD (Broward), Mar. 9, 2000, at 3B.

450. Daniel de Vise, *Ex-Teacher Nears Award in Suit Against School Board*, MIAMI HERALD (Broward), Feb. 10, 2000, at 3B.

451. Caroline J. Keough, *Ousted Hollywood Chief Wins Lawsuit*, MIAMI HERALD (Broward), Mar. 10, 2000, at 1A.

452. Brad Bennett, *Lauderdale Loses Records Dispute*, MIAMI HERALD (Broward), May 19, 2000, at 1B.

fees.⁴⁵³ The former chief convinced a jury that the city violated whistleblower laws by firing him after he disclosed hiring improprieties in his department to state officials.⁴⁵⁴ When a public employee convinces the Public Employees Relations Commission (“PERC”) that he or she was wrongfully disciplined, state law dictates that the Commission award reasonable attorneys’ fees.⁴⁵⁵ In *Gaston v. Department of Revenue*,⁴⁵⁶ however, the court ruled that the statutory amendment did not apply to a case that was no longer pending before PERC on the amendment’s effective date.⁴⁵⁷

3. Reinstatement and Back Pay

A former City of Miami employee who pleaded guilty to five felonies involving voter fraud asked an arbitrator for his job back and \$52,000 in back pay.⁴⁵⁸ The former employee claimed the city failed to investigate over twenty other employees who allegedly committed voter fraud as well.⁴⁵⁹ Similarly, a Miami-Dade building inspector, indicted for allowing Dadeland Station to open in shoddy condition, sued the county seeking reinstatement, and \$5 million for emotional distress, after state prosecutors dropped their case against him.⁴⁶⁰

4. Appeals to Public Employees Relations Commission

In *Noone v. Florida Department of Corrections*,⁴⁶¹ the question raised was whether PERC properly refused to hear an appeal by a dismissed public employee after he failed to show up at a hearing.⁴⁶² PERC ruled that the employee was not at fault for failing to keep in touch with his attorney.⁴⁶³

453. Wanda J. Demarzo, *\$269,000 More Goes to Fired Cop*, MIAMI HERALD (Broward), May 6, 2000, at 6B.

454. *Id.*

455. FLA. STAT. § 447.208(3)(e) (2000).

456. 742 So. 2d 517 (Fla. 1st Dist. Ct. App. 1999).

457. *Id.* at 520.

458. Manny Garcia, *Vote-Fraud Player Seeks Old Job as City of Miami’s Systems Worker, Lost Wages*, MIAMI HERALD (Broward), Aug. 26, 1999, at 1B.

459. *Id.*

460. Don Finefrock, *Suspended Dade Building Official Sues for His Job—Plus Damages*, MIAMI HERALD (Broward), Dec. 3, 1999, at 5B.

461. 745 So. 2d 481 (Fla. 1st Dist. Ct. App. 1999).

462. *Id.* at 481.

463. *Id.* at 482.

As a result, the court reversed the dismissal and remanded the case for an evidentiary hearing.⁴⁶⁴

5. Section 1985(3) Claims Alleging Conspiracy Under the Civil Rights Act

In a case of first impression in the Eleventh Circuit, *Dickerson v. Alachua County Commission*,⁴⁶⁵ the court was faced with the question of whether a Title VII claim preempts a subsection three of section 1985 claim where the same facts support both claims.⁴⁶⁶ Subsection three of section 1985 provides for the recovery of damages by an individual who is harmed by a conspiracy to deprive such person of equal protection of the laws or of equal privileges and immunities under the laws.⁴⁶⁷ The question raised in this case was whether Title VII, with its comprehensive remedial scheme, affords the sole remedy for employment discrimination raised by a public employee.⁴⁶⁸ The court concluded that Title VII does not preempt a constitutional cause of action under subsection three of section 1985, relying on congressional intent to retain that section as a parallel remedy for unconstitutional workplace discrimination.⁴⁶⁹

The second issue in *Dickerson* involved the “intracorporate conspiracy doctrine,” which provides that a corporation’s employees, serving as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation, just as it is not possible for an individual to conspire with himself.⁴⁷⁰ This doctrine has been applied to public universities as well.⁴⁷¹ Relying on circuit precedent, the court concluded that the intracorporate conspiracy doctrine barred the employee’s civil rights conspiracy claim.⁴⁷²

464. *Id.*

465. 200 F.3d 761 (11th Cir. 2000).

466. *Id.* at 765.

467. *Id.* at 766.

468. *Id.*

469. *Id.* at 766–67.

470. 200 F.3d at 767; *see also* *Chambliss v. Foote*, 562 F.2d 1015 (5th Cir. 1977), *aff’g*, 421 F. Supp. 12, 15 (E.D. La. 1976) (applying the intracorporate conspiracy doctrine to foreclose a section 1985(3) claim against a public university and its officials).

471. *Chambliss*, 562 F.2d at 1015.

472. *See Dickerson*, 200 F.3d at 770.

6. Exhaustion of Administrative Remedies

In *Public Health Trust v. Hernandez*,⁴⁷³ the court denied an employee's motion to compel arbitration of his dispute with his employer, a Miami-Dade County agency.⁴⁷⁴ Instead, the employee was ordered first to exhaust his administrative remedies, i.e., the four step grievance procedure set out in the collective bargaining agreement.⁴⁷⁵

VI. PUBLIC SECTOR COLLECTIVE BARGAINING ISSUES

A. *Union Election Issues*

The biggest public employee union vote in over a decade in South Florida, involving 5400 employees in four public hospitals and two dozen clinics, ended after eighteen months of bitter campaigning.⁴⁷⁶ Nurses and other hospital professionals at the North Broward Hospital District voted 1242 to 957 against joining the Service Employees International Union in November 1999.⁴⁷⁷ The union has vowed to appeal the outcome to Florida's Labor Relations Board, alleging wrongdoing by the hospital district and state election monitors.⁴⁷⁸ A few days before the nurses and professional employees voted, the non-professional employees at the public hospital voted against joining a union as well.⁴⁷⁹ The vote took place after the state PERC turned down union claims that the election process was undermined because the chair of the commission had a conflict of interest—she is married to a paid district lobbyist.⁴⁸⁰ The union also tried to delay the vote owing to the hospital district's failure to hand over an accurate list of eligible employees' addresses,⁴⁸¹ because no hearing had been held addressing union allegations that the hospital district had committed unfair campaign

473. 751 So. 2d 124 (Fla. 3d Dist. Ct. App. 2000).

474. *Id.* at 125.

475. *Id.*

476. Bob LaMendola, *Union Campaign Nearing Bitter End*, SUN SENTINEL (Broward), Nov. 14, 1999, at 1B.

477. Staff Reports, *Professionals, Nurses Nix Union*, SUN SENTINEL (Broward), Nov. 21, 1999, at 3B.

478. *Id.*

479. Karen Rafinski, *Union Fights Uphill Battle to Sign Up Hospital Workers*, MIAMI HERALD (Broward), Nov. 20, 1999, at 4B.

480. *Union Election Begins at Hospital District*, MIAMI HERALD (Broward), Nov. 17, 1999, at 2B.

481. *See id.* The district relied on a state law effective July 1999, that bars it from disclosing the home addresses of healthcare workers.

practices,⁴⁸² and because of practical problems over the way the election was being conducted.⁴⁸³ Nurses triggered the union drive after layoffs owing to a 1995 budget deficit increased their work load. In March 2000, the district and the union reached a settlement over some of the union's outstanding claims of unfair labor practices committed during the campaign.⁴⁸⁴

B. Government Unions

Union membership in the public sector grew from 37.2% in 1997 to 37.5% in 1998, according to the Bureau of Labor Statistics.⁴⁸⁵ During the same period, membership in the private sector fell to 9.5% from 9.7%.⁴⁸⁶ This trend owes much to the fact that generally government employers do not fight unionization, while many private employers do.⁴⁸⁷

The nation's largest public sector union, the American Federation of State, County and Municipal Employees ("AFSCME"), faced charges of corruption recently.⁴⁸⁸ An internal audit spelled out how union officers "forged checks, made unauthorized withdrawals from union accounts, siphoned union dues into their personal accounts and used union credit cards for personal expenses."⁴⁸⁹

Closer to home, the Broward State Attorney's office launched an investigation into AFSCME Local 532, the union representing Fort Lauderdale city employees.⁴⁹⁰ City employees claim the union refused to release financial records detailing where members' dues money was going.⁴⁹¹ The investigation came amid a challenge by the Fraternal Order of Police to replace AFSCME Local 532 to represent 1000 city employees.⁴⁹² In

482. Vivi Abrams, *Union: Hospital District Unfair*, MIAMI HERALD (Broward), Oct. 13, 1999, at 3B.

483. *Union Seeks Delay In Hospital Workers' Vote*, MIAMI HERALD (Broward), Nov. 9, 1999, at 2B.

484. *Hospital District, Union Settle Grievances*, MIAMI HERALD (Broward), Mar. 11, 2000, at 2B.

485. Steven Greenhouse, *Union Membership Rose in '98, but Unions' Percentage of Work Force Fell*, N.Y. TIMES (Nat'l ed.), Jan. 26, 1999, at A20.

486. *Id.*

487. *Id.*

488. Steven Greenhouse, *Document Details Abuses in a Union of Civil Servants*, N.Y. TIMES (Nat'l ed.), Jan. 21, 2000, at A1.

489. *Id.*

490. Brad Bennett, *City Workers Union Target of Investigation*, MIAMI HERALD (Broward), Feb. 10, 2000, at 3B.

491. *Id.*

492. Brad Bennett, *Union Aims to Compete for Workers*, MIAMI HERALD (Broward), Feb. 9, 2000, at 3B.

Miami, the head of the AFSCME union representing city employees criticized Miami commissioners, the police, and fire unions during a commission meeting on the city's budget.⁴⁹³ In sum, the union leader criticized the police department's paying overtime to officers—instead of civilian public employees—to manage its central communications network.⁴⁹⁴ Similarly, he criticized the fire department for relying on firefighters rather than civilian union employees to manage its communications.⁴⁹⁵

C. *Bargaining Impasses*

The law enjoins employers and the union elected as the employees' exclusive bargaining representative to bargain in good faith over the terms and conditions of employment until they reach impasse, i.e., a deadlock. In the past year, collective bargaining disputes have arisen primarily among public school teachers and police officers.

For instance, Broward County's 13,000 public school teachers reached an impasse with the Broward County School Board just before classes began last year.⁴⁹⁶ Disagreement ranged over wages, requiring teachers to meet after school hours, and the fate of an early retirement plan.⁴⁹⁷ Miami-Dade Community College ("MDCC") teachers still had no contract with the MDCC District eighteen months after they voted to unionize in March, 1998.⁴⁹⁸ To make matters worse, the faculty union filed suit to revoke a four year contract extension for the district's president who negotiated with the union.⁴⁹⁹ Finally, on February 1, 2000, MDCC's unionized professors ratified a collective bargaining agreement containing their first pay raise in two years, but it required professors to spend thirty-five hours a week on campus—the agreement ended bitter fighting at the nation's largest community college.⁵⁰⁰ Meanwhile, faculty at Broward Community College's Central Campus were up in arms over a reorganization that eliminated

493. Tyler Bridges, *Union Leader Decries Budget Choices*, MIAMI HERALD (Broward), Sept. 16, 1999, at 8B.

494. *Id.*

495. *Id.*

496. Beth Reinhard, *Teachers, Board at Impasse in Talks Over New Contract*, MIAMI HERALD (Broward), Aug. 26, 1999, at 3B.

497. *Id.*

498. Jack Wheat, *Union Slams MDCC President's Contract*, MIAMI HERALD (Broward), Aug. 31, 1999, at 10B.

499. *Id.*

500. Jack Wheat, *Community College, Professors Hammer Out Contract*, MIAMI HERALD (Broward), Feb. 1, 2000, at 8B.

faculty positions.⁵⁰¹ It is estimated that Florida will need 100,000 new public school teachers by the end of the decade, leading school districts and teachers unions to come up with innovative ways of reducing the attrition rate among all teachers, but especially among beginning teachers.⁵⁰²

In law enforcement, the City of Miramar and its police union have all but agreed to a new contract after ten months of negotiations.⁵⁰³ In June, 1999, the union rejected the city's contract terms, 107 to zero.⁵⁰⁴ Finally, the parties resolved differences over salary and overtime pay.⁵⁰⁵ Other noteworthy provisions of the proposed contract include cutting off-duty overtime pay for time spent on standby for court appearances in exchange for across-the-board wage increases, and increasing the minimum pay officers receive for their court appearances.⁵⁰⁶ Several months later, relations between the Miramar police officers and the police chief were strained over new policies, and a department reorganization was undertaken by the chief without consultation with the union.⁵⁰⁷ Similarly, a survey conducted by the Pinecrest Police Union uncovered unrest in the department over understaffing and fears of retaliation against whistleblowers.⁵⁰⁸

VII. CONCLUSION

Public sector employment law covers a lot of ground. Every stage of employment, from hiring, to the terms of employment, to employment discrimination, to discipline and discharge, and even retirement, unemployment, and pensions raise a host of legal issues that sorted out under federal or state constitutions, under federal, state, or local statutory law, or under the common law governing torts and contracts. To complicate matters, some laws cover both private and public employees, some cover only one or the other, and some employees are not covered at all. As this article makes clear, both public employees as well as public officials are

501. Lisa Arthur and Wanda DeMarzo, *Faculty, Provost Skirmish at BCC*, MIAMI HERALD (Broward), Mar. 23, 2000, at 1B.

502. Robert Sanchez, *Schools, Unions Do Homework to Cut Teacher Attrition Rates*, MIAMI HERALD (Broward), Mar. 21, 2000, at 8B.

503. David D'Addio, *Miramar, Police Union Move Closer to Settling on a Three-Year Contract*, Aug. 5, 1999, at 3B.

504. *Id.*

505. *Id.*

506. *Id.*

507. Juan Carlos Rodriguez, *Miramar Officers, Chief Will Meet in Attempt to Ease Strife*, MIAMI HERALD (Broward), Feb. 10, 2000, at 3B.

508. Eunice Ponce, *Survey of Pinecrest Ranks Shows Problems, Police Union Says*, MIAMI HERALD (Broward), June 25, 2000, at 3B.

always under the watchful eye of the news media. This means that any measure of wrongdoing, whether willfully or innocently committed, is grist for the newspaper mill. For this reason, legal issues involving public officials (and even employees) are fresh as this morning's headlines.

The Healthy Debate: A Proposal for the Addition of Negligent Failure to Warn and Strict Liability Failure to Warn Jury Instructions to the Florida Standard Jury Instructions for Product Liability Cases

Michael Flynn *

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I. INTRODUCTION

Everyday in courtrooms throughout Florida, plaintiff and defendant trial lawyers and trial judges engage in a healthy debate over jury instructions. It is here that the law of Florida is really made and unmade. No area of the law engenders more of a debate than product liability law.¹ These debates routinely dissect warranty, negligence, and strict liability causes of action. Thankfully, the Supreme Court of Florida provides guidance for trial lawyers and trial judges through the *Florida Standard Jury Instructions*.² These standard jury instructions cover express and implied warranty product

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1. John Howie & Ladd Sanger, *Failure to Warn: The Difference Between Strict Liability and Negligence from a Plaintiff's Perspective*, 13 AIR & SPACE L. 3 (1999).
2. See generally Fla. Standard Jury Instructions in Civil Cases (1998).

liability claims, strict liability manufacturing and design defect claims,³ and negligence claims.⁴ Yet, something is missing!

What is missing are *Florida Standard Jury Instructions* for negligent failure to warn and strict liability failure to warn causes of action. Absent this guidance from the supreme court, trial lawyers and trial judges scramble to put together jury instructions of which neither the lawyers, nor the judges, can be confident will hold up on appeal. What should be a healthy debate becomes a needless, unhealthy debate.

The purpose of this article is to propose standard jury instructions for product liability negligent failure to warn and strict liability failure to warn causes of action for use in the Florida courts. The article first examines Florida law concerning negligent failure to warn and strict liability failure to warn product liability causes of action. Next, the article presents proposals for negligent failure to warn and strict liability failure to warn jury instructions based on Florida law. Finally, the article concludes with an analysis of the proposed standard jury instructions.

II. THE FLORIDA LAW OF NEGLIGENT AND STRICT LIABILITY FAILURE TO WARN CLAIMS IN PRODUCT LIABILITY CASES

Whether a substantive difference exists between theories of negligent failure to warn and strict liability failure to warn has long been a topic of debate.⁵ Because theories of strict liability and negligence in the failure to warn context use some of the same terminology and address some of the same issues, many courts blur the line that separates each theory into distinct causes of action.⁶ Some have gone as far as to deny that any practical difference exists, insisting that strict liability and negligent failure to warn claims are interchangeable.⁷ This debate seemingly originated with the writing of the *Restatement (Second) of Torts*⁸ and continues with the drafting of the *Restatement (Third) of Torts, Product Liability*.⁹ While other states and academics characterize the difference between negligent and strict

3. *Id.* §§ PL 4, 5.

4. *Id.* § 3.2.

5. See Richard N. Pearson, *Strict Liability and Failure to Warn*, 3 PROD. LIAB. L.J. 108 (1992); see also Howie & Sanger, *supra* note 1, at 3.

6. THE FLORIDA BAR CONTINUING LEGAL EDUCATION, PRODUCTS LIABILITY IN FLORIDA § 2.4, (3d ed. 1995) (hereinafter PRODUCTS LIABILITY).

7. Howie & Sanger, *supra* note 1, at 3.

8. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

9. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1997); Pearson, *supra* note 5, at 108.

liability failure to warn claims as “fuzzy,”¹⁰ “difficult,”¹¹ and “illusory,”¹² Florida has chosen to separate strict liability failure to warn and negligent failure to warn claims.¹³ Perhaps the easiest way to understand the distinction between these two causes of action under Florida law is to first examine how these claims are the same.

Under either a negligence theory or a strict liability theory, product sellers and manufacturers must warn foreseeable users of a product.¹⁴ Further, liability for failure to warn foreseeable product users will extend to those who suffer personal injury or property damage as a result of using the product, or being within the vicinity of the use of the product.¹⁵ Hence, a manufacturer’s liability in negligence and strict liability extends to bystanders.¹⁶ An exception to this rule can be found in cases where the product is a drug, prescribed for a patient’s use through a physician. In these cases, the manufacturer is only required to warn the prescribing physician.¹⁷ Florida’s adoption of this “learned intermediary rule,” did not, however, protect the manufacturer of fingerprint ink cleaner for injury to a prisoner because the police were not considered “learned intermediaries.”¹⁸

A failure to warn claim, whether sounding in negligence or strict liability, includes not only failing to warn of a particular risk, but also giving an inadequate warning.¹⁹ In short, the mere existence of a warning is not dispositive of the adequacy of the warning. An adequate warning must notify the user not only of the dangerous propensities of the product, but also of the dangers of use and misuse.²⁰ The wording in a warning must be directed to the significant dangers arising from the failure to use the product in the prescribed manner, such as the risk of serious injury or death.²¹ The failure of a warning to effectively communicate the risk consistent with this

10. PRODUCTS LIABILITY, *supra* note 6, at § 2.4.

11. See Michael A. Pittenger, Note, *Reformulating the Strict Liability Failure to Warn*, 49 WASH. & LEE L. REV. 1509, 1510 (1992).

12. Howie & Sanger, *supra* note 1, at 3.

13. *Ferayomi v. Hyundai Motor Co.*, 711 So. 2d 1167, 1169 (Fla. 4th Dist. Ct. App. 1998).

14. *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242, 248–49 (Fla. 1st Dist. Ct. App. 1984); 3 Fla. Torts (MB) § 70.21 [2][d] (2000).

15. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 89 (Fla. 1976).

16. *Id.*

17. *Upjohn Co. v. MacMurdo*, 562 So. 2d 680, 683 (Fla. 1990).

18. *Hayes v. Spartan Chem. Co.*, 622 So. 2d 1352, 1354 (Fla. 2d Dist. Ct. App. 1993).

19. Howie & Sanger, *supra* note 1, at 4.

20. *Tampa Drug Co. v. Wait*, 103 So. 2d 603, 607 (Fla. 1958).

21. *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033, 1036 (Fla. 4th Dist. Ct. App. 1994).

standard renders the warning inadequate and the product seller or manufacturer liable.²²

The wording or language of a product warning must be of such intensity as to attract the attention of a product user and be commensurate with the potential danger in using the product.²³ For example, a warning label on a chemical sealant was considered inadequate because it “did not particularly call attention to itself” by its composition, type, or color, and failed to communicate with sufficient intensity the severity of the danger in the use of the sealant.²⁴

A warning may also be considered inadequate by virtue of its location.²⁵ Where the driver of a tractor was killed when the tractor he was operating rolled over, a warning in the user’s manual would not preclude a finding that the manufacturer was liable for failing to adequately warn.²⁶ The court explained that just because a warning in an instruction manual is adequate, a jury could find a manufacturer liable for failing to warn because the warning was not affixed to the tractor.²⁷ Further, the fact that a warning complies with industry guidelines for warnings does not automatically render the warning adequate.²⁸

Finally, both a negligent and strict liability failure to warn case can be based on the failure of a manufacturer to warn of potential dangers from the misuse of a product. A manufacturer must warn of a product danger, which could cause injury, if the misuse of the product is foreseeable.²⁹

From the foregoing, it would be quite easy for trial lawyers and judges to conclude that with so many overlapping principles, a negligent failure to warn and a strict liability failure to warn claim are identical and interchangeable.³⁰ But if Florida trial lawyers and judges so concluded, they would be fooled.

III. THE DISTINCTION BETWEEN NEGLIGENT FAILURE TO WARN AND STRICT LIABILITY FAILURE TO WARN CAUSES OF ACTION

The key to understanding the real difference between negligent and strict liability failure to warn claims rests with an analysis of the seller’s or

22. Brito v. Palm Beach, 753 So. 2d 109, 113 (Fla. 4th Dist. Ct. App. 1998).

23. Radiation Tech., Inc. v. Ware Constr. Co., 445 So. 2d 329 (Fla. 1983); Am. Cyanamid Co. v. Roy, 466 So. 2d 1079, 1082 (Fla. 4th Dist. Ct. App. 1983).

24. Roy, 466 So. 2d at 1082–83.

25. Brown, 647 So. 2d at 1035.

26. *Id.*

27. *Id.*

28. *Id.*

29. High v. Westinghouse Elec. Corp., 610 So. 2d 1259, 1262 (Fla. 1992).

30. See PRODUCTS LIABILITY, *supra* note 6, at § 2.4.

manufacturer's knowledge of product risks.³¹ Negligent failure to warn is just that, a negligence cause of action.³² Therefore, a product seller or manufacturer must warn of product risks if a reasonably prudent product seller or manufacturer would supply such a warning.³³ Implicit in this rule of law is the requirement that a reasonably prudent product seller need only warn about product risks known to such seller or those kinds of product risks which a reasonably prudent product seller should have known about.³⁴ A reasonably prudent product seller or manufacturer is considered an expert with expert knowledge about its own product.³⁵ Therefore, if a reasonably prudent product seller could reasonably foresee injury to a product user, however rare, the product seller or manufacturer has a duty to warn.³⁶

In contrast, strict liability is not concerned with the reasonably prudent seller or manufacturer standard.³⁷ Strict liability does not require an evaluation of the product seller or manufacturer's conduct.³⁸ A product seller can be found strictly liable for failing to warn even though the seller was completely non-negligent.³⁹ Under Florida law, a prima facie case of strict liability does not require a showing of negligence.⁴⁰ In a strict liability failure to warn case, the product seller will be liable for failing to warn about a product risk that was known or knowable in light of the prevailing and generally recognized best scientific information available at the time of product manufacture and sale.⁴¹

Florida law recognizes that absent the requirement that the product seller have actual or constructive knowledge of product risk, a strict liability failure to warn claim would render a product seller an insurer.⁴² Florida clearly rejects imposing strict liability on a product seller for failing to warn of product risks it could not have known about.⁴³ Further, Florida rejects the theory of imputing knowledge of product risks which were not knowable at the time of product manufacture and sale to the product seller to set up a

31. 3 Fla. Torts (MB) § 70.21 [2][d][v] (2000).
32. See 41A FLA. JUR. 2D *Products Liability* § 19 (1995).
33. See *id.*
34. See 3 Fla. Torts (MB) § 70.21 [2][d][i] (2000).
35. *Advance Chem. Co. v. Harter*, 478 So. 2d 444, 448 (Fla. 1st Dist. Ct. App. 1985).
36. *Id.*
37. *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167, 1172 (Fla. 4th Dist. Ct. App. 1998).
38. *Id.*
39. *Jennings v. BIC Corp.*, 181 F.3d 1250 (11th Cir. 1999); *Ferayorni*, 711 So. 2d at 1171.
40. *Ferayorni*, 711 So. 2d at 1172.
41. *Id.*
42. *Id.*
43. *Id.*

strict liability claim.⁴⁴ Finally, it is important to note that a product seller is required to warn only of those risks which are known or discoverable based on the prevailing and best scientific information available, as opposed to every risk which might be suggested by some obscure piece of research or information.⁴⁵

The foregoing distinction in Florida law between a negligent and a strict liability failure to warn claim can be traced to the *Ferayorni v. Hyundai Motor Co.*⁴⁶ case. This 1998 Fourth District Court of Appeal case relied on and adopted the reasoning of the Supreme Court of California in *Anderson v. Owens-Corning Fiberglas Corp.*⁴⁷ In *Anderson*, the Supreme Court of California was concerned that applying strict liability to a failure to warn cause of action would reduce the product seller to an insurer.⁴⁸ It is this concern, shared by the *Ferayorni* court, that prompted the subtle but substantial difference in the knowledge required of a product seller in a negligent failure to warn claim and a strict liability failure to warn claim.⁴⁹

IV. PROPOSED JURY INSTRUCTIONS

The consequence of Florida recognizing the distinction between a negligent and strict liability failure to warn cause of action is that a plaintiff who pleads both claims is entitled to two jury instructions.⁵⁰ As the *Ferayorni* court noted, the giving of a negligent failure to warn jury instruction does not satisfy the need for a strict liability failure to warn jury instruction.⁵¹ Although there exists *Florida Standard Jury Instructions* for negligence in general,⁵² and product liability for manufacturing and design defect claims,⁵³ *Ferayorni* specifically points out that, not only is there no jury instruction for a negligent failure to warn claim, but also that “[t]he Committee on Standard Jury Instructions in Civil Cases has not provided standard instructions on any theory of strict liability duty to warn.”⁵⁴ *Florida Standard Jury Instructions* Product Liability IV, comment 2, specifically states, “[p]ending further development of Florida law, the committee reserved the question of whether there can be strict liability for failure to

44. *Id.*

45. *Ferayorni*, 711 So. 2d at 1172.

46. *Id.* at 1167.

47. 810 P.2d 549 (Cal. 1991).

48. *Id.* at 552–53.

49. *Ferayorni*, 711 So. 2d at 1170.

50. *Id.*

51. *Id.*

52. Fla. Standard Jury Instructions in Civil Cases § 4.1 (1998).

53. *Id.* §§ PL 4, 5.

54. *Ferayorni*, 711 So. 2d at 1171.

warn and, if so, what duty is imposed on the manufacturer or seller.”⁵⁵ The *Ferayorni* case appears to have resolved this question.⁵⁶ Now, all that is needed is the publication of standard jury instructions for both types of claims. The following are proposed standard jury instructions for a negligent failure to warn and strict liability failure to warn cause of action.⁵⁷

NEGLIGENT FAILURE TO WARN

The issue for your determination on the claim of (claimant) against (defendant) is whether (defendant) was negligent [in failing to warn of the dangers of (describe product)] [or] [in failing to give an adequate warning of the dangers of (describe product)].

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful [manufacturer] [or] [distributor] would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. A reasonably careful [manufacturer] [or] [distributor] would possess expert knowledge in the area of (describe product). A reasonably careful [manufacturer] [or] [distributor] would warn of the dangers in using a product if [he] or [she] or [it] knew of, or should have known of the dangers, and should have foreseen (claimant’s) use of (describe product), and (claimant’s) particular injury, however rare. A product is considered dangerous when the risk of injury to the user of the product is not obvious.

A warning is inadequate if its [wording is inadequate] [or] [its location is inadequate] [or] [if the manner in which it was conveyed is inadequate]. The wording is inadequate unless it makes apparent the product’s potentially harmful consequences and contains specific language directed at the significant dangers caused by a failure to use the product in the prescribed manner. The location of a warning is

55. Fla. Standard Jury Instructions in Civil Cases §§ PL 1–5, cmt. 2. (1998).

56. See *Ferayorni*, 711 So. 2d at 1172.

57. The idea for this article actually grew out of a writing assignment I gave to the law students in my Product Liability class. As is almost always the case, my students exceeded my expectations in drafting model jury instructions. In particular, one student, Mary Clarke, J.D. Nova Southeastern University Shepard Broad Law Center, 2000, distinguished herself in this writing assignment. In fact, the proposed jury instructions in this article are taken in large part from Ms. Clarke’s writing assignment. Therefore, Ms. Clarke deserves all of the credit for putting together these proposed jury instructions. Any mistakes or inaccuracies are clearly due to my attempt to add and revise her draft. By the way, she deserved and received an “A” grade for her work on these instructions.

inadequate if it is not likely to reach the user. The manner of the warning is inadequate unless it is of such intensity to cause a reasonable person to exercise caution, for his or her own safety, equal to the potential danger.

PL

PRODUCT LIABILITY

The issues for your determination on the claim of (claimant) against (defendant) are whether the (describe product) [sold] [supplied] by (defendant) was defective when it left the possession of (defendant) and, if so, whether such defect was a legal cause of [loss] [injury] [or] [damage] sustained by (claimant or person for whose injury claim is made). A product is defective

PL 6 strict liability (warning defect)

if due to [a failure to provide a warning] [and] [or] [an inadequate warning] the product does not adequately warn of a particular risk that was known or knowable in light of the generally recognized and best scientific and medical information available at the time of manufacture and distribution and the product is expected to and does reach the user without substantial change affecting that condition.

A warning is inadequate if its [wording is inadequate] [or] [its location is inadequate]. The warning's wording is inadequate unless it makes the potential harmful consequences apparent and contains specific language directed at the significant risks or dangers caused by a failure to use the product in the prescribed manner. The location of a warning is inadequate if it is not likely to reach the user. The manner of the warning is inadequate unless it is of such intensity to cause a reasonable person to exercise caution equal to the potential danger.

If the greater weight of the evidence does not support the claim of (claimant), your verdict should be for (defendant).

[However, if the greater weight of the evidence does support the claim of (claimant), then your verdict should be for

(claimant), and then you shall consider the defense raised by (defendant).] *[However, if the greater weight of the evidence does support the claim of (claimant), then you shall consider the defense raised by (defendant). On the defense, the issues for your determination are (state defense issues).]

* “Greater weight of the evidence” means the more persuasive and convincing force and effect of the entire evidence in the case.

NOTE ON USE

1. When defense issues are to be submitted, use the charge contained within the second pair of brackets. In other cases, use the first bracketed sentence instead.

2. The committee intends for part PL6 of this instruction to be used in conjunction with the current Product Liability Florida Model Jury Instruction, and should be inserted after PL5 (strict liability).

COMMENT

1. *Inherently Dangerous*. The plaintiff is not required to show that the product was inherently dangerous to maintain a strict liability for failure to warn cause of action because whether or not a product is “inherently dangerous” is not determinative of the applicability of a strict liability cause of action. *Brown v. Glade & Grove Supply, Inc.*, 647 So. 2d 1033 (Fla. 4th Dist. Ct. App. 1994); *Ferayorni v. Hyundai Motor Co.*, 711 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1998).

2. *Knowledge*. Florida law requires a showing of knowledge for a strict liability failure to warn claim. *Ferayorni v. Hyundai Motor Co.*, 771 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1998). However, the theories of negligent failure to warn and strict liability failure to warn remain distinct and separate because the required showing of knowledge is less burdensome for a strict liability action—the plaintiff need not show that the manufacturer’s or distributor’s conduct fell below the standard of care. *Id.* Rather, the plaintiff need only show that the risk of danger was known or knowable in light of the generally recognized and best scientific and medical information available at the time of manufacture and distribution. *Id.*

3. *Risk-utility*. The committee recommends that no charge be given regarding the risk of the danger in relation to the utility of the product on the issue of failure to warn because the cost of precaution, the warning label, is

so minimal that it virtually never outweighs the likelihood of harm and severity of harm from failing to provide such a warning.

4. *Adequacy of Warning.* The committee finds that the adequacy of a warning as explained by *American Cyanamid Co. v. Roy*, 466 So. 2d 1079 (Fla. 4th Dist. Ct. App. 1984), should be addressed in the jury instructions for a strict liability failure to warn case.

V. CONCLUDING ANALYSIS OF PROPOSED JURY INSTRUCTIONS

The two key aspects of the proposed negligent and strict liability standard jury instructions are that they substantively confirm and guide trial lawyers and trial judges regarding Florida law and mechanically follow the same format as the other standard jury instructions.

The negligent failure to warn jury instruction mirrors the definition of negligence found in the *Florida Standard Jury Instructions in Civil Cases* section 4.1, and accurately advises jurors that negligence, in the context of product warnings, can be both in the failing to give a warning or in giving an inadequate warning. Further, the proposed jury instruction avoids any mention of “inherently dangerous” in reference to a product risk or danger because that term is outdated and no longer applicable in Florida.⁵⁸ Instead, the proposed jury instruction excludes obvious product dangers from the product sellers’ duty to warn.⁵⁹

The second part of the negligent failure to warn instruction, which is also present in the strict liability failure to warn jury instruction, is essential for jurors to be able to measure the adequacy of a warning. Without being either plaintiff or defendant friendly, this part of the jury instruction leaves the determination of the reasonableness and sufficiency of the product warning to the jury, where it belongs. The breakdown of the jury instruction into the wording, location, or manner of a product warning enables a jury to consider any one of the three inadequacies as the basis for liability.

The proposed instruction avoids any juror confusion about whether product warnings include directions or instructions on the use of a product by defining a warning in terms of product dangers. Further, the proposed instruction shields the product seller from liability for the unintended, unforeseeable misuse of a product by defining product dangers in terms of using a product in the prescribed manner. Finally, the proposed jury instructions use of the words “wording,” “location,” “manner,” and “intensity” is a purposeful choice to use and define legal concepts in plain and straightforward language.

58. *Advance Chem. Co. v. Harter*, 478 So. 2d 444, 447 (Fla. 1st Dist. Ct. App. 1985).

59. *Sanders v. Am. Body Armor & Equip., Inc.*, 652 So. 2d 883 (Fla. 1st Dist. Ct. App. 1995).

The proposed strict liability failure to warn jury instruction not only incorporates previous language concerning the adequacy of a product warning, but also patterns the *Product Liability Standard Jury Instructions* already adopted by the Supreme Court of Florida. Therefore, the language of the proposed instruction is consistent with the previously adopted jury instructions. The critical addition to this proposed jury instruction is the knowledge requirement that distinguishes a negligent failure to warn cause of action from the strict liability failure to warn cause of action.

The adoption of these proposed jury instructions does not amount to a reform of product liability law in Florida. Rather, such adoption provides needed guidance to trial lawyers and trial judges and ends an unhealthy and needless debate.

“This New-Born Babe an Infant Hercules”: The Doctrine of “Inextricably Intertwined” Evidence in Florida’s Drug Wars

Milton Hirsch*

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I. INTRODUCTION

The locution “inextricably intertwined,” an alliterative coupling of adverb and adjective purporting to justify the introduction at a criminal trial of evidence of crimes for which the defendant is uncharged, appears nowhere in Magna Carta. It is unmentioned in connection with the reforms of Edward I, or those following the restoration of the Stuarts, or those associated with the enthronement of William and Mary. Baron Gilbert, in his seminal work on evidence in 1726, has nothing to say about it. It is not to be found in the evidentiary treatises of Starkie, Phillips, or Thayer. The *Federal Rules of Evidence* make no express reference to it. It is a fair summary of the history of the law of evidence to say that, until about the year 1980, no one thought that evidence of uncharged crimes could be rendered admissible by the simple expedient of describing it as “inextricably intertwined” with evidence of the crime or crimes actually pleaded in the indictment.

The past two decades have seen a jurisprudential revolution. During that time, state and federal appellate courts having jurisdiction over criminal litigation in Florida have authored some two hundred opinions considering

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the doctrine of “inextricably intertwined” evidence.¹ Most of those federal opinions are in drug cases, and in those cases, the demised evidence is almost always found to be admissible because “inextricably intertwined.” It is a fair summary of the history of the law of evidence to say that, since about the year 1980, evidence of uncharged crimes can be rendered admissible by the simple expedient of describing it as “inextricably intertwined” with evidence of the crime or crimes actually pleaded in the indictment.

It is difficult to view this doctrinal *volte face* as anything but result-oriented jurisprudence. This powerful neoteric rule of “inextricably intertwined” evidence—“This new-born babe an infant Hercules”²—supports the admission of highly prejudicial and otherwise inadmissible other-crimes evidence. It enables the prosecution to circumvent the procedural obstacles set up by Rule 404(b)³ governing the admissibility of

1. As discussed *infra* Part IV, the term “inextricably intertwined” was spawned and continues to be nurtured in Eleventh (former Fifth) Circuit narcotics cases. The doctrine is an occasional visitor to other jurisdictions, where it may be cited in non-drug cases as well as drug cases. *See, e.g.*, *United States v. Carboni*, 204 F.3d 39 (2d Cir. 2000) (business crimes); *United States v. Shkolir*, 182 F.3d 902 (2d Cir. 1999) (securities, mail, and wire fraud); *United States v. Gonzalez*, 110 F.3d 936 (2d Cir. 1997) (possession of firearm by convicted felon); *United States v. King*, 126 F.3d 987 (7th Cir. 1997) (tax crime); *United States v. Mundi*, 892 F.2d 817 (9th Cir. 1989) (fraud and related crimes); *United States v. Rodriguez-Estrada*, 877 F.2d 153 (1st Cir. 1989) (business crimes). The focus of this article, however, is on the state and federal courts having jurisdiction over Florida, in support of the thesis that the expansion by the Eleventh Circuit of the “inextricably intertwined” doctrine is best understood as a judicial contribution to the “war on drugs.”

2. EDMOND ROSTAND, *CYRANO DE BERGERAC* 105 (Hooker transl., Bantam Books) (“*Ce nouveau-ne, Madame, est un petit Hercule*”).

3. Rule 404(b) of the *Federal Rules of Evidence* provides: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

Section 90.404 of the *Florida Statutes*, the state law congener to Rule 404(b), provides in pertinent part:

OTHER CRIMES, WRONGS, OR ACTS. —

(a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

prior similar fact evidence. It prompts conviction for crimes of which an accused may be charged and innocent, on the basis of evidence of crimes of which the accused is uncharged but may be guilty. It facilitates prosecution of the "war on drugs" by depriving the defendant of one of the ancient and honorable premises of the Anglo-American system of justice: that the jury sits in judgment on the act a man is alleged to have done, not on the life a man is alleged to have led.⁴

II. THE COMMON LAW *RES GESTAE* RULE

Common law courts viewed uncharged crimes evidence as irrelevant and the introduction of such evidence as unfair, the defendant having been afforded no notice by the indictment or otherwise that such evidence would be offered.⁵

The [common law] rule which requires that all evidence which is introduced shall be relevant to the guilt or the innocence of the accused is applied with considerable strictness in criminal proceedings. . . . [The defendant] can with fairness be expected to come into court prepared to meet the accusations contained in the indictment only, and, on this account, all the evidence offered by

mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

(b) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.

2. When the evidence is admitted, the court shall, if requested, charge the jury on limited purpose for which the evidence is received and is to be considered. After the close of evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

FLA. STAT. § 90.404 (2000); see discussion *infra* notes 27–28, 55, and 255.

4. "[A] defendant starts his life afresh when he stands before a jury, a prisoner at the bar." *People v. Zackowitz*, 172 N.E. 466, 468 (N.Y. 1930).

5. H.C. UNDERHILL, *A TREATISE ON THE LAW OF CRIMINAL EVIDENCE* (1898) § 87, at 107.

the prosecution should consist wholly of facts which are within the range and scope of its allegations.⁶

Apart from the inherent unfairness of obliging an accused to defend against charges of which he has had no notice, the introduction of uncharged crimes evidence was viewed at common law as resulting in damning prejudice. Jurors:

[W]ill very naturally believe that a person is guilty of the crime with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character. And, it cannot be said with truth that this tendency is wholly without reason or justification⁷

To the general rule, “applied with considerable strictness,” that no evidence could be offered of uncharged crimes, the common law made certain exceptions. One such exception was a manifestation of the *res gestae* rule, that many-headed hydra. When the uncharged crimes evidence was part of the *res gestae*—when “several crimes are intermixed, or blended with one another, or connected so that they form *an indivisible criminal transaction, and a complete account of any one of them can not be given without showing the others . . .*”⁸—then the uncharged crimes evidence was admissible. No single trope or form of words (other than the unhelpful *res gestae*) was used to state the test for admissibility. The general idea, however, was, as stated by Underhill: the demised other-crimes evidence must be “indivisible” from the evidence of the charged crimes, such that the tale of the charged offenses could not be told without relating the evidence of the uncharged offenses.⁹ Courts allowed evidence of an uncharged crime only if it was “part and parcel of the same transaction” as the charged crime,

6. *Id.*; see also 1 CROOM-JOHNSON & BRIDGMAN, TAYLOR ON EVIDENCE § 326, at 228 (1931):

This rule . . . is founded on common sense and common justice . . . for, as one of the chief objects of an indictment is to afford distinct information to the prisoner of the specific charge which is about to be brought against him, the admission of any evidence of facts unconnected with that charge, would be clearly open to the serious objection of taking the prisoner by surprise. No man should be bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to submit to such an ordeal.

Id.

7. UNDERHILL, *supra* note 5, § 87, at 107.

8. *Id.* § 88, at 108–09 (emphasis added).

9. *Id.*

or “so directly and immediately connected with the crime for which the [defendant] was on trial”¹⁰ that it was “impossible to give a complete or intelligent account of the crime charged without referring to the other crime.”¹¹

When a collateral offense, or, as it is sometimes called, an extraneous crime, forms part of the *res gestae*, evidence of it is not excluded by the fact that it is extraneous. As an isolated or disconnected fact, it is not relevant . . . but when offered under the exceptions to the rule, it becomes of substance with the charge on trial.¹²

“Evidence may be given, not only of the act charged itself, but of other acts so closely connected therewith, as to form part of one chain of facts which could not be excluded without rendering the evidence unintelligible—part in fact of the *res gestae*.”¹³ Lord Ellenborough stated the rule as follows: “If several and distinct offences [sic] blend themselves with one another, the detail of the party’s whole conduct must be pursued.”¹⁴ Wigmore limited such evidence to “other criminal acts which are an inseparable part of the whole deed.”¹⁵ He explained:

Suppose that A is charged with stealing the tools of X; the evidence shows that a box of carpenter’s tools was taken, and that in it were the tools of Y and Z as well as of X; here we are incidentally proving the commission of two additional crimes, because they are necessarily interwoven with the stealing charged, and together form one deed. The other two crimes are not offered as affecting A’s character, nor do they affect his character; because all were done, if at all, as parts of a whole, and if we believe or disbelieve his doing of one part, we believe or disbelieve his doing of all. The two other crimes do not affect his character in the way forbidden by the reasons of the character-rule . . . *i.e.* by way of undue prejudice, in that we might condemn him now, though innocent of the act charged, because we are prejudiced by his former crimes; nor by

10. Killins v. State, 9 So. 711, 715 (Fla. 1891).

11. Nickels v. State, 106 So. 479, 489 (Fla. 1925).

12. 1 FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES § 33, at 121 (Hilton, 10th ed. 1912) (footnotes omitted) (collecting cases); *see also* State v. Wilson, 233 P. 259, 261 (Or. 1925).

13. HAWKE, ROSCOE’S CRIMINAL EVIDENCE 101 (1928).

14. The King v. Ellis, 6 Barnewall & Cresswell 145, 147 (K.B. 1826).

15. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 218, at 271 (1904) (emphasis omitted).

way of unfair surprise, in that he cannot be prepared to defend himself against evidence of former misconduct of which he had no notice. While thus, on the one hand, these concomitant crimes are not obnoxious to the reasons of the character rule, so also they are necessarily gone into in proving the entire deed of which the act charged forms a part. There is therefore not only a necessity for proving them, but no objection against proving them.¹⁶

*Killins v. State*¹⁷ and *Oliver v. State*¹⁸ are substantially similar to one another. In each case, the defendant shot one person to death, and at the same time shot at or menaced a bystander, who later testified against him.¹⁹ Applying the common law *res gestae* rule, the *Oliver* court explained that “[t]he shooting was done in rapid succession, and, according to the son’s version of the affair, the altercation preceding it had commenced between him and the accused. It was thus all one and the same transaction, and the testimony was competent.”²⁰ The defendant in *Nickels v. State*²¹ was charged with rape.²² The testimony of the victim necessarily made incidental reference to conduct by the defendant that might have given rise to charges of robbery or burglary:

When attacked, the victim resisted her assailant with the utmost vigor and determination and a violent struggle between them occurred in the bathroom of the victim’s home, in which room the actual attack was precipitated and consummated. The testimony indicates that the victim was wearing, among other things, two rings. During the course of the struggle, the assailant forcibly removed one of these rings, but was unable to remove the other, a wedding ring. The struggle continued unabated until unconsciousness on the part of the victim intervened as her assailant was about to consummate his carnal attack upon her. Immediately after the accomplishment of the latter purpose and while the victim lay upon the bathroom floor, her hands bound by a towel, her assailant visited other parts of the house where he procured several other articles of jewelry and personal paraphernalia. After thus occupying himself for about ten minutes,

16. *Id.*

17. 9 So. 711 (Fla. 1891).

18. 20 So. 803 (Fla. 1896).

19. In *Killins*, the witness was the decedent’s mother; in *Oliver*, the decedent’s son.

20. *Oliver*, 20 So. at 804.

21. 106 So. 479 (Fla. 1925).

22. *Id.* at 481.

he returned to the bathroom where the victim still lay, and after speaking briefly with her there, fled the scene.²³

The court quite properly concluded that testimony regarding the taking by the defendant of the wedding ring, as well as “other articles of jewelry and personal paraphernalia,” was within the scope of the *res gestae* rule and therefore admissible.

Thus the common law drew a firm line between other-crimes evidence that was truly inextricable from evidence of crimes charged, and evidence that was merely adminicular.²⁴ Evidence of uncharged misconduct was admissible only when it could not be elided from the narrative of the charged misconduct without leaving that narrative confusing, incomplete, or incomprehensible. Evidence of uncharged misconduct was not admissible, however, simply because it provided the prosecution with narrative depth or better story telling. To fall within the *res gestae* rule, the demised evidence must be truly essential to the presentation of the evidence in chief. If the evidence in chief were comprehensible and told a complete tale without the other-crimes evidence, then the other-crimes evidence would be inadmissible, even if it rounded out the prosecution’s case.

This common law *res gestae* rule was narrow in its scope and infrequent in its application.²⁵ An unremarkable caterpillar, it languished for centuries. But when in 1979 it burst from its chrysalis, what emerged was not a butterfly but a bird of prey named “inextricably intertwined.”

III. SIMILAR CRIME EVIDENCE

Of course the *res gestae* rule was not the only provision made by the common law for the admission of evidence of uncharged crimes. Long before the adoption of Rule 404(b)—indeed long before the codification of rules of evidence—the common law of Florida, as elsewhere, recognized that evidence of uncharged crimes might be admitted for the purposes set out in Rule 404(b) and section 90.404 of the *Florida Statutes*: to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”²⁶

23. *Id.*

24. I have borrowed this term from the jurisprudence of the ecclesiastical courts, because I can find no term in our common law jurisprudence that fits my meaning so precisely. Adminicular evidence bolsters and corroborates the principal evidence. It is intertwined, but not inextricably so. It confirms, fortifies, and vivifies the principal evidence; but the principal evidence is capable of being presented without it.

25. See UNDERHILL, *supra* note 5, § 87; see also WIGMORE, *supra* note 15, § 218 n.1.

26. FED. R. EVID. 404(b); FLA. STAT. § 90.404(2)(a) (2000); see, e.g., Nickels v. State, 106 So. 479, 489 (Fla. 1925) (admitting other-crimes evidence “to establish the identity

Codification brought important limitations on the power and utility of such similar crime evidence. The prosecution became bound to provide timely notice of its intent to offer such evidence at trial.²⁷ The defense could demand a limiting instruction at the time the evidence was admitted, and again as part of the court's charge to the jury.²⁸ Courts became obliged to engage in a balancing test under Rules 404 and 403,²⁹ weighing probative value against unfair prejudice, before admitting such evidence.³⁰ At a time when prosecutorial legions were clamoring for a doomsday machine with

of the person committing the crime laid in the indictment"); *Ryan v. State*, 92 So. 571, 573 (Fla. 1922) (admitting other-crimes evidence "as tending to show the defendant's state of mind shortly after he had [committed the charged crime], and the intent with which the act was done. It was admitted as tending to show a criminal intent in [committing the charged crime], malice and premeditation."); *West v. State*, 28 So. 430, 432 (Fla. 1900) (allowing evidence of other crimes to show "purpose"); *Roberson v. State*, 24 So. 474, 475-76 (Fla. 1898) (permitting evidence of spoliation to show guilty knowledge); *Oliver v. State*, 20 So. 803, 805 (Fla. 1896) (admitting evidence of uncharged crimes to "show the animus of the defendant"); *Killins v. State*, 9 So. 711, 715 (Fla. 1891) (holding uncharged crimes evidence admissible to "show the vicious intent, the *animus*, by which the defendant was actuated . . ."); *see generally Williams v. State*, 110 So. 2d 654 (Fla. 1959).

27. Section 90.404(2)(b) of the *Florida Statutes* requires the prosecution "no fewer than 10 days before trial . . . [to] furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information." FLA. STAT. § 90.404(2)(b)1 (2000). Rule 404(b) of the *Federal Rules of Evidence* was amended in 1991 to require "reasonable notice in advance of trial . . . of the general nature of any such evidence [the prosecution] intends to introduce at trial." FED. R. EVID. 404(b). Previously, some federal district courts had enforced a notice requirement by custom, court order, or local rule. *See, e.g., S.D. Fla. Local R. 88.10* (obliging the prosecution to "advise the defendant of its intention to introduce during its case in chief proof of evidence pursuant to Rule 404(b)," which advice is to be given "not later than fourteen (14) days after the arraignment").

28. Section 90.404(2)(b)2 of the *Florida Statutes* provides:

When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

FLA. STAT. § 90.404(2)(b)2 (2000).

29. Rule 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

30. *See, e.g., United States v. Beechum*, 582 F.2d 898 (5th Cir. 1979). *Beechum*, for many years the cynosure of Rule 404(b) analysis in the Fifth and later the Eleventh Circuit, was decided the same year the Fifth Circuit decided *Aleman*. *See United States v. Aleman*, 592 F.2d 881 (5th Cir. 1979).

which to wage the war on drugs, one of their principal existing weapons, evidence of prior similar crimes, was being stripped of much of its firepower. Then, in 1979, the Fifth Circuit authored its opinion in *United States v. Aleman*.³¹

On January 13, 1978, DEA Agent Castro arrested two individuals named Vela and Ramirez for the sale of heroin.³² Eleven days later, DEA Agent Reina, acting in an undercover capacity, met with Aleman to negotiate a purchase of cocaine.³³ In the course of that meeting, Aleman made reference to the arrests of Vela and Ramirez, and indicated that he had attempted to help Vela and Ramirez sell heroin.³⁴ At the conclusion of the meeting, Aleman handed Reina a sample of cocaine.³⁵

Aleman, Vela, and others were charged in a multi-count indictment with crimes relating to the distribution of heroin.³⁶ There were no charges involving cocaine.³⁷ At trial, however, Agent Reina testified to his conversation with Aleman about cocaine, and made reference to the cocaine sample Aleman had provided to him.³⁸ On appeal, Aleman assigned the admission of this evidence as error, in that it was evidence of an uncharged crime not properly within the scope and purpose of Rule 404(b).³⁹ The court of appeals, however, held that a Rule 404(b) analysis was inapplicable to other-crimes evidence where, as here, the other-crimes evidence and the evidence used to prove the crime charged are inextricably intertwined.⁴⁰

If by use of the trope “inextricably intertwined” the court meant to invoke the common law *res gestae* rule, its statement of the law was no doubt correct. Other-crimes evidence that is truly inextricable from, and not merely adminicular to, the principal evidence is indeed admissible without regard to the limitations of Rule 404(b). By way of illustrating this principle, the *Aleman* court posited the case of a “person [who] breaks into a house, murders the occupants, and steals a television set.”⁴¹ Undoubtedly, evidence of the unlawful taking of the TV set would be admitted at a trial in which only the homicides were charged, just as evidence of the unlawful taking of jewelry and other personal effects was admitted at the trial in

31. 592 F.2d 881 (5th Cir. 1979).

32. *Id.* at 883.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Aleman*, 592 F.2d at 883.

37. *Id.*

38. *Id.* at 884.

39. *Id.*

40. *Id.* at 885.

41. *Aleman*, 592 F.2d at 885.

Nickels in which only the rape was charged.⁴² The explanation given by the *Aleman*⁴³ court for its ruling seems to fall within the rationale of the common law *res gestae* rule:

Reina's testimony would have been incomplete and confusing had he not been able to explain how, eleven days after Ramirez and Vela had been arrested for heroin dealing, he and Aleman came to discuss Aleman's participation with Ramirez and Vela in the distribution scheme. It would have detracted from the search for truth to require that Reina attempt to testify without mentioning the purpose of the meeting and what occurred in it.⁴⁴

There were, however, troubling suggestions that the *Aleman* court was departing from, or not even relying upon, the common law *res gestae* rule. By way of case authority, *Aleman* cites not to the pre-codification cases construing the *res gestae* rule, but to a single case from the Eighth Circuit: *United States v. Calvert*.⁴⁵

The defendant in *Calvert* was charged with insurance fraud.⁴⁶ At trial, witnesses testified to other crimes or bad acts engaged in by Calvert, which misconduct related in various ways and degrees to the crimes charged.⁴⁷ The Eighth Circuit held that this evidence was properly admitted under a variety of rationales, none of which seem to adumbrate the *Aleman* court's "inextricably intertwined" holding. The *Calvert* court began by discussing the principles of the then newly enacted Rule 404(b).⁴⁸ The closest that the *Calvert* court gets to the notion of "inextricably intertwined" is in its

42. *Nickels v. State*, 106 So. 479, 494 (Fla. 1925).

43. *Aleman*, 592 F.2d at 885.

44. *Id.* Whether the *Aleman* court applied the common law *res gestae* rule appropriately or not is a question about which reasonable minds may differ. Presumably the trial testimony of Agent Reina took something like the following form: I was conducting an undercover investigation in cocaine trafficking; in that capacity I met with Aleman; in the course of our meeting he made reference to the heroin trafficking operation of Ramirez and Vela, whom I knew had been arrested eleven days previously; Aleman made certain statements acknowledging his complicity in that heroin trafficking operation; when we parted company, Aleman gave me a sample of cocaine to encourage me to purchase cocaine from him.

A strict application of the *res gestae* rule would have obliged Reina elide to the first and last facts, *viz.*, that he was conducting an investigation into cocaine trafficking, and that Aleman gave him a sample of cocaine. Query whether such a redaction would have rendered Reina's testimony incomplete, confusing, or misleading.

45. 523 F.2d 895 (8th Cir. 1975).

46. *Id.* at 899–900.

47. *Id.* at 905–06.

48. *Id.* at 906–07.

characterization of some of the other-crimes evidence as constituting “integral parts of the very crime for which [Calvert] was convicted.”⁴⁹ But in the same breath the court, analogizing this misconduct to “the ‘casing’ of several banks before robbing the most suitable target,” held the evidence “properly admitted as evidence of preparation and planning.”⁵⁰

Calvert seems an odd choice as a foundation for the *Aleman* court’s “inextricably intertwined” doctrine. Perhaps by way of acknowledging the problem, *Aleman* conducts a lengthy Rule 404(b) analysis, purporting to justify the admission of the other-crimes evidence on that basis as well as on the “inextricably intertwined” theory.⁵¹ This “either/or” jurisprudence serves no good purpose. Their first-blush similarity notwithstanding, Rule 404(b) evidence and “inextricably intertwined” evidence in the true *res gestae* sense are very different things. Evidence under Rule 404(b) is admitted only for certain limited purposes, and the jury must be so instructed; failure to instruct violates the prohibition against adducing evidence simply to damn the defendant’s character. But other-crimes evidence that is truly inextricable from evidence of the charged crimes is admitted without limitation or instruction. It may be received, irrespective of any bearing on character, and yet not as evidential of design, motive, or the like.⁵² Evidence offered under Rule 404(b) is subject to the “probative versus prejudicial” balancing test of Rule 403. But other-crimes evidence that is truly inextricable cannot, as a matter of tautology, be excluded no matter how unfairly prejudicial it may be. “[O]ften . . . the ‘inextricably intertwined’ evidence . . . is extremely, if not ultimately, prejudicial as to the jury’s understanding of the defendant’s guilt. This does not affect the propriety of admitting such evidence.”⁵³ If evidence is genuinely inextricable from the evidence in chief, “the trial judge need not formally weigh its probity [*sic*; probative value] against its potential prejudice,”⁵⁴ because exclusion of such evidence would, by hypothesis, leave the evidence of the charged offenses so exiguous and incomprehensible that it would be impossible to go forward with the trial. It is these distinctions that render the

49. *Calvert*, 523 F.2d at 907.

50. *Id.* (citing Rule 404(b)). Further muddying the analysis, the court then dropped a footnote stating that, in any event, the defendant had failed to object to this particular other-crimes evidence at trial and therefore waived the issue of admissibility. *See id.* at 907 n.12.

51. *See Aleman*, 592 F.2d at 885–86.

52. WIGMORE, *supra* note 15, § 218; *see also* United States v. Leichtman, 742 F.2d 598, 605 (11th Cir. 1984) (because evidence was “inextricably intertwined” rather than 404(b), “the trial judge did not err in refusing defendants’ requested instructions limiting the . . . evidence to proof of motive”).

53. United States v. Foster, 889 F.2d 1049, 1054 (11th Cir. 1989).

54. *Id.* at 1054 n.5.

“inextricably intertwined” doctrine the powerful prosecutorial weapon it has become.⁵⁵

The *Aleman* and *Calvert* opinions seem to give little, if any, consideration to these defining distinctions, treating two very different evidentiary doctrines as if they were variations on a single theme. This sin has been propagated by other courts seizing upon *Aleman’s* holding.⁵⁶

The inapplicability of 404(b)-based jurisprudence to “inextricably intertwined” evidence is apparent in a case involving evidence which is genuinely inextricable. Consider, for example, a stripped-down version of *Nickles*: A woman is assaulted on the street by a man who seeks to pull a diamond ring off her finger. They struggle violently, and the assailant succeeds in ripping the ring from the finger of his victim. He is apprehended some minutes later, but the ring is not in his possession and it is not recovered. He is charged with a single count of aggravated battery.⁵⁷ At trial, the victim testifies, describing the injury done to her finger when the ring was torn off. Defense counsel need not bother objecting that this testimony constitutes evidence of the uncharged crime of strong-arm robbery.⁵⁸ It does indeed, but the testimonial evidence of the strong-arm

55. Another conceptual distinction between 404(b)-type evidence and *res gestae* “inextricably intertwined” evidence that sometimes seems to give courts difficulty has to do with relevance. Rule 404(b) and section 90.404 of the *Florida Statutes* are rules of conditional or limited relevance. See FED. R. EVID. 404; FLA. STAT. § 90.404 (2000). Evidence admitted under these rules is typically deemed relevant for some purposes, but irrelevant for others. By contrast, where “inextricably intertwined” evidence is concerned, relevance is irrelevant. Thus if *probens* A is relevant to the proof of *probandum* X, and if X is material to the issue, A is, as a general rule, admissible; if A cannot be said without also saying B, B becomes admissible as “inextricably intertwined.” And this is so whether or not B is relevant (i.e., probative of X, or of anything else material to the issue). It would be pointless even to consider the relevance or not of B.

56. See, e.g., *United States v. McLean*, 138 F.3d 1398, 1404 (11th Cir. 1998) (suggesting in dicta that any error resulting from introduction of putatively “inextricably intertwined” evidence could be remedied by a jury instruction, because “the use of . . . evidence by the jury under a Rule 404(b) theory or an ‘inextricably intertwined’ theory is not materially different”); *United States v. Utter*, 97 F.3d 509, 514 (11th Cir. 1996) (applying probative value versus unfair prejudice test to “inextricably intertwined” evidence); *United States v. Fortenberry*, 971 F.2d 717, 721 (11th Cir. 1992); *United States v. Foster*, 889 F.2d 1049, 1054 n.5 (11th Cir. 1989); *United States v. Martin*, 794 F.2d 1531, 1533 n.4 (11th Cir. 1986) (other-crimes evidence admitted but jury instructed that “defendants are not on trial for any act or conduct or offense not charged in the indictment”); *United States v. Richardson*, 764 F.2d 1514, 1522 (11th Cir. 1985) (applying probative value versus unfair prejudice test); *United States v. McDowell*, 705 F.2d 426, 429 (11th Cir. 1983); see also *Consalvo v. State*, 697 So. 2d 805, 813–14 (Fla. 1996) (other-crimes evidence properly admitted as “inextricably intertwined,” but held error for prosecutor to argue the evidence in closing).

57. See, e.g., FLA. STAT. § 784.045 (2000).

58. See § 812.13.

robbery is genuinely inextricable (in the common law *res gestae* sense) from the evidence of the crime charged. The defense is not entitled to pretrial notice, under section 90.404 of the *Florida Statutes*, of the prosecution's intent to elicit this testimony.⁵⁹ The defense is as much on notice of the other-crimes evidence as it is of the evidence in chief. It can scarcely be otherwise because the two classes of evidence are, by hypothesis, inextricable. The defense is not entitled to have the jurors instructed that they may receive the other-crimes evidence only for this or that limited purpose. The evidence is properly considered by the jurors without limitation or instruction in their deliberations as to the charge of aggravated battery. The defense is not entitled to a judicial determination whether the probative value of the evidence outweighs its unfair prejudice. Even if the court were to conclude that unfair prejudice outweighed probative value, there would be nothing the judge could do about it. Bowdlerizing the evidence to eliminate or reduce the prejudice would leave the remaining admissible evidence incomprehensible and therefore utterly lacking in probative value.

Conflating the jurisprudence of the common law *res gestae* rule with that of 404(b)-type evidence has no doubt been one factor contributing to the metamorphosis of the meek, mild-mannered *res gestae* rule into the plenipotent "inextricably intertwined" rule. The result is a jurisprudential mare's nest. Did the prosecutor, whether through overwork and inadvertence or in bad faith, fail to give pretrial notice of his other-crimes evidence? Let him, even in midtrial, take refuge in the argument of last resort: the other-crimes evidence is "inextricably intertwined" with the evidence in chief.⁶⁰ Is the judge uncertain whether to admit the proffered evidence as "inextricably intertwined?" Let him compound one error with another, admitting the evidence but instructing the jurors in typically translucent legal argot that they are to consider the evidence only for certain limited purposes. The burdens of Rule 404(b) are dispensed with, the blessings, for the erring prosecutor and the wavering judge, remain.

It is unpleasant to attribute the expansion of the "inextricably intertwined" doctrine to a judicial inability to distinguish between the proper understanding of that doctrine and Rule 404(b); or to a judicial eagerness to enable the prosecution to avoid the procedural limitations with which Rule 404(b) is burdened. It is tempting to attribute the expansion of the "inextricably intertwined" rule to another cause entirely: the common law

59. § 90.404.

60. "[A]t the charge conference... the district court asked whether a 404(b) instruction was necessary. For the first time, the prosecutor put forward the position that the [other-crimes] evidence was admissible because it was 'inextricably intertwined' with the charges in the indictment." *McLean*, 138 F.3d at 1403 (emphasis added). The evidence was admitted, and the ensuing conviction affirmed on appeal. *Id.*

res gestae rule was easy of application as long as courts were concerned only with common law crimes. A murder, rape, or robbery typically is perpetrated in a brief period of time and by a small number of persons. Determining whether evidence of a crime or crimes not charged is truly inextricable and not merely adminicular is a relatively straightforward matter. By contrast, the drug trafficking cases that have come before the federal courts in Florida and elsewhere in the past couple of decades involve crimes such as conspiracy that may persist over the course of months or even years and may involve dozens of coconspirators, named and unnamed. In such cases—so runs the argument—it is a more difficult and complicated matter to determine whether other-crimes evidence is “inextricably intertwined,” and uncertainty should be resolved in favor of a judicial determination of admissibility.

Tempting or not, this argument must be rejected. If a federal indictment is so capacious in its scope that the court is hampered in its ability to make the kinds of evidentiary determinations the law obliges the court to make, then the law provides the remedy. Counts may be severed.⁶¹ Defendants may be severed.⁶² But it is no remedy to deracinate the jurisprudence of the common law *res gestae* rule. Regrettably, however, that is just what courts proceeded to do.

IV. “INEXTRICABLY INTERTWINED” METASTASIZES

The jurisprudence of the “inextricably intertwined” doctrine developed rapidly after the partition of the Eleventh Circuit from the Fifth Circuit.⁶³ The defendant in *United States v. Costa*,⁶⁴ for example, was charged with possession of cocaine with intent to distribute and conspiracy to possess cocaine with intent to distribute.⁶⁵ The case against him consisted principally of the testimony of “flipped” codefendants Cole and Campbell.⁶⁶

Cole sold an ounce of cocaine, obtained from Campbell, to an undercover agent of the Drug Enforcement Agency The agent pressed Cole about obtaining a kilogram of cocaine, and Cole asked Campbell whether it could be procured. After unsuccessfully attempting to acquire the kilogram from another

61. See FED. R. CRIM. P. 8, 14.

62. See *id.*

63. The Eleventh Circuit, in the en banc decision of *Bonner*, adopted as precedent the decisions of the Fifth Circuit decided prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

64. 691 F.2d 1358 (11th Cir. 1982).

65. *Id.* at 1360.

66. *Id.*

source, Campbell reached Costa . . . and learned Costa had a kilogram he wished to sell. After a series of negotiations, first a sample and then the entire kilogram were delivered by Campbell to Cole [and then] to the agent. Upon Cole's arrest she named Campbell as her source, and he was then arrested.

Campbell cooperated with the DEA, naming Costa as his source.⁶⁷

At trial, Cole and Campbell testified to the foregoing events.⁶⁸ In addition, however, Campbell was permitted "to testify concerning his prior relationship with Costa, even though his testimony showed Costa previously had dealt in cocaine."⁶⁹ Campbell testified as to the circumstances in which he came to know Costa as a dealer in cocaine to show why he could expect Costa to provide him with a kilogram of cocaine.⁷⁰ Citing *Aleman*,⁷¹ the *Costa* court held this "prior relationship" testimony to be "inextricably intertwined" with proof of the charged crimes.⁷² "Campbell's testimony about Costa's previous dealing in cocaine was necessary because it formed an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted."⁷³

The *Costa* court's version of the "inextricably intertwined" doctrine cannot be derived from the common law *res gestae* rule. Campbell testified as to the crimes charged that he learned from Cole of the existence of a willing buyer for a kilo of cocaine; that he shopped around for a willing seller, ultimately locating Costa; that after the customary negotiations, Costa delivered first a sample, then the kilo itself, to Campbell; who in turn delivered it to Cole, who delivered it to the DEA agent.⁷⁴ Somewhere during or after the foregoing narrative, the prosecutor apparently succeeded in asking a question such as, "and what made you believe that you might obtain a kilogram of cocaine from Costa?" Campbell apparently succeeded in providing an answer such as, "because I had personal knowledge that on several occasions in the past Costa had engaged in drug transactions." There can be no serious suggestion that it was "impossible to give a complete or intelligent account of the crime charged without referring to the other crime[s]" or that Costa's former drug dealing and his involvement in the charged crimes were "connected so that they form an indivisible criminal

67. *Id.*

68. *Id.*

69. *Costa*, 691 F.2d at 1360-61.

70. *Id.* at 1361.

71. *United States v. Aleman*, 592 F.2d 881 (5th Cir. 1976).

72. *Costa*, 691 F.2d at 1361.

73. *Id.*

74. *Id.* at 1360-61.

transaction, and a complete account of . . . [the latter] cannot be given without showing [the former].”⁷⁵ Campbell’s narrative as to the charged offenses was complete, intelligible, and probative without his testimony as to uncharged antecedent misconduct.

Nor can the *Costa* court’s departure from common law precedent be attributed to an inherent difference between common law crimes and federal drug conspiracies. This was not a multi-defendant case involving dozens of transactions extending over the course of many weeks. The entire case, from the first contact between Cole and the undercover agent to the arrest of Costa, took place during about a three week period in July of 1981.⁷⁶ So far as appears from the opinion, there were no unindicted coconspirators and the prosecution’s case in chief consisted mainly of testimony from Cole and Campbell.⁷⁷

In defense of the admissibility of the evidence of uncharged misconduct, the *Costa* court, apart from citing without comment to *Aleman*, observed that “Campbell’s testimony about Costa’s previous dealing in cocaine was necessary because it formed an integral and natural part of the witness’s accounts of the circumstances surrounding the offenses for which the defendant was indicted.”⁷⁸ How Campbell’s testimony as to Costa’s uncharged crimes was “integral” to his or any other witness’s testimony as to Costa’s charged crimes is left unsaid. If by “integral and natural” the court meant that the demised testimony gave contextual corroboration to the evidence in chief, the court was entirely correct. But evidence which provides such corroboration is adminicular, not inextricable. Its presence fortifies the evidence in chief, but its absence does not cripple the evidence in chief. No doubt the admission of such evidence lent force to the prosecution narrative, but this, without more, does not justify its admission. The *Costa* court provides no more, although its last word on the subject—perhaps most troubling of all—is one of commendation to the trial court for its “sensitivity to the problems arising under Rule 404(b).”⁷⁹

Costa soon proved itself no mere aberration. In a series of Eleventh Circuit cases, “inextricably intertwined” became the talisman by which evidence of uncharged crimes was rendered admissible.

The defendant in *United States v. McCrary*⁸⁰ was an inmate at the Federal Correctional Institute, in Talladega, Alabama.⁸¹ He was charged with bribing a corrections officer, distributing a small amount of

75. UNDERHILL, *supra* note 5, § 87, at 108–109.

76. *Costa*, 691 F.2d at 1360.

77. *Id.*

78. *Id.* at 1361 (citing *United States v. Aleman*, 592 F.2d 881, 886 (5th Cir 1996)).

79. *See id.*

80. 699 F.2d 1308 (11th Cir. 1983).

81. *Id.* at 1310.

methaqualone, and two counts of introducing contraband cigarettes into the prison.⁸² At trial, testimony was elicited from prosecution witnesses that McCrary “dealt in marijuana and quaaludes on several other occasions not . . . covered in the indictment.”⁸³ With an incantation of the shibboleth “inextricably intertwined” and a single reference to *Aleman*, the court found the other-crimes evidence to have been properly admitted.⁸⁴ In *United States v. McDowell*,⁸⁵ the defendant purchased two kilos of cocaine from one Dalmau in the autumn of 1980.⁸⁶ Unbeknownst to McDowell, Dalmau was later arrested for unrelated misconduct and agreed to become an informer for the DEA.⁸⁷ During the summer of 1981 Dalmau (in his capacity as informer) and McDowell began negotiating another cocaine deal, which negotiations ended in McDowell’s arrest and prosecution.⁸⁸ Evidence of the 1980 cocaine transaction was offered and received at trial.⁸⁹ The Eleventh Circuit affirmed without discussion, citing *Aleman* and noting desultorily, “[a]rguably evidence concerning the dealings between Dalmau and McDowell is ‘inextricably intertwined’ with the crime charged.”⁹⁰ Dalmau’s testimony might have been incomplete and confusing had he not been permitted to mention the first cocaine deal.⁹¹ How Dalmau’s testimony about a drug deal in 1981 would have been rendered unintelligible, without testimony about an unrelated drug deal in 1980, must remain a matter of speculation. The tepid and diffident language employed in the opinion—the demised evidence “arguably” was inextricable because its absence “might have” left the evidence in chief incomplete—suggests a court embarrassed by being caught in the act of affirming on insupportable theory the conviction of an obviously guilty man.⁹²

82. *Id.* The cigarettes were contraband simply by virtue of their having been brought into the prison without authorization from prison officials. *Id.*

83. *Id.* at 1311.

84. *McCrary*, 699 F.2d at 1311. Although the court provided no analysis whatsoever on the “inextricably intertwined” issue, it did engage in “either/or jurisprudence”: “[E]ven if the evidence of Mr. McCrary’s numerous other illegal dealings is treated as ‘other acts’ evidence [i.e., is not “inextricably intertwined”], it is admissible under” Rule 404(b). *Id.*

85. 705 F.2d 426 (11th Cir. 1983).

86. *Id.* at 427.

87. *Id.*

88. *Id.*

89. *Id.*

90. *McDowell*, 705 F.2d at 429.

91. *Id.* Again, the court engaged in “either/or jurisprudence,” commenting that “[e]ven if the first transaction is treated as an extrinsic act, admission of the evidence was proper” under Rule 404(b) “to show intent.” *Id.* What particular intent was purportedly demonstrated by this evidence is not set forth in the *McDowell* opinion; intent to be a drug dealer, perhaps, or intent to get convicted.

92. *Id.*; see also *United States v. Males*, 715 F.2d 568 (11th Cir. 1983).

A scant three or four years after the term was coined by the *Aleman* court, “inextricably intertwined” referred to a principle that bore no recognizable resemblance to its common law antecedents. It had become a doctrinal juggernaut capable of battering down ancient evidentiary walls as surely as the cacophony made by Joshua and the armies of Israel battered down the ancient walls of Jericho.⁹³ During the balance of the twentieth century, evidence admitted in Eleventh Circuit drug cases as “inextricably intertwined” fell into two general categories: evidence admitted simply because the other crimes occurred during the same time period as the charged crimes, and evidence admitted to show context, background, or the motivation of witnesses.

A. *The “Same Time Period” Rule*

The defendants in *United States v. Williford*⁹⁴ were charged with conspiracy and related “offenses involv[ing] large quantities of marijuana flown into rural Georgia in small aircraft.”⁹⁵ A prosecution informant testified at trial that, during the time period of the conspiracy, he orchestrated a meeting between the defendants and an undercover agent to negotiate a sale of a kilogram of cocaine, but no sale actually occurred.⁹⁶ On appeal, the court rejected the prosecution’s argument that the testimony as to the cocaine negotiations was admissible under Rule 404(b).⁹⁷ “Intent is the only issue to which this extrinsic act is relevant This evidence is insufficiently similar to establish” intent.⁹⁸ Having characterized the other-crimes evidence as “extrinsic,” and thus by definition not “inextricably intertwined” the court then ruled that the evidence was admissible as “inextricably intertwined,” because it fell within the conspiracy period.⁹⁹ “While not all bad acts occurring within the time frame of a conspiracy are automatically admissible, the fact that the cocaine negotiations occurred with a witness coconspirator during the time of the conspiracy weighs heavily toward finding the acts are intertwined.”¹⁰⁰

93. See *Joshua* 6:1–20.

94. 764 F.2d 1493 (11th Cir. 1985).

95. *Id.* at 1497.

96. *Id.* at 1496.

97. *Id.* at 1497.

98. *Id.*

99. *Williford*, 764 F.2d at 1497.

100. *Id.* at 1499. The court misspeaks when it says that the cocaine negotiations “occurred with a witness coconspirator.” The witness, one Hammond, had become a prosecution informer in June of 1982. *Id.* at 1496. The cocaine negotiations took place among the defendants, Hammond, and an undercover agent on August 3, 1982. *Id.* At that time, Hammond had ceased to be a coconspirator, although of course he still posed as one. If

A decade later, the court was no longer reticent to state frankly that all bad acts occurring within the time frame of a conspiracy are automatically admissible as "inextricably intertwined." *United States v. Ramsdale*¹⁰¹ involved a conspiracy to the manufacture of methamphetamine.¹⁰² Most of the evidence in the case concerned the purchase in Florida and transportation to Oregon by bus of phenylactic acid, a chemical necessary to manufacture methamphetamine.¹⁰³ The trial court also allowed the testimony of a uniform patrol officer, Chantal Marie Thomas.¹⁰⁴ Officer Thomas knew nothing of the charged conspiracy and had nothing to say about phenylactic acid.¹⁰⁵ Her entire testimony was that on September 21, 1991, a date within the conspiracy time period, she stopped co-defendant Charles Christoferson's car for a defective rear license, and incidental to the stop conducted a search in which she found Christoferson to be in possession of 3.05 grams of methamphetamine, \$7801 in cash, a shotgun and a .9 millimeter pistol.¹⁰⁶ Observing that "Christoferson's vehicle stop occurred during the time of the conspiracy as charged in the indictment,"¹⁰⁷ the Eleventh Circuit concluded that "[e]vidence of possession of the drug which Christoferson was accused of conspiring to manufacture, during the period of time alleged in the indictment, and under circumstances . . . suggest[ing] drug trafficking, is not extrinsic" and is admissible as "inextricably intertwined."¹⁰⁸

In neither *Williford* nor *Ramsdale* is there any attempt to preserve a vestige of the common law *res gestae* rule. The informer in *Williford* testified at length to the particulars of, and his involvement in, the marijuana smuggling conspiracy.¹⁰⁹ The single and discrete act of negotiating but not consummating a cocaine transaction was thoroughly excisable from the narrative of the marijuana conspiracy. No more was required than to instruct

Hammond's testimony as to the cocaine negotiations was admissible as "inextricably intertwined" with the evidence of the marijuana conspiracy, it must be because all other-crimes evidence occurring during the conspiracy time period is automatically "inextricably intertwined," the court's protestations to the contrary notwithstanding.

The court also found the demised evidence to be "inextricably intertwined" under the context/background/witness motivation theory. See discussion *infra* Part IV.B.; see also *United States v. Montes-Cardenas*, 746 F.2d 771 (11th Cir. 1984).

101. 61 F.3d 825 (11th Cir. 1995).

102. *Id.* at 827.

103. *Id.*

104. *Id.* at 829.

105. *Id.*

106. *Ramsdale*, 61 F.3d at 829.

107. *Id.*

108. *Id.* at 830.

109. *Williford*, 764 F.2d at 1496.

the informer to omit the matter from his testimony. Such a redaction would have left no gaping lacunae in the story of the marijuana conspiracy. It would not have affected that story at all. In *Ramsdale*, Officer Thomas was called to the witness stand for the sole purpose of testifying to an event that was neither pleaded as being, nor proven to be, in furtherance of the charged conspiracy.¹¹⁰ The proposition that the testimony of one witness about certain facts can become admissible because “inextricably intertwined” with the testimony of other witnesses about other facts is given little if any consideration in the common law *res gestae* cases.

The defendant in *United States v. Jimenez*¹¹¹ was charged with conspiring to possess methamphetamine with the intent to distribute it.¹¹² Over what must have been an apoplectic defense objection, the trial court received evidence that during the conspiracy period not only did Jimenez possess marijuana and a firearm, but he also beat his live-in girlfriend.¹¹³

In affirming, it appeared at first that the court of appeals was headed in the direction of “inextricably intertwined.” Citing *Ramsdale*, the court stated the general principle that uncharged other-crimes evidence is “admissible if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense.”¹¹⁴

The court then abandoned any attempt to demonstrate the inextricability of the other-crimes evidence, at least as to the marijuana possession. Instead, it proceeded on a theory of relevance, or more particularly of “non-irrelevance.” Evidence of possession of marijuana, said the court, “is not necessarily irrelevant to proof of methamphetamine distribution.”¹¹⁵ This sort of averment is difficult to rebut. It would be an interesting challenge to attempt to posit some form of conduct that is *necessarily* irrelevant to proof of methamphetamine distribution. On these facts, the court of appeals found the “non-irrelevance” of the marijuana evidence to arise from taped telephone conversations in which reference was made to “cupcakes with white icing” and “cupcakes with green icing.”¹¹⁶ Agents testified that “cupcakes with white icing” was drug slang for methamphetamine, and that

110. See *Ramsdale*, 61 F.3d at 829.

111. 224 F.3d 1243 (11th Cir. 2000).

112. *Id.* at 1245.

113. *Id.* at 1246.

114. *Id.* at 1249 (citing *United States v. McLean*, 138 F.3d 1398, 1403 (11th Cir. 1998) and *Ramsdale*, 61 F.3d at 829). What the court appears to offer as alternatives are really appositives: evidence that arose out of the same course of conduct as the charged crimes and is necessary to complete the story of the charged crimes *is* inextricably intertwined.

115. *Id.* at 1250.

116. *Jimenez*, 224 F.3d at 1250.

“cupcakes with green icing” was drug slang for marijuana.¹¹⁷ If “cupcakes with green icing” really did mean marijuana, said the court, then it was likely that “cupcakes with white icing” really did mean methamphetamine; if “cupcakes with white icing” really did mean methamphetamine, then it was likely that Jimenez was discussing the distribution of methamphetamine; and if Jimenez was discussing the distribution of methamphetamine, then it was likely that he was guilty of the charged crimes.¹¹⁸ Thus is demonstrated the admissibility, on the theory of “non-irrelevance,” of evidence of the uncharged marijuana crime. At the conclusion of this demonstration, the court admitted that this “may not be the most obvious case for admissibility of this evidence.”¹¹⁹

But even if the foregoing analysis makes a powerful case for the admissibility of “non-irrelevant” other-crimes evidence, the fact remains that the marijuana crimes were neither charged in the indictment nor noticed under Rule 404(b). That being so, the marijuana evidence was inadmissible. If the marijuana evidence was “inextricably intertwined” with the methamphetamine evidence, then it was admissible without regard to its relevance. But the court does not even consider whether, for example, testimony that Jimenez possessed marijuana or discussed “green cupcakes” could have been excised from the prosecution’s case without rendering that case confusing or unintelligible.

As to the evidence of Jimenez beating his girlfriend, the court was obliged to acknowledge that even the “same time period” version of the “inextricably intertwined” theory would not support admissibility. “[W]e find it hard to believe that the government could not have successfully redacted the abuse-related comments from [the] taped conversations.”¹²⁰ That being said, however, the court determined that it need not “actually decide whether the abuse references were inextricably intertwined with other government evidence” because the error, if any, was harmless.¹²¹

With no conceptual or historical foundation, the “inextricably intertwined” doctrine sponsors into evidence testimony that is eminently extricable from the evidence in chief, apparently on the theory that any bad

117. *Id.*

118. *Id.*

119. *Id.* In making this remark, the court was also referring to the evidence of gun possession. It appears that when the police burst into his home, Jimenez at first drew a gun. *Id.* Prior to trial, however, Jimenez moved to suppress physical evidence on the grounds that the police had failed to “knock and announce.” *Jiminez*, 224 F.3d at 1250. If Jimenez was initially unaware that the armed men entering his house were agents of the law, his instinct to reach for a weapon with which to protect his home and hearth was perfectly understandable—and in any event, not evidence of conspiring to distribute methamphetamine.

120. *Id.*

121. *Id.*

thing a drug dealer does during the time period covered by a conspiracy charge—which time period, of course, is determined by the prosecutor offering the evidence, not the alleged drug dealer against whom it is offered—is fair game.¹²² This rule of admissibility has two things to commend it: it is supremely easy of application, and it provides the prosecution with an unexampled weapon with which to wage the “war on drugs.”

B. *The “Context, Background, and Motivation” Rule*

The “same time period” rule was not the only basis for admission of the uncharged crime evidence in *Williford*. Testimony may be admitted as “inextricably intertwined” even though “not part of the crime charged” if it “pertain[s] to the chain of events explaining the context, motive and set-up of the crime.”¹²³ Thus to be “inextricably intertwined,” the evidence need not pertain to the crime charged. It need not pertain to the context, motive, and set-up (whatever these terms mean) of the crime charged.¹²⁴ It need not “explain . . . the context, motive, and set-up of the crime” charged.¹²⁵ It need not form a fixed and identifiable part of the chain of events explaining the context, motive, and set-up of the crime charged. It need *only* “[pertain] to the chain of events explaining the context, motive, and set-up of the crime” charged.¹²⁶ Is it possible to imagine *any* evidence so evanescent in *any* given case as not to pass this test?

The defendant in *United States v. Gomez*¹²⁷ was observed engaging in a hand-to-hand drug deal and was arrested immediately.¹²⁸ A search of his person and his car incident to the arrest revealed a loaded pistol in the glove compartment, a mobile telephone, and a book with the phone numbers of several persons then under investigation.¹²⁹ Also in *Gomez’s vade mecum*

122. A charge of conspiracy pleaded as “beginning on a date unknown to the grand jury” and ending at the time of arrest arguably embraces the defendants’ entire lives. If the prosecutor then learns in mid-trial that a defendant has done a bad thing—particularly a bad thing involving drugs—of which the prosecutor was previously unaware, there is no impediment to its admission. It is “inextricably intertwined” with the charged crimes. That the grand jury was never told of it in considering the indictment, and that the defendant has had no notice of it in preparing to meet the indictment, is no objection.

123. *Williford*, 764 F.2d at 1499; *see also* *United States v. Proserpi*, 201 F.3d 1335 (11th Cir. 2000).

124. *Williford*, 764 F.2d at 1499.

125. *Id.*

126. *Id.*

127. 927 F.2d 1530 (11th Cir. 1991).

128. *Id.* at 1532.

129. *Id.* at 1532–33.

was a listing and phone number for a man identified only as "Sammy."¹³⁰ At trial, the prosecution was permitted to introduce evidence that, some two months *after* Gomez's arrest, a Sammy Zuluago, who proved to be the "Sammy" in Gomez's book, engaged in a drug transaction.¹³¹ "Although this evidence concerned an event which occurred after [Gomez's] arrest, this circuit has held that evidence inextricably intertwined with the chain of events surrounding the crime charged is admissible."¹³² The evidence of Zuluago's misconduct "was relevant to the scheme and chain of events surrounding the charged importation conspiracy."¹³³ How, precisely, it was relevant is left unsaid. There is no suggestion that Gomez was involved in the drug transaction in which Zuluago engaged at a time when Gomez was safely behind bars. There is no suggestion that Zuluago's transaction was a part of, or a continuation of, the drug crimes for which Gomez was convicted. But "inextricably intertwined" evidence need not be intertwined, inextricably or otherwise. It need only pertain, in some fashion, to the chain of events explaining the context, motive, and set-up of the crime or crimes charged. The *Gomez* evidence easily met this "test." The prosecution gives "context" to the charged drug crimes by showing that at the time of his arrest for those crimes, Gomez had the phone number of a man who, two months later, would engage in an unrelated drug crime.¹³⁴

Similarly, in *United States v. Herre*,¹³⁵ the court allowed evidence of the defendant's prior state court arrest for marijuana smuggling in a federal prosecution for criminal contempt, the contempt consisting of the defendant's failure to testify before the federal grand jury.¹³⁶ Herre had been immunized and ordered to testify, but refused to do so.¹³⁷ To establish the offense charged, the prosecution was obliged to prove nothing more.¹³⁸ The prior drug arrest was deemed "inextricably intertwined," because it provided the jury "necessary background information showing why Herre had been subpoenaed and provided the jury with some basis to understand the reasons behind the charged offense."¹³⁹

130. *Id.* at 1533.

131. *Id.*

132. *Gomez*, 927 F.3d at 1535 (citing *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

133. *Id.*

134. *Id.*

135. 930 F.2d 836 (11th Cir. 1991).

136. *Id.* at 837.

137. *Id.*

138. See 18 U.S.C. § 401 (1994).

139. *Herre*, 930 F.2d at 838.

Both *Gomez* and *Herre* cite *Williford's* "chain of events" language. Neither *Gomez* nor *Herre* explains what is meant by this language.¹⁴⁰ What sort of chain must exist between the uncharged crimes evidence and the charged offenses? How far may the chain extend, and how attenuated may each succeeding link be from the charged crimes? In *Gomez*, the uncharged-crime evidence consisted of proof that a person with whom *Gomez* apparently had some involvement committed a crime in which *Gomez* apparently had no involvement.¹⁴¹ Whether this evidence would have been admissible under traditional Rule 401/403, balancing of probative versus unfair prejudicial value is a nice question. Fortunately for prosecutors, "inextricably intertwined" is a means for end-running that balancing test. The prosecution in *Herre* could easily have demonstrated that *Herre* was duly subpoenaed; was immunized pursuant to section 6001 of Title 18 of the *United States Code*; appeared before the grand jury; and refused to testify. That the subject matter of the subpoena was drug smuggling was surely irrelevant to the act of contumacy. *Herre* would have been just as much in violation of section 401 of Title 18 of the *United States Code* if he had unlawfully refused to testify about a parking meter violation. But if *Herre's* trial jury had any reluctance to convict him, that reluctance was surely overcome when the jurors learned that *Herre* was himself a drug smuggler. If evidence that in all likelihood could not withstand scrutiny under Rules 401, 403, and 404(b) can avoid such scrutiny and gain admission on the bare allegation that it relates in some fashion to a chain of events explaining the context, motive, and set-up of charged crimes, then nothing remains of the fundamental Anglo-American legal principle that evidence of uncharged crimes is presumptively inadmissible.

That certainly appeared to be the case after *United States v. Fortenberry*.¹⁴² Although not a drug case, *Fortenberry* makes bold use of the "inextricably intertwined" doctrine. Police suspected *Fortenberry* in two murders.¹⁴³ No murder charges were ever brought, but federal authorities prosecuted *Fortenberry* for, *inter alia*, unlawful possession of a Mossberg 500 twelve-gauge shotgun.¹⁴⁴ Prior to trial, the prosecution notified *Fortenberry* of its intent to introduce, pursuant to Rule 404(b), evidence of *Fortenberry's* participation in the murders to establish his illegal possession of the shotgun which the prosecution believed was used to commit the murders.¹⁴⁵ In its case in chief, the prosecution "presented numerous witnesses linking *Fortenberry* to the double murder and the murder weapon

140. See *Gomez*, 927 F.2d at 1535; *Herre*, 930 F.2d at 837-838.

141. *Id.*

142. 971 F.2d 717 (11th Cir. 1992).

143. *Id.* at 719.

144. *Id.*

145. *Id.* (footnote omitted).

itself,"¹⁴⁶ but the shotgun was never found and therefore never produced at trial.¹⁴⁷

The trial court's analysis was a hodge podge of Rule 404(b) and the "inextricably intertwined" theory.¹⁴⁸ The district court found the murder evidence to be "inextricably intertwined" with evidence of the charged possession count subject only to Rule 403 limitations¹⁴⁹—which limitations, by definition, have no applicability to evidence truly inextricable from the evidence of charged offenses. The district court, at the time it admitted evidence of the murders, cautioned the jury that Fortenberry was on trial not for murder but only for possessing firearms.¹⁵⁰ "The district court explained that the murder evidence was admissible solely for the jury to determine whether it created an inference that Fortenberry possessed the shotgun in question."¹⁵¹ Genuinely inextricable evidence neither requires nor invites a cautionary instruction.

The Eleventh Circuit affirmed.¹⁵² Evidence of the double murder was properly admitted on the charge of possession of a firearm.¹⁵³ The homicide evidence was "inextricably intertwined" with the evidence of possession, because it was "an essential part of the chain of events explaining the context, motive, and set-up of the possession charge and was necessary to complete the story of the crime for the jury."¹⁵⁴ Again, the court offers no definition or explication of the terms "context, motive, and set-up" upon which it relies. The closest the court gets to amplifying these terms is to say that the other-crimes evidence "explained the context of how and why Fortenberry acquired possession of the shotgun."¹⁵⁵ Whatever "context" and "set-up" mean, they must mean a great deal. Their use enabled the prosecution to adduce on a trial of simple possession of a firearm otherwise inadmissible proof of a double homicide.¹⁵⁶ Because this proof was offered as demonstrating "context, motive, and set-up," it must be inextricable; because inextricable, it must be admissible.¹⁵⁷ The long-standing general rule that only evidence of charged offenses is admissible has been reduced to an inconsequential exception (if it has any continued vitality at all) to the

146. *Id.*

147. *Fortenberry*, 971 F.2d at 721.

148. *Id.* at 720–21.

149. *Id.* at 721.

150. *Id.* at 720.

151. *Id.*

152. *Fortenberry*, 971 F.2d at 720.

153. *Id.* at 721.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Fortenberry*, 971 F.2d at 721.

new general rule that any evidence of any bad act or crime is admissible if it can be said in some fashion to pertain to a chain of events bearing upon the context, motive, and set-up (terms helpfully undefined, therefore all the more capaciously applied) of the crime charged.¹⁵⁸

Stranger even than “context” and “set-up” is “motive.” Most of the cases in which the Eleventh Circuit employs the “inextricably intertwined” rule are drug cases. Drug crimes are not crimes of passion; they are crimes of financial gain. Motive is seldom an issue. The defendant sold the drugs for money, or he bought the drugs to use and to sell for more money to buy more drugs. Knowledge and intent may be at issue, particularly in possession cases, but motive is clear. In *United States v. Foster*,¹⁵⁹ a DEA agent in Savannah, Georgia received a tip that three people would deplane from Miami carrying cocaine.¹⁶⁰ The agent observed Foster and his traveling companions Stephanie Davis and Jeffrey Smith arrive at the airport, and detained them there.¹⁶¹ A subsequent search of Ms. Davis revealed that she had a kilo of cocaine secreted in her girdle.¹⁶² Prior to Foster’s trial, Davis made a deal with the prosecution and agreed to testify.¹⁶³ She was permitted, as part of her trial testimony, to relate that two and a half weeks prior to her arrest with Foster, she had carried drugs at Foster’s direction in the same girdle while flying from Miami to Savannah.¹⁶⁴ In holding that this evidence was properly admitted, the court of appeals seemed to speak the language of Rule 404(b), e.g., the testimony was “relevant to Mr. Foster’s opportunity, intent, preparation, planning, and knowledge.”¹⁶⁵ But the reason for the court’s ruling was that the other-crimes evidence was necessary to explain the *witness’s*, not the defendant’s, motive.¹⁶⁶

Ms. Davis’ explanation of the [earlier] transaction was necessary in order for the jury to understand why Davis agreed to hide the cocaine for Mr. Foster on the [later] trip with little or no advance notice or apparent reflection on her part. Evidence concerning the success of the [earlier] venture and the payment of \$500.00 from

158. See also *United States v. Pessefall*, 27 F.3d 511 (11th Cir. 1994) (holding other-crimes evidence occurring *eight years* prior to charged crimes admissible as “inextricably intertwined”).

159. 889 F.2d 1049 (11th Cir. 1989).

160. *Id.* at 1050.

161. *Id.*

162. *Id.*

163. *Id.* at 1051.

164. *Foster*, 889 F.2d at 1051.

165. *Id.* at 1053.

166. *Id.*

Foster to Davis explains her willingness to participate in the [later] transaction.¹⁶⁷

This entirely artificial rationale highlights just how false the doctrine of “inextricably intertwined” really is. Those unwilling to pretend that the emperor is wearing new clothes know perfectly well why the testimony regarding the first drug deal was admitted: to show that the defendant is a habitual drug dealer, and someone the jury should have no hesitation in convicting. At a stretch, the evidence could be justified under Rule 404(b) as going to negate mistake or accident, and as showing a pattern of conduct. But to suggest that testimony regarding the earlier drug deal is somehow “inextricable” from testimony regarding the latter drug deal, and admissible as such, is untenable. In what sense is it “inextricable?” Clearly, Davis could relate the events of the second drug transaction in full without so much as a passing reference to the first transaction. The other-crime evidence bore not at all upon any element of the *actus reus*. And to the extent it bore upon the *mens rea*, it was alleged to bear, not upon the *mens rea* of the defendant, but upon the *mens rea* of the witness. A witness’s motive to testify may be at issue, but Davis’ motive to engage in the crime about which she was testifying was of no relevance at all. And even if somehow it could be made relevant, what could be plainer than the source of her motivation to act as a drug courier? Davis did it for money. Nor is there much force to the suggestion that the jury needed to learn why Davis acted “with little or no advance notice or apparent reflection on her part.”¹⁶⁸ Davis received all the notice, and indulged all the reflection, she required when she was promised five hundred dollars.

V. “INEXTRICABLY INTERTWINED” IN STATE COURT

Given Florida’s central importance as a battlefield in the “war on drugs,” and given the number of federal cases deploying the “inextricably intertwined” doctrine as a weapon in that war, the paucity of drug cases in the state courts of Florida in which the applicability of that doctrine has been raised is remarkable. Remarkable, too, is the constancy with which Florida courts have resisted the temptation to distort the notion of “inextricably intertwined” out of all proportion in order to permit the introduction of any and all prosecution evidence.

“Inextricably intertwined” evidence did not make its first appearance in Florida jurisprudence until 1986, in an opinion captioned *Tumulty v. State*.¹⁶⁹

167. *Id.* at 1050.

168. *Id.* at 1053.

169. 489 So. 2d 150 (Fla. 4th Dist. Ct. App. 1986).

Jean Tumulty had participated in three drug smuggling ventures with the same group of colleagues.¹⁷⁰ These individuals undertook a fourth such venture in which Tumulty was not involved.¹⁷¹ Although marijuana was successfully brought into the United States, the importers were unable for some reason to sell it.¹⁷² The pilot, one Marrs, refused to relinquish possession of the airplane until he was paid, thus rendering all future smuggling business impossible.¹⁷³ Tumulty solved this problem by arranging to have Marrs murdered.¹⁷⁴ It was for the murder, and not for drug smuggling, that Tumulty was charged.¹⁷⁵ The court of appeal determined that evidence of the drug smuggling, however, was properly admitted at trial.¹⁷⁶

It was relevant because it was “inextricably intertwined” in the scenario of the fourth trip to show the context of the crime. It was “inseparable crime” evidence that explains or throws light upon the crime being prosecuted. In order to present an orderly, intelligible case the state had to show the relationship between [the owner of the plane] and Tumulty, close personal friends and business associates, supplier and middleman. . . . The motive for the killing was directly related to the “conversion” of [the] airplane by Marrs and the urgent need for [Tumulty and the others] to get it back in service.¹⁷⁷

In support of this proposition, the *Tumulty* court cites, not the common law cases—not *Killins* and *Oliver*—but Professor Ehrhardt’s treatise on Florida evidence.¹⁷⁸ Ehrhardt, in turn, cites to *Aleman* and progeny.¹⁷⁹

But there was no need to rely upon *Aleman* or other federal authorities. *Tumulty* falls squarely within the *res gestae* version of “inextricably intertwined” evidence. The defendant’s motive to commit the charged offense (as opposed to a witness’s motive to testify at the trial of the defendant for the charged offense) is inseparable from the charged offense itself. Although a defendant’s motive is often obvious,¹⁸⁰ it is not always

170. *Id.* at 151.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Tumulty*, 489 So. 2d at 151.

175. *Id.*

176. *Id.* at 153.

177. *Id.*

178. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 404.16, at 206 (2000 ed.).

179. *Id.*

180. Willie Sutton famously observed that his motivation for robbing banks was because that was where the money was. In Sutton’s autobiography he confessed that this oft-quoted remark was not really his own. WILLIE SUTTON & EDWARD LINN, WHERE THE MONEY

so—as in *Tumulty*. In such cases, evidence of uncharged crimes to establish motive as to charged crimes may be admissible under the *res gestae* rule.

[F]acts and circumstances . . . will [sometimes] warrant a presumption that the [charged offense] grew out of, and was, to some extent, induced by . . . [the uncharged offense]; in which case, such circumstances connected with the [uncharged offense] as are calculated to show the *quo animo* or motive by which the [defendant] was actuated or influenced in regard to the [charged crime], are competent and legitimate testimony.¹⁸¹

And again:

When the acts form one transaction, the evidence is admissible Where the *scienter* or *quo animo* is requisite to, and constitutes a necessary and essential part of the crime with which the person is charged; and proof of such guilty knowledge, or malicious intention, is indispensable to establish his guilt in regard to the transaction in question, testimony of such acts, conduct, or declarations of the accused, as tend to establish such knowledge or intent, is competent; notwithstanding they may constitute in law a distinct crime.¹⁸²

Although *Tumulty* was undoubtedly correctly decided, it would be a dangerous oversimplification to say that evidence of uncharged crimes is “inextricably intertwined” whenever such evidence bears upon the defendant’s motive as to the charged crimes. The test for “inextricably intertwined” evidence—the proper *res gestae* test—is whether the evidence in chief is rendered unintelligible, confusing, or misleading without the other-crimes evidence. If the tale of the charged crimes can be told without including the other-crimes evidence, then the other-crimes evidence is not inextricable. Thus where the defendant’s motive as to the charged crime is readily inferred from the evidence in chief, or is otherwise not in issue, it would be wrong to admit other-crimes evidence as “inextricably intertwined” to establish motive.¹⁸³

WAS (1976). “I never said it. The credit belongs to some enterprising reporter who apparently felt a need to fill out his copy . . . [but] [i]f anybody had asked me, I’d have probably said it. That’s what almost anybody would say . . . it couldn’t be more obvious.” *Id.*

181. FRANCIS WHARTON, I A TREATISE ON THE CRIMINAL LAW 443 (6th ed. 1868) (footnotes omitted).

182. *Id.* at 445.

183. The tendency of the courts to blur the conceptual distinction between Rule 404(b) evidence and “inextricably intertwined” evidence may be attributable in part to the difficulty

Although it was possible to narrate the events of Marris' murder without describing the prior drug deals that led up to it—although they were separated in terms of time, place, manner, victim, and the like—it is probably true that the narrative of Marris' murder would have made little sense without the evidence of the prior drug dealings. Tumulty, after all, did not choose Marris out of the telephone book. Unlike the federal cases,¹⁸⁴ here, the other-crimes evidence of “motivation” was not offered to show the motivation of witnesses, but to show the motivation of the defendant.¹⁸⁵

Tumulty was decided by an intermediate appellate court. The Supreme Court of Florida had no occasion to give consideration to the “inextricably intertwined” principle until it decided *Griffin v. State*¹⁸⁶ in 1994. Griffin was accused of a variety of serious felonies, including the theft of an automobile which he used during burglaries.¹⁸⁷ The car in question had been rented by one Marshall.¹⁸⁸ At trial, Marshall testified:

[O]n the evening of April 23, 1990, he returned to the Miami Beach hotel where he was staying, placed the car keys on the dresser, and retired for the evening. When he awoke the next morning, Mr. Marshall found that the car keys and the car were gone. Griffin concedes that his possession of the automobile was admissible because grand theft was a charge the jury was considering. However, Griffin argues that the testimony relating to the missing keys was inadmissible . . . because it suggested that the hotel room had been burglarized, and was used by the State to show that Griffin had a propensity to burglarize motel rooms.¹⁸⁹

Clearly the evidence of the taking of Marshall's keys was admissible. Griffin was charged with theft of the car, and stealing the keys was the means by which he stole the car. Perhaps the matter might have been

different if there were, for example, evidence that the car had been “hot wired,” or towed away, or that someone else had a second set of keys. But on the facts reflected in the opinion, Griffin's taking of the keys was as

in handling evidence of motive. Such evidence may be admissible by the plain terms of Rule 404(b) and section 90.404 of the *Florida Statutes*. See, e.g., *Zack v. State*, 753 So. 2d 9 (Fla. 2000). Such evidence may also be admissible as “inextricably intertwined”—but only when the test for inextricability is met.

184. See, e.g., *United States v. Foster*, 889 F.2d 1049 (11th Cir. 1989).

185. *Tumulty v. State*, 489 So. 2d 150, 153 (Fla. 4th Dist. Ct. App. 1986).

186. 639 So. 2d 966 (Fla. 1994).

187. *Id.* at 967.

188. *Id.* at 969.

189. *Id.*

inseparable from his taking of the car as was the defendant's taking of the victim's ring and other personal items in the course of the rape prosecuted in *Nickels*; as inseparable as the taking of Y's and Z's tools in connection with the theft of X's toolbox in Wigmore's example.¹⁹⁰

The Supreme Court of Florida's dispositive treatment of "inextricably intertwined" evidence is presented in the companion cases of *Hartley v. State*¹⁹¹ and *Ferrell v. State*.¹⁹² Hartley and Ferrell were tried separately for a murder and kidnapping they committed together. At Hartley's trial, a police officer "testified that when he arrested Hartley and Ferrell for the victim's murder, Hartley denied knowing the victim. The police officer then testified that he told Hartley they knew he had robbed the victim two days before the murder."¹⁹³ The Supreme Court of Florida had no difficulty concluding that the officer's testimony was improperly admitted, whether on a theory of "inextricably intertwined" or otherwise.¹⁹⁴ The court reasoned that "[t]he officer was not testifying to the fact that Hartley admitted robbing the victim; the officer was merely repeating the officer's own statement that he knew Hartley robbed the victim two days before the murder."¹⁹⁵ At Ferrell's trial, however, the court admitted "evidence that Ferrell and Hartley robbed the victim two days before the murder."¹⁹⁶ This evidence was admitted as "explain[ing] Ferrell's motivation [for the murder] in seeking to prevent retaliation by the victim" for the prior robbery.¹⁹⁷

The Florida courts have hewed to the common law version of "inextricably intertwined," admitting other-crimes evidence only when it is truly inseparable from the *actus reus* of the charged crime, or from the *mens rea* of the charged crime,¹⁹⁸ or both.¹⁹⁹ In less than a handful of instances, Florida courts have spoken the language of their federal counterparts, admitting other-crimes evidence by way of a general reference to "context."²⁰⁰

190. WIGMORE, *supra* note 15, § 218.

191. 686 So. 2d 1316 (Fla. 1996).

192. 686 So. 2d 1324 (Fla. 1996).

193. *Hartley*, 686 So. 2d at 1319–20.

194. *Id.* at 1320.

195. *Id.*

196. *Ferrell*, 686 So. 2d at 1328.

197. *Id.* at 1329.

198. *Cf.* *Erickson v. State*, 565 So. 2d 328 (Fla. 4th Dist. Ct. App. 1990) (*actus reus*) with *Strausser v. State*, 682 So. 2d 539 (Fla. 1996) (*mens rea*), and *Pugh v. State*, 518 So. 2d 424 (Fla. 2d Dist. Ct. App. 1988) (*actus reus* and *mens rea*); *see also* *State v. Shaw*, 730 So. 2d 312 (Fla. 4th Dist. Ct. App. 1999); *State v. Cohens*, 701 So. 2d 362 (Fla. 2d Dist. Ct. App. 1997).

199. *See, e.g.*, *Pugh v. State*, 518 So. 2d 424, 426 (Fla. 2d Dist. Ct. App. 1988).

200. *See, e.g.*, *Coolen v. State*, 696 So. 2d 738, 743 (Fla. 1997). In *Coolen* the court found "the testimony was necessary to establish the entire context out of which the crime

In *Griner v State*,²⁰¹ the defendant perpetrated two separate robberies within two blocks and twenty-two minutes of each other.²⁰² Admitting evidence of the first robbery at the trial of the second was error. The two were not “inextricably intertwined.” “The most we can say about the relationship between these two events is that one occurred very soon after the other, which is not sufficient to make the evidence regarding the first incident admissible”²⁰³

In *Porter v. State*,²⁰⁴ the police received a call regarding an incident of domestic violence at the Porter residence.²⁰⁵ When Officer Walters arrived on the scene, Mrs. Porter called out, “[h]e’s trying to kill me.”²⁰⁶ Walters and another officer separated the Porters, ultimately finding it necessary to put handcuffs and leg restraints on Mr. Porter.²⁰⁷ His manacles notwithstanding, Porter continued to assault and struggle with the officers.²⁰⁸ He was charged with resisting an officer with violence and battery on a law enforcement officer.²⁰⁹ The court of appeal determined that the wife’s cry for help “was not inextricably intertwined with the crimes for which Porter was charged.”²¹⁰ This was so because:

There was a clear break between the wife’s statement and Porter’s altercation with the [officers]. The only relevance [of] the wife’s out-of-court statement was to explain the [officers’] presence at the Porter residence. However, the [officers’] presence was sufficiently explained by . . . Walter’s testimony that he received a call concerning a domestic violence incident. There was no need to reveal the wife’s statement²¹¹

The flip-side of *Porter* was *Carrillo v. State*.²¹² Carrillo was arrested for a domestic incident with his live-in girlfriend and charged with aggravated

arose. [The] testimony was relevant and was not unduly prejudicial. Therefore, we find no error in the admission of this testimony.” *Id.*; see also *Shively v. State*, 752 So. 2d 84, 85 (Fla. 5th Dist. Ct. App. 2000); *Osborne v. State*, 743 So. 2d 602, 602 (Fla. 4th Dist. Ct. App. 1999); *T.S. v. State*, 682 So. 2d 1202, 1202 (Fla. 4th Dist. Ct. App. 1996).

201. 662 So. 2d 758 (Fla. 4th Dist. Ct. App. 1995).

202. *Id.* at 759.

203. *Id.*

204. 715 So. 2d 1018 (Fla. 2d Dist. Ct. App. 1998).

205. *Id.* at 1019.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Porter*, 715 So. 2d at 1019.

210. *Id.* at 1020.

211. *Id.*

212. 727 So. 2d 1047 (Fla. 2d Dist. Ct. App. 1999).

battery.²¹³ In the police car as he was being taken away Carrillo kicked, struck his head against the window, cursed, and threatened, "if I'm going to jail for this bitch, I might as well kill her."²¹⁴ Rightly rejecting the argument that this conduct was "inextricably intertwined" as bearing upon "motive" or anything else, the court ruled that "Carrillo's threats and disruptive behavior in the police car were so far removed in time from the incident [of domestic violence that] they had little probative value as to his intent or state of mind at the earlier time. Furthermore, the two incidents were not inextricably intertwined."²¹⁵

As the foregoing cases illustrate, most of the development of the "inextricably intertwined" doctrine in Florida has been in non-drug cases. But *Huhn v. State*²¹⁶ involved a falling-out among drug dealers that led to armed kidnapping and aggravated assault.²¹⁷ Relying upon the Fourth District's opinion in *Tumulty*, the prosecution offered evidence of previous drug transactions in which the victim and the perpetrators of the kidnapping/assault had participated together.²¹⁸ The *Huhn* court, however, distinguished *Tumulty*.²¹⁹ In that case, the prior drug dealing provided the motive for an otherwise inexplicable murder; the murder was simply the consequence—in effect, the dramatic conclusion—of a falling-out during the previous drug transactions.²²⁰ In *Huhn*, the previous drug deals had been consummated uneventfully, and formed no part of the crimes of kidnapping and assault for which the defendant was charged.²²¹

In *D.M. v. State*,²²² the court of appeal for the Third District found evidence to have been properly admitted as "inextricably intertwined" in a drug case.²²³

During a period of fifteen minutes, a surveillance officer observed D.M. and . . . A.E. standing on a sidewalk in front of a duplex. On three occasions, someone approached the duo and handed money to A.E. A.E. handed the money to D.M. While D.M. remained on

213. *Id.* at 1047.

214. *Id.* at 1048.

215. *Id.*; see also *Beckett v. State*, 730 So. 2d 809 (Fla. 4th Dist. Ct. App. 1999); *St. Louis v. State*, 584 So. 2d 180 (Fla. 4th Dist. Ct. App. 1991).

216. 511 So. 2d 583 (Fla. 4th Dist. Ct. App. 1987).

217. *Id.* at 584.

218. *Id.* at 586–87.

219. *Id.* at 590.

220. *Tumulty v. State*, 489 So. 2d 150 (Fla. 4th Dist. Ct. App. 1986).

221. *Huhn*, 511 So. 2d at 590; see also *Adams v. State*, 743 So. 2d 1216 (Fla. 4th Dist. Ct. App. 1999); *Selver v. State*, 568 So. 2d 1331 (Fla. 4th Dist. Ct. App. 1990).

222. 714 So. 2d 1117 (Fla. 3d Dist. Ct. App. 1998).

223. *Id.* at 1119.

the sidewalk, A.E. walked to a utility room at the rear of the duplex, returned from the utility room, and handed over a small object to the person who had paid the money.²²⁴

After a fourth such transaction, one of D.M.'s customers was arrested and found to be in possession of a cocaine rock.²²⁵ The police then arrested D.M. and A.E.²²⁶ The two juveniles were charged with sale of cocaine in the fourth transaction and—crucially for the “inextricably intertwined” issue—possession with intent to sell a supply of packaged-for-sale cocaine rocks found in the utility room.²²⁷ At trial, the prosecution offered in evidence the first three sales viewed by the surveillance officer.²²⁸ Evidence of the conduct giving rise to these sales was genuinely inseparable from the charged possession offense.²²⁹ To prove the possession crime as against both defendants, the prosecution:

[W]as required to show dominion and control by the [defendants] over the drugs in the utility room. During the fifteen-minute surveillance, the officer observed four transactions and four trips to retrieve objects from the utility room. The evidence of the trips . . . was inextricably intertwined with the evidence of the sidewalk transactions.²³⁰

This analysis is unimpeachable.

VI. CONCLUSION

“The law,” said no less an authority than Benjamin Nathan Cardozo, “has outgrown its primitive stage of formalism when the precise word was the sovereign talisman”²³¹ Nearly a century later, the phrase “inextricably intertwined” has taken on the status of a sovereign talisman which, with primitive formalism, conjures up the admission of inadmissible evidence.

Meantime, the expression “*res gestae*” has been cast aside by all courts.²³² Wigmore himself describes the phrase as:

224. *Id.* at 1118.

225. *Id.*

226. *Id.*

227. *D.M.*, 714 So. 2d at 1118.

228. *Id.*

229. *Id.* at 1119.

230. *Id.* at 1119–20.

231. *Wood v. Lucy*, 118 N.E. 214 (N.Y. 1917).

232. *But cf. Lucy v. State*, 340 So. 2d 840 (Ala. Crim. App. 1976).

[U]nsatisfactory, first, because it is obscure and indefinite, and needs further definition and translation before either its reason or its scope can be understood; and, secondly, because its very looseness and obscurity lend too many opportunities for its abuse. It is not too much to say that it is nowadays most frequently used merely as a cover for loose ideas and ignorance of principles. . . . [T]he result is only to make rulings on evidence arbitrary and chaotic, when we ignore the correct purposes of admission and substitute an indefinite and meaningless phrase of this sort.²³³

There is irony here. Having rejected, as “obscure and indefinite,” as “need[ing] further definition and translation,” as a mere “cover for loose ideas” the term *res gestae*, the Eleventh Circuit has simply substituted in its place the term “inextricably intertwined”—a figure of speech as obscure and indefinite, as much in need of definition and translation, as likely to shelter loose ideas, as any form of words ever visited upon the law.

Such figures of speech have their purpose. If the jurisprudential goal is a rule of law so capacious and indefinite as to provide all drug convictions with a safe harbor on appeal, “inextricably intertwined” is ideal. If, however, the jurisprudential goal is clarity of thought and expression, and a due regard for the fair trial rights of accused citizens, the “inextricably intertwined” rule as presently applied in the Eleventh Circuit is very far from ideal.

Without reverting to the term *res gestae*, the courts in the Eleventh Circuit should revert to the common law understanding of what is today termed “inextricably intertwined” evidence. Evidence of uncharged misconduct should be admitted only when such evidence cannot be redacted from the narrative of the charged misconduct without leaving that narrative confusing or incomplete. “Inextricably intertwined” evidence should be received infrequently, as a narrow exception to the general rule against the admission of evidence of uncharged crimes.

That the “inextricably intertwined” rule, properly defined and understood, is a necessary part of our evidentiary jurisprudence cannot be gainsaid. In *United States v. Kerris*,²³⁴ undercover agent Flagg was investigating a stolen car ring, and in that capacity came to Florida to obtain a stolen auto for delivery to New York.²³⁵ In his undercover role, Flagg met Kerris.²³⁶ When Flagg told Kerris that he (Flagg) was taking two kilos of

233. WIGMORE, *supra* note 15, § 218.

234. 748 F.2d 610 (11th Cir. 1984).

235. *Id.* at 613.

236. *Id.*

cocaine to New York with him, Kerris offered to supply all of Flagg's future cocaine needs.²³⁷

Kerris then introduced Flagg to DeMeo, Kerris' partner and future codefendant.²³⁸ It was DeMeo who supplied Flagg with the stolen vehicle to be transported to New York.²³⁹ At the time Flagg took delivery of the car, DeMeo asked Flagg if he needed additional cocaine.²⁴⁰ Flagg answered that he did not but, should a need arise in the future, he would be in touch.²⁴¹ Flagg then drove the auto to New York, telephoning Kerris several times along the way to discuss both the delivery arrangements for the car and plans for future cocaine transactions.²⁴² As a result of these discussions, cocaine was later delivered to Flagg in New York.²⁴³ Finally, Flagg "had several telephone conversations with both Kerris and DeMeo . . . in which Flagg [discussed] . . . pay[ing] \$250,000 in exchange for five kilograms of cocaine and two stolen cars."²⁴⁴ Kerris and DeMeo were charged with drug crimes, but no count in the indictment expressly referenced the stolen vehicles.²⁴⁵ On these facts, however, the court quite properly found the evidence of the misconduct involving the cars to be inextricable from that of the drug offenses.²⁴⁶ Flagg's testimony would have been expurgated beyond all recognition if he had been obliged to delete references to the stolen autos.²⁴⁷

Compare *United States v. Chilcote*.²⁴⁸ There, an undercover agent named Matthews had infiltrated a cocaine operation in which Chilcote was involved.²⁴⁹ On an occasion when Chilcote and Matthews "were engaged in weighing and analyzing the cocaine, they had a conversation in which Matthews asked [Chilcote] whether he was a pilot. [Chilcote] replied that he was not a pilot, but that he had once flown a DC-3 to Colombia and back."²⁵⁰ The inference, of course, was that Chilcote's unlicensed flight to Colombia was for the purpose of a prior drug deal. Rejecting the application of the

237. *Id.*

238. *Id.*

239. *Kerris*, 748 F.2d at 613.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Kerris*, 748 F.2d at 613.

245. *Id.*

246. *Id.* at 615.

247. *Id.* (inexplicably citing to *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1979), the controlling authority for admissibility of evidence under Rule 404(b)); *see also* *United States v. King*, 126 F.3d 987 (7th Cir. 1997) (applying the doctrine of *res gestae*/inextricably intertwined in a non-drug case).

248. 724 F.2d 1498 (11th Cir. 1984).

249. *Id.* at 1500.

250. *Id.* at 1501.

“inextricably intertwined” doctrine (one of the few such instances in a drug case in the history of the Eleventh Circuit), the court ruled that “agent Matthews’ testimony about [Chilcote’s] involvement in the crime charged would have been completely comprehensible without the testimony regarding [Chilcote’s] claimed flight to Colombia. The evidence regarding the flight was entirely unrelated to the transaction at issue here and constitutes extrinsic evidence”²⁵¹

Had the *Chilcote* court been inclined to do so, it could easily have treated the evidence of the prior flight to Colombia as giving “context” to the charged offense. The chain of induction from Chilcote’s admission that he had unlawfully piloted a plane to Colombia and back, to the conclusion that he was a practiced and determined drug smuggler was no more attenuated than the chain of induction required to link the other-crimes evidence to the charged crimes in *McDowell*,²⁵² for example, or *Herre*²⁵³ or *Foster*.²⁵⁴ Commendably, the Eleventh Circuit excluded the other-crimes evidence, and did so on the correct grounds: that proof of the charged offenses “would have been completely comprehensible without the testimony regarding [Chilcote’s] claimed flight to Colombia.”²⁵⁵

Thus application of the correct test for “inextricably intertwined” evidence proves to be no more difficult than many of the other evidentiary determinations courts routinely make in drug cases. That being conceded, there can be no justification for admission of evidence on the “same time period” theory or the “context, background, or witness’s motivation” theory. If proof of the charged crimes is not rendered incomprehensible, confusing, or misleading without the other-crimes evidence, then the other-crimes evidence is not admissible as “inextricably intertwined.”²⁵⁶

251. *Id.*

252. *United States v. McDowell*, 705 F.2d 426 (11th Cir. 1983).

253. *United States v. Herre*, 930 F.2d 836 (11th Cir. 1991).

254. *United States v. Foster*, 889 F.2d 1049 (11th Cir. 1985).

255. *Chilcote*, 724 F.2d at 1501.

256. When the prosecution seeks to offer evidence under Rule 404(b) or section 90.404 of the *Florida Statutes*, it must give pretrial notice of that intent. See *supra* note 3. Such pretrial notice affords the trial court an opportunity to devote mature reflection to the issue of admissibility, and to fashion a ruling (necessarily provisional, but still providing guidance to counsel and litigants) tailored to the facts and circumstances of the case. Such a ruling is necessarily better considered than one made in the hurly-burly of trial. Extending this pretrial notice requirement to evidence sought to be admitted as “inextricably intertwined” would be similarly salutary. Courts should view putatively “inextricably intertwined” evidence with an even more jaundiced eye than they do evidence offered under Rule 404(b) or section 90.404 of the *Florida Statutes*. The former is subject to redaction or limitation under the Rule 403 balancing test; the latter, by definition, *cannot* be elided or limited without rendering the evidence in chief incomprehensible, misleading, or confusing.

Clicking on the Dotted Line: Florida’s Enactment of the Uniform Electronic Transactions Act as a Boost to E-Commerce

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I. INTRODUCTION

In 1776, John Hancock signed his name with ink on a document known as the Declaration of Independence.¹ As the first and largest name on the Declaration, John Hancock's name has become a synonym for the word "signature."² This paper-based system of recording signatures has been an important method of communicating for hundreds of years, with contract jurisprudence being based upon the fundamental principle that a handwritten signature indicates a person's intent to transact business.³ However, since John Hancock signed the Declaration of Independence, technological advancements have led to the evolution of numerous forms of communication, such as radio, television, cable, and satellite.⁴ It is no longer necessary to sign your "John Hancock" to represent yourself. One of the newest forms of communication is the Internet, which is being combined with other technologies to create a highly advanced system of communication.⁵ This new form of electronic communication is becoming increasingly pervasive, influencing the everyday lives of all Americans.⁶ The use of the technology through computers and the Internet now means that an individual can buy, sell, or trade, by clicking a mouse, pressing a key, or typing a name. It has been suggested that we are in the midst of an electronic commerce ("e-commerce") revolution that is bigger than the industrial revolution and every other major economic shift that has preceded it.⁷ America has both the fastest growing number of Internet users and the largest proportion of e-commerce consumers in the world.⁸ By 2001–2002, total e-commerce is predicted to reach \$330 billion.⁹ The increasing trend

1. 13 THE ENCYCLOPEDIA AMERICANA 757 (Int'l ed. 1995).

2. *Id.*

3. Amelia H. Boss, *Searching for Security in the Law of Electronic Commerce*, 23 NOVA L. REV. 585, 585–86 (1999).

4. United States Internet Council, *State of the Internet: USIC's Report on Use & Threats in 1999*, at <http://www.usic.org/papers/stateoftheinternet99.htm> (last visited Aug. 2, 2000).

5. *Id.*

6. *Id.*

7. Mark Grossman, *The E-Commerce Revolution*, CYBERLAW.NEWS (Becker & Poliakoff, P.A., Fort Lauderdale, Fla.), Winter 2000, at 1; Anitesh Barua & Andrew B. Whinston, *The Internet Economy Indicators: Overview—The Big Picture*, at http://www.internetindicators.com/overview_big_picture_june_00.html (last visited Aug. 9, 2000).

8. Roper Starch Worldwide, *America is Fastest-Growing Internet Market, As Teens Lead the Way*, at <http://www.ropers.com/news/content/news127.htm> (last visited Aug. 2, 2000).

9. Organisation for Economic Co-operation and Development, *Growth of Electronic Commerce: Present and Potential*, at http://www.oecd.org/subject/e_commerce/ebooks/027-054.pdf (last visited Nov. 11, 2000).

towards using electronic transactions is based on the inefficiencies of paper-based communications.¹⁰ Some advantages of conducting business through e-commerce are that it is convenient, flexible, and efficient.¹¹ Although e-commerce has eliminated the need for slower, paper-based transactions, a number of questions have been raised in the legal system as to what constitutes a signature within an electronic transaction.¹² In addition to these questions, security concerns regarding electronic transactions have also been raised.¹³

The United States government discourages barriers to the increasing use of e-commerce to conduct business,¹⁴ and recently passed legislation that gives electronic signatures the same legally binding effect as handwritten signatures.¹⁵ At the state level, a number of states, including Florida, have adopted the 1999 Uniform Electronic Transactions Act ("UETA") to provide their own legal standard for e-commerce transactions.¹⁶ This article considers the effect of Florida's Electronic Transaction Act on businesses, consumers, and governmental entities in Florida, and the issues raised by giving electronic signatures the same legally binding effect as handwritten signatures. With the vast increase in computer use and electronic transactions in conducting business, it is important that attorneys in all areas of concentration, judges, and everyday consumers have a knowledge of the ramifications of the new legislation that gives electronic signatures the same legally binding effect as handwritten signatures and paper records.

10. Shea C. Meehan, Comment, *Consumer Protection Law and the Uniform Electronic Transactions Act (UETA): Why States Should Adopt UETA as Drafted*, 36 IDAHO L. REV. 563, 564 (2000).

11. Barua & Whinston, *supra* note 7.

12. Boss, *supra* note 3, at 587.

13. Boss, *supra* note 3, at 592.

14. The White House, *A Framework for Global Electronic Commerce*, at <http://www.ecommerce.gov/framework.htm> (July 1, 1997); U.S. Department of Commerce, *The Emerging Digital Economy*, at www.doc.gov/ecommerce/EmergingDig.pdf (June 22, 1999); see also U.S. Government Working Group on Electronic Commerce, *First Annual Report*, at <http://www.doc.gov/ecommerce/E-comm.pdf> (Nov. 1998).

15. Electronic Signatures in Global and National Commerce Act (ESGNA), Pub. L. No. 106-229, 114 Stat. 464 (2000) (to be codified at 15 U.S.C. §§ 7001-7031).

16. UNIF. ELEC. TRANSACTIONS ACT (UETA) §§ 1-21, 7A U.L.A. 20-46 (West Supp. 2000); see also FLA. STAT. § 668.50 (2000).

II. WHAT IS THE INTERNET AND ELECTRONIC COMMERCE?

The Internet is a worldwide system of computer networks,¹⁷ which transport information from stored files from one computer to others having the same Transmission Control Protocol/Internet Protocol ("TCP/IP").¹⁸ Through the Internet, computers can be used to send and receive electronic mail ("e-mail"),¹⁹ send and receive documents from other computers, and view information on the World Wide Web.²⁰

As an application of the Internet, e-commerce transactions are increasing at a rapid pace and will potentially account for a sizeable share of overall commerce.²¹ Although the term e-commerce has no widely accepted definition, it generally refers to doing business and selling goods and services on the Internet.²² These goods and services can be delivered both on-line, through a computer, or offline, being mailed in a regular fashion through the Postal Service.²³ The emphasis on a geographic location suitable for business, large amounts of capital, and retail stores are irrelevant in

17. The original purpose of the Internet was for the United States government to have a decentralized system of computers to ensure that communication would still be possible even if some were destroyed in an event such as a nuclear war. Sean Selin, *Governing Cyberspace: The Need for an International Solution*, 32 GONZ. L. REV. 365, 367 (1997). This decentralization then expanded beyond a military purpose into the commercial and educational context of computers. *Id.* The unique structure of the Internet means that it is difficult to govern. *Id.* at 368. It is not a single entity, and is not controlled by any government, company, or individual. *Id.*

18. University of California, Berkeley, *What is the Internet, the WWW, and Netscape? An Introduction*, at <http://www.lib.berkeley.edu/TeachingLib/Guides/Internet/WhatIs.html> (last modified July 19, 2000).

19. *Id.* E-mail is a medium where electronic letters, pictures, sounds, and data files can be instantly sent within a building or across the world. Paul Hoffman, *Internet Electronic Mail*, at <http://www.sciam.com/1998/0398issue/0398working.html> (last visited Aug. 3, 2000). By entering an Internet mail address, the sender of the message uses software, such as Microsoft Outlook, to send the document to another person. *Id.* The message is sent by TCP software to a mail submission server that converts the recipient's address into a numeric IP address. *Id.* Routers through the Internet then relay the message to its destination on the most efficient pathway, through data lines to the destination mail server. *Id.* This places the message in the recipient's mail box, and the recipient can then use software to display the message. *Id.*

20. University of California, Berkeley, *supra* note 18.

21. JONATHAN COPPEL, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *E-COMMERCE: IMPACTS AND POLICY CHALLENGES 3* (Econ. Dep't Working Papers No. 252, 2000).

22. *Id.* at 4.

23. *Id.*

e-commerce transactions.²⁴ E-commerce transactions come in a number of forms, for instance, business to business, between businesses and consumers, or from consumer to consumer.²⁵ By using e-commerce, thousands of businesses and consumers now have ease of access for the opportunity to generate and spend revenue.²⁶

III. TRADITIONAL CONTRACT LAW AND SIGNATURES

A. Writings

Some contracts require a writing to be held enforceable, and most of the United States have adopted some modified form of the Statute of Frauds, originally an English statute passed in 1677.²⁷ The main provision of the Statute of Frauds states that no law suit can be maintained on certain types of contracts unless they are in writing and signed by the party involved, or by an authorized agent.²⁸ The types of contracts included under the Statute of Frauds are those for the sale of goods over \$500, contracts for the sale of land, contracts which cannot be performed within one year, and contracts that guaranty the debt of another.²⁹ The formal requirements of the Statute of Frauds have been incorporated by both the Uniform Commercial Code (“UCC”)³⁰ and Florida’s own version of the UCC.³¹

Although a writing requirement is not always needed to form a binding contract, parties often formalize an agreement in writing after negotiating a transaction.³² Traditionally, writing requirements have been used to ensure that terms of a document are fixed.³³ If there are any ambiguities regarding the parties’ intent within a transaction, courts generally limit their interpretation of the agreement to what is contained in the text of the

24. Global Information Infrastructure Commission, *GIIC Recommendations for Promoting the Use of Electronic Commerce*, at <http://www.giic.org/focus/ecommerce/ecrecs.html> (last visited Aug. 3, 2000).

25. COPPEL, *supra* note 21, at 4.

26. Kalama M. Lui-Kwan, *Recent Developments in Digital Signature Legislation and Electronic Commerce*, 14 BERKELEY TECH. L.J. 463 (1999).

27. BLACK’S LAW DICTIONARY 661 (6th ed. 1990).

28. *Id.* at 662.

29. *Id.*

30. U.C.C. § 2-201(1) (1989).

31. FLA. STAT. § 672.201 (2000); *see also* 45 FLA. JUR. 2D *Sales and Exchanges of Goods* § 30 (1984).

32. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2.8 (4th ed. 1998).

33. Adam White Scoville, *Clear Signatures, Obscure Signs*, 17 CARDOZO ARTS & ENT. L.J. 345, 356 (1999).

document.³⁴ The *Restatement (Second) of Contracts* states that a writing is acceptable if it reasonably identifies the subject matter of a contract, is sufficient to indicate that a contract has been made, and states the essential terms of the promises contained in the contract with reasonable certainty.³⁵

B. Signatures

In contrast to writings, signatures are attached to documents for the purpose of authentication, and to demonstrate a signer's intent to be bound by what is written.³⁶ A signature can be defined as any mark, sign, or symbol on an instrument or document that signifies knowledge, approval, or acceptance of an obligation,³⁷ or something that an individual may use to represent herself.³⁸ In addition to handwritten signatures, it has also been recognized, unless stated otherwise by a statute, that a genuine signature may be one that is stamped, typewritten, engraved, or faxed.³⁹ It is the signer's intent rather than the form of a signature that determines whether a signature is legal.⁴⁰

Along with showing evidence of a person's intent, a secondary purpose of a signature can be to identify the person signing a document or to show the integrity of a document.⁴¹ As suggested by Smedinghoff and Hill-Bro,⁴² these secondary purposes become important in the electronic world, because of the potential for electronic transactions to be altered.⁴³ Potential damage to the integrity of an electronic document may be inflicted by a computer hacker, or someone attempting to commit fraud.⁴⁴ Furthermore, the identity of the sender and the integrity of the document hold great importance in electronic transactions, because the transactions can be anonymous and

34. *Id.*

35. RESTATEMENT (SECOND) OF CONTRACTS § 131 (1981).

36. 80 C.J.S. *Signatures* § 1(a) (1953); *see also* Scoville, *supra* note 33, at 356.

37. 80 C.J.S. *Signatures* § 1(a) (1953).

38. *Id.*

39. *Id.* § 7; *see also* State v. Hickman, 189 So. 2d 254, 258 (Fla. 2d Dist. Ct. App. 1966).

40. William E. Wyrrough, Jr. & Ron Klein, *The Electronic Signature Act of 1996: Breaking Down Barriers to Widespread Electronic Commerce in Florida*, 24 FLA. ST. U. L. REV. 407, 420 (1997).

41. Thomas J. Smedinghoff & Ruth Hill Bro, *Moving With Change: Electronic Signature Legislation As a Vehicle for Advancing E-Commerce*, 17 J. MARSHALL J. COMPUTER & INFO. L. 723, 731 (1999). The integrity of a document could be shown by initialing pages of a document before it is signed to prevent pages being substituted. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

occur over thousands of miles without the parties ever meeting or exchanging any papers.⁴⁵ Although most handwritten signatures are used merely to indicate a signer's intent, electronic signatures in an e-commerce transaction can identify the sender of a document, indicate the sender's intent to be bound by the contractual terms, and ensure the integrity of the document that has been signed.⁴⁶ Based on traditional contract law and signatures, a name typed at the end of an e-mail should qualify as a signature, as long as the person signing the e-mail had an intent to contract.⁴⁷

C. *What Are Electronic Signatures?*

With the development of e-commerce, traditional paper-based signatures have been replaced by electronic signatures.⁴⁸ As a result, legislation has been directed toward the types of documents and signatures that can be electronically created, communicated and stored.⁴⁹ These electronically generated signatures are referred to as either "electronic signatures" or "digital signatures."⁵⁰ Although these terms are often used interchangeably, each has its own distinct meaning.⁵¹ An electronic signature is a broadly used, technology-neutral term which embraces all the methods by which an individual can sign an electronic record or transaction.⁵² An electronic record is a record that is "created, generated, sent, communicated, received, or stored by electronic means."⁵³ Electronic signatures can take numerous forms, including a faxed writing,⁵⁴ a name typed in an e-mail message,⁵⁵ a secret code, as used in a personal identification number of an automated teller machine with a credit card,⁵⁶ a biometric identifier using physical characteristics such as face, finger prints, and retinas,⁵⁷ or digital signatures.⁵⁸

45. Smedinghoff & Hill Bro, *supra* note 41, at 732.

46. *Id.*

47. *Id.* at 737.

48. Wyrough, Jr. & Klein, *supra* note 40, at 421.

49. Smedinghoff & Hill Bro, *supra* note 41, at 729.

50. *Id.*

51. *Id.*

52. *Id.* at 730.

53. FLA. STAT. § 668.50(2)(g) (2000).

54. Wyrough, Jr. & Klein, *supra* note 40, at 421.

55. Smedinghoff & Hill Bro, *supra* note 41, at 730.

56. *Id.*

57. *Id.*

58. *Id.*

In contrast, a digital signature is a specific term for one type of electronic signature.⁵⁹ It is a stamp that a signer places on documents or data which is unique to that signer.⁶⁰ For a digital signature to be produced and used, a signer will have both a "public key" and a "private key."⁶¹ The public and private keys are used in electronic documents to encrypt and scramble information, leaving only the person with the appropriate key as being able to unscramble the information to make it readable again.⁶² Anyone can gain access to the signer's public key, but only the signer can use her private key.⁶³ In conjunction with the appropriate software, a signer can use her private key to encrypt and scramble information contained in a document, thus attaching her digital signature.⁶⁴ When the document with the digital signature is passed to another person, the person who receives the document can decrypt the signature by using the signer's public key.⁶⁵ If the unscrambling of the document is successful, it proves that the signer signed the document, and if the message is the same as that which was created, the recipient knows that the signed data has not been altered.⁶⁶ If the original message was forged or altered, and the private key did not correspond to the public key used, the recipient would not be able to decrypt the message.⁶⁷

IV. THE NEED FOR A UNIFORM STANDARD FOR ELECTRONIC TRANSACTIONS

A fundamental issue that e-commerce raises is whether the electronic records and electronic signatures generated by transactions within e-commerce "meet legal formalities such as the writing and signature requirements imposed by a variety of statutes and regulations"⁶⁸ Under traditional contract law, electronic transactions, such as those with a faxed signature, should be legally binding.⁶⁹ Statutes and regulations requiring transactions to be in writing are considered barriers that need to be removed to allow the development and increase of e-commerce transactions.⁷⁰

59. *Id.*

60. David M. Nadler & Valerie M. Furman, *House Passes Digital Signature Act*, CYBERSPACE LAW, Dec. 1999, at 17.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Nadler & Furman, *supra* note 60, at 17.

66. *Id.*

67. *See id.*

68. Smedinghoff & Hill Bro, *supra* note 41, at 733.

69. *Id.* at 735-36.

70. *Id.* at 734.

However, because of a lack of specific statutory guidelines, coupled with a lack of uniformity in court decisions among jurisdictions, the legality of electronic signatures has been questioned.⁷¹

A. *Uniform Acts*

1. The Uniform Computer Information Transactions Act

The Uniform Computer Information Transactions Act (“UCITA”) has been developed by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).⁷² This Act includes substantial provisions on electronic signatures, and provides a comprehensive uniform law for computer information licensing.⁷³ The purpose of UCITA is to provide a set of rules for creating and adopting electronic contracts by using the traditional principles of contract law.⁷⁴ Examples of computer information that could be subject to UCITA include computerized databases, computerized music, access contracts to sites on and off the Internet containing computer information, and software such as diskettes and compact discs, which may be used to hold computer information.⁷⁵ UCITA is limited to commercial licensing.⁷⁶ Similar to the common law understanding of signatures, UCITA sees signatures as being a method to show a signer’s intent to authenticate a document.⁷⁷

71. *Id.* at 737; *see also* Parma Tile Mosaic & Marble Co. v. Short, 663 N.E.2d 633, 634 (N.Y. 1996) (holding that a heading, including a name on a fax, does not constitute a signature for the writing requirement under the Statute of Frauds).

72. Carol A. Kunze, *The ETA Forum*, at <http://www.webcom.com/legaled/ETAForum/bkgd.html> (last modified July 11, 1999). The NCCUSL began in 1892 as a conference attended by commissioners from seven states and by 1912 every state had representation. *Id.* It is a nonprofit, unincorporated association of over 300 commissioners on uniform laws that represent all fifty states. *Id.* The commissioners are mostly judges, practicing attorneys, and professors of law. *Id.* The main task of the NCCUSL is to determine which areas of the law would benefit from a uniform standard for a law, and to write and recommend these uniform laws to provide state legislatures with a model for enactment. *Id.*

73. Uniform Law Commissioners, *A Few Facts About Uniform Computer Information Transactions Act*, at http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ucita.htm. (last visited Aug. 4, 2000).

74. *Id.*

75. Uniform Law Commissioners, *Summary: Uniform Computer Information Transactions Act*, at http://www.nccusl.org/uniformact_summaries/uniformacts-s-ucita.htm (last visited Aug. 4, 2000).

76. Scoville, *supra* note 33, at 356.

77. *Id.*

2. The Uniform Electronic Transactions Act

To help create certainty and uniformity in the field of electronic transactions, the NCCUSL established a drafting committee to develop a uniform act to establish a legal standard for the recognition of electronic records and electronic signatures.⁷⁸ The uniform law generated by this committee is known as the Electronic Transactions Act, and was approved and recommended for enactment in all the states in 1999.⁷⁹ The Act attempts to remove barriers to e-commerce,⁸⁰ with limited purposes to ensure that electronic records are given the same recognition as a piece of paper, and that electronic signatures are given the same legal effect as manual signatures.⁸¹ It does not attempt to provide a new standard of legislation governing all electronic commerce, and it does not effect the substantive rules of contracts.⁸² UETA applies only to electronic signatures and records relating to a transaction, not to all writings and signatures, and not those governed by most of the UCC.⁸³ It is a procedural statute that does not require electronic signatures or records to be used, but provides a standard for governing these transactions.⁸⁴ The commissioners also make it clear that the Act is not a digital signature statute.⁸⁵ Where a state has a statute governing digital signatures, the Act is not designed to replace that legislation, but to support and compliment that statute.⁸⁶

Both the Uniform Law commissioners and legal scholars have encouraged the states to adopt UETA. They have advanced a number of reasons as to why UETA should be adopted in its entirety, including the fact that it defines and validates electronic signatures, it removes the barriers to e-commerce, it assures that people can choose between paper or electronic based methods of transacting business, it does not affect consumer protection laws, and it encourages state governments to use electronic communi-

78. Kunze, *supra* note 72.

79. *Id.*

80. Uniform Law Commissioners, *Why States Should Adopt the Uniform Electronic Transactions Act*, at http://www.nccusl.org/uniformact_why/uniformacts-why-ueta.htm. (last visited Aug. 4, 2000).

81. Uniform Law Commissioners, at http://www.nccusl.org/uniformact_summaries/uniformacts-s-veta.htm (last visited Aug. 4, 2000).

82. Uniform Law Commissioners, *supra* note 75.

83. *Id.* The reason that most contracts governed by the UCC are excluded is because most articles of the UCC already deal with the use of electronic records. Meehan, *supra* note 10, at 568.

84. Uniform Law Commissioners, *supra* note 75.

85. UETA, Prefatory Note, 7A U.L.A. 17-19 (West Supp. 2000).

86. *Id.*

cations and records.⁸⁷ UETA applies to both commercial and many non-commercial signatures, and although UETA and UCITA are designed to compliment each other, UETA has a wider scope and uses a broader definition of an electronic signature.⁸⁸ In contrast to UCITA, UETA requires a signature with intent to associate the person with a particular record.⁸⁹

So far, UETA has been adopted by a number of states, including California, Florida, Pennsylvania, Utah, and Virginia, and introduced in a number of others, such as Delaware, Michigan, and New Jersey.⁹⁰ With the increasing use and concerns about electronic transactions, it seems likely that other states will also adopt UETA in the near future. A further reason advanced for adopting UETA in its entirety is that preemptive federal regulations may be financially burdensome to the states if they adopt non-uniform amendments.⁹¹

B. Federal Legislation

1. The Electronic Signatures in Global and National Commerce Act

In addition to the NCCUSL, the United States government also recognizes that traditional laws and regulations can hinder the development of e-commerce.⁹² As both a national and international marketplace, the government states that the Internet needs to be governed by a legal framework that is consistent and predictable at the state, national, and international level, regardless of the jurisdiction in which a buyer or seller makes the transaction.⁹³ After consideration of a number of bills, Congress recently passed the Electronic Signatures in Global and National Commerce Act ("ESGNCA"), being signed into law by President Clinton on June 30, 2000.⁹⁴ After signing the legislation, the President stated that by providing a

87. Uniform Law Commissioners, *supra* note 81; Meehan, *supra* note 10, at 563.

88. Scoville, *supra* note 33, at 356.

89. *Id.*

90. Carol A. Kunze, *What's happening to UETA in the States*, at <http://www.uetonline.com/hapstate.html> (last modified July 9, 2000). According to UETA online, the full list of states that have adopted the UETA to date are Arizona, California, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Nebraska, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and Virginia. *Id.* The states that have introduced UETA are Alabama, California, Colorado, Delaware, District of Columbia, Hawaii, Michigan, New Jersey, North Carolina, Rhode Island, Vermont, and West Virginia. *Id.*

91. Meehan, *supra* note 10, at 564.

92. Global Information Infrastructure Commission, *supra* note 24.

93. *Id.*

94. ESGNCA, Pub. L. No. 106-229, § 101(a) 114 Stat. 464 (2000) (to be codified at 15 U.S.C. §§ 7001-7031).

legal standard for electronic contracts and signatures, there will be new frontiers of economic opportunity, while still protecting the rights of American consumers in the largest economic expansion in history.⁹⁵

As a member of the Committee on Commerce, Science, and Transportation, Senator Spencer Abraham, introduced ESGNCA as Senate Bill 761⁹⁶ on March 5, 1999, to regulate interstate commerce by electronic means by allowing and encouraging the increased use of e-commerce through free market forces.⁹⁷ The Act states that a signature, contract, or other record of a transaction cannot be denied legal effect, validity, or enforceability, solely on the basis that it was formed by an electronic record or electronic signature.⁹⁸ There is no requirement that any person has to agree to use or receive electronic signatures or electronic records.⁹⁹ Also, it does not affect statutes, regulations, or rules of law, other than to the extent that they require contracts or records to be written or signed by non-electronic means.¹⁰⁰ In developing the Act, Congress intended to have the marketplace, rather than governments, control the continued growth and development of e-commerce.¹⁰¹

Where information relating to a transaction is required to be made available to a consumer in writing, the use of an electronic record can be used to meet this requirement.¹⁰² By providing consumers with the right not to use electronic records or signatures to conduct transactions, the Act states that an electronic record can only be used to satisfy the writing requirement of a statute, regulation, or rule of law if a consumer consents to it, and does not later withdraw that consent.¹⁰³ Specifically, prior to consenting, consumers must be given a clear and conspicuous statement that they can withdraw their consent, and that they can have the record made available in a non-electronic form.¹⁰⁴ A statement of the hardware and software that will be needed to access and retain electronic records is also required, along with

95. The White House, *Signing of Electronic Signatures in Global and National Commerce Act*, at http://www.whitehouse.gov/WH/New/html/electronic_signatures_text.html. (last visited Aug. 4, 2000).

96. In Senate Bill 761, the Act was called the "Millennium Digital Commerce Act." S. 761, 106th Cong. § 1 (1999).

97. *Id.*

98. ESGNCA, Pub. L. No. 106-229, § 101(a), 114 Stat. 464, 464 (2000) (to be codified at 15 U.S.C. §§ 7001-7031).

99. § 101(b).

100. *Id.*

101. COMM. ON COMMERCE, SCI., & TRANSP., MILLENNIUM DIGITAL COMMERCE ACT, S. REP. No. 106-131, at 5 (1999).

102. § 101(c).

103. *Id.*

104. *Id.*

the procedures consumers need to follow to withdraw consent and receive a non-electronic record.¹⁰⁵ If consumers consent electronically, it must be reasonably demonstrated that they will be able to access the information in its electronic form.¹⁰⁶ However, the failure to obtain electronic consent or confirmation from a consumer cannot be the sole basis in denying the validity of a contract.¹⁰⁷ An electronic signature can also be used as notarization for a transaction where a statute or other law requires this authorization.¹⁰⁸

Although ESGNCA is intended to give electronic signatures and records the same legally binding effect as handwritten signatures, there are some specific exceptions.¹⁰⁹ The Act does not apply to contracts governed by statutes or other laws regarding the creation and execution of wills, codicils or testamentary trusts, divorce, adoption, or other matters of family law, and a majority of sections of the UCC.¹¹⁰ Furthermore, the Act can preempt state electronic signature laws, but a state law will not be preempted if it is an adoption of UETA,¹¹¹ or the law is an alternative method for achieving the same recognition of electronic records and signatures and consistent with the principles contained in ESGNCA.¹¹²

2. The Electronic Signatures in Global and National Commerce Act and the Uniform Electronic Transactions Act

The definitions of terms in ESGNCA, such as electronic record, electronic signature, person, and transaction, are consistent with those contained in UETA.¹¹³ In regulating and encouraging a uniform standard for electronic signatures and records, the government does not intend to preempt

105. *Id.*

106. *Id.*

107. § 101(c)(3), 114 Stat. at 466.

108. § 101(g), 114 Stat. at 467.

109. § 103, 114 Stat. at 468.

110. § 103(a). Further exceptions include court orders and official court documents, such as briefs and pleadings, the cancellation or termination of utilities, repossession or default under credit or rental agreements, the cancellation or termination of either health or life insurance benefits, the recall of a product for health and safety reasons, and documentation regarding the transportation or handling of toxic or dangerous materials. § 103(b)(1).

111. § 102(a)(1).

112. *Id.*; see Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws*, at <http://www.jetaonline.com/docs/pfry700.html> (last visited Aug. 4, 2000).

113. COMM. ON COMMERCE, SCIENCE, AND TRANSP., MILLENNIUM DIGITAL COMMERCE ACT, S. REP. No. 106-131, at 5 (1999).

or overrule state law enactments of UETA.¹¹⁴ The gradual enactment of UETA by the states is similar to the situation that occurred when the NCCUSL released the UCC, where the uniform act was not adopted in every state simultaneously.¹¹⁵ There was a transition period with the status of commercial law being somewhat unclear, while states debated and considered the ramifications of the UCC before deciding to approve its enactment.¹¹⁶ The Committee on Commerce, Science, and Transportation recognizes that effects of the transition period seen when the states were considering and adopting the UCC will be the same for the enactment of UETA.¹¹⁷ In achieving the goal of a uniform standard for contracts generated by electronic methods, the federal legislation provides uniformity, even among those states that have either not yet adopted or chosen not to adopt UETA.¹¹⁸

V. FLORIDA'S ELECTRONIC SIGNATURE LEGISLATION AND THE UNIFORM ELECTRONIC TRANSACTION ACT

A. *The Electronic Signature Act of 1996*

In a step to encourage the development of e-commerce in Florida, the legislature passed the Electronic Signature Act of 1996.¹¹⁹ Similar to UETA and ESGNCA, this Act provides that an electronic signature may be used to sign a writing and may be given the same force and effect as a written signature.¹²⁰ The intent of the legislature in adopting this Act was to enhance public confidence in the use of electronic signatures, minimize forged electronic signatures and fraud in e-commerce, encourage economic development in the state, and allow government the opportunity to provide its services by electronic communications.¹²¹ Differences between electronic signatures and digital signatures are defined in this Act,¹²² and it gives both forms of communication, including future forms of electronic signatures, the same legal effect as written signatures.¹²³ Many electronic signature statutes incorrectly use technology-specific terminology in referring to a digital

114. S. REP. No. 106-131, at 2.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. FLA. STAT. §§ 668.001--006 (2000).

120. § 668.004.

121. § 668.002.

122. § 668.003.

123. Wyrrough, Jr. & Klein, *supra* note 40, at 420.

signature to refer to all the ways in which an electronic signature can be generated.¹²⁴ However, Florida correctly recognizes that a digital signature is generated by an asymmetric cryptosystem where a public key can be used to determine whether the document was created by the signer's private key, and whether the original message has been altered in any way.¹²⁵

B. *Florida's Enactment of the Uniform Electronic Transactions Act*

On May 26, 2000, Governor Jeb Bush signed Florida's adoption of UETA into law, becoming effective on July 1, 2000.¹²⁶ The Florida Legislature followed the wording of UETA almost in its entirety, since the Florida enactment has the same legislative intent as both UETA and ESGNCA, which is to remove barriers to e-commerce.¹²⁷ As a consequence of the Act, electronic signatures and records can now be used to satisfy a provision of law that requires a signature or a record to be in writing.¹²⁸ In the Electronic Signature Act of 1996, Florida already has a digital signature law.¹²⁹ As UETA is not a digital signature law, Florida's adoption of UETA both supports and compliments the Electronic Signature Act of 1996.¹³⁰

The federal government recognizes UETA as valid legislation to promote and develop e-commerce and as an exception to ESGNCA.¹³¹ By adopting UETA, Florida's legislation will not be preempted by the recently passed federal Act.¹³² In regulating interstate commerce through ESGNCA, the federal government has allowed states to retain some independence in adopting their own standard for electronic transactions.¹³³ It is possible that some states may have, or may adopt, their own legislation concerning standards for electronic transactions. However, when businesses and consumers in Florida are involved in electronic transactions with parties from other states, there should be no concern that the principles contained in Florida's adoption of UETA will be undermined or invalidated by differing state legislation. Based on the principles of the Supremacy Clause in the

124. Smedinghoff & Hill Bro, *supra* note 41, at 729-30.

125. § 282.72; *see* Smedinghoff & Hill Bro, *supra* note 41, at n.25.

126. Ch. 2000-164, § 42, 2000 Fla. Laws 972, 1013.

127. *See* HOUSE OF REPRESENTATIVES COMM. ON UTILS. & COMMS. ANALYSIS & ECON. IMPACT STATEMENT ON BILL NO. CS/HB 1891, at 2 (Comm. Print 2000) [hereinafter ANALYSIS CS/HB 1891].

128. FLA. STAT. § 668.50(7) (2000).

129. §§ 282.70-75.

130. ANALYSIS CS/HB 1891, *supra* note 127.

131. *See* ESGNCA, Pub. L. No. 106-229, § 102, 114 Stat. 464 (2000) (to be codified at 15 U.S.C. §§ 7001-7031).

132. § 102, 114 Stat. at 467-68.

133. *See* § 103, 114 Stat. at 468.

United States Constitution,¹³⁴ states having legislation that directly conflicts with ESNCA will be required to follow the federal law that requires a uniform national standard for electronic transactions. By enacting UETA, the Florida legislature has ensured that any disputes between businesses or consumers in Florida and out-of-state parties, from a state which has legislation that does not follow federal standards, will be governed by the standards for electronic transactions contained in Florida's UETA.

1. Definitions and Applications of the Act

a. *Electronic Transactions*

While giving electronic transactions generated by electronic records and electronic signatures the same effect as those written on paper, these transactions are limited to those between two or more people in the context of business, insurance, or governmental affairs.¹³⁵ As defined in UETA, transactions may include recurring weekly or monthly orders between companies that have agreed to methods and manners of their transactions, individuals making purchases from an Internet site, and the closing of business transactions by facsimile or e-mail.¹³⁶ UETA does not apply to the creation and execution of wills, codicils, or testamentary trusts.¹³⁷ The reason for this is because electronic transactions in UETA must be between two or more persons.¹³⁸ Wills, codicils, and testamentary trusts are unilateral acts.¹³⁹ Also, the Act does not apply to UCITA, rules relating to judicial procedure, or the UCC, with the exception of sections 671.107, 671.206 and chapters 672 and 680 of the *Florida Statutes*.¹⁴⁰ Although UETA does not

134. U.S. CONST. art. VI.

135. FLA. STAT. § 668.50(2)(p) (2000).

136. UETA § 2 cmt. 12, 7A U.L.A. 24 (West Supp. 2000).

137. FLA. STAT. § 668.50(3)(b) (2000).

138. § 3 cmt. 4.

139. *Id.*

140. FLA. STAT. § 668.50(3) (2000). Section 671.107 of the *Florida Statutes* states that "[a]ny claim or right arising out of an alleged breach can be discharged . . . without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." § 671.107.

Section 671.206 of the *Florida Statutes* provides that, except in the cases of a contract for the sale of goods, securities, or security agreements, a contract for the sale of personal property is not enforceable as an action or a defense if the value exceeds, or the remedy sought, is in excess of \$5000, unless there is a writing between the parties that there is a contract, at a stated price, with the subject matter reasonably identified, and signed by the party against whom enforcement is sought, or his or her authorized agent. §671.206.

apply to UCITA, Florida has not formally enacted UCITA, and there does not appear to be a comparable act in the laws of Florida.¹⁴¹

b. *Electronic Signatures and Electronic Records*

The U.S. government has expressed a desire that laws relating to e-commerce should be technology-neutral, meaning that one particular technology should not be required or favored over another.¹⁴² This encourages the development of new technology to transact business.¹⁴³ Given the constant changing nature of computer technology, future forms of electronic communications will develop rapidly, and it is not possible to accurately predict what communication forms will be used to transact business in the future.¹⁴⁴ Therefore, having technology-neutral legislation governing e-commerce also ensures laws will still be applicable when new forms of communication are developed.¹⁴⁵ By being technology-neutral, UETA fulfils the desire of the federal government.¹⁴⁶

In UETA, an electronic signature is defined as an “electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.”¹⁴⁷ Therefore, a person’s voice on an answering machine or typing a name in an e-mail will be sufficient to meet the legal requirement of a signature, as long as there is an intent to execute or adopt the sound, symbol, or process for the purpose of signing a record.¹⁴⁸ Furthermore, a computer program or other automatic method of communication can be used to form a contract even if the terms and conditions of the agreement were not reviewed.¹⁴⁹ For example, clicking “I agree” for the receipt of goods or services from an Internet site will be legally enforceable, if this is coupled with an intent to sign and the person was free to refuse the terms and conditions of the agreement.¹⁵⁰ A signature will be attributable to actions taken by a person, or an authorized agent, based on factors such as a name on the letterhead of a

141. SENATE STAFF ANALYSIS & ECON. IMPACT STATEMENT ON BILL NO. CS/SB 2416 (Comm. Print 2000) [hereinafter ANALYSIS CS/HB 2416].

142. See The White House, *supra* note 14.

143. See also Smedinghoff & Hill Bro, *supra* note 41, at 760–61.

144. Scoville, *supra* note 33, at 356.

145. Smedinghoff & Hill Bro, *supra* note 41, at 731. The integrity of a document could be shown by initialing pages of a document before it is signed to prevent pages being substituted. *Id.*

146. *Id.* at 739.

147. FLA. STAT. § 668.50(2)(h) (2000).

148. UETA § 2 cmt. 7, 7A U.L.A. 23 (West Supp. 2000)

149. FLA. STAT. § 668.50(14) (2000).

150. UETA § 14 cmt. 3, 7A U.L.A. 38 (West Supp. 2000).

fax, a typed name in an e-mail, a coded PIN number, or a combination of public and private keys.¹⁵¹ Once an electronic signature or record has been attributed to a person, its effect will be determined from the context of the surrounding circumstances at the time the record or signature was created, adopted, or executed.¹⁵²

Electronic records can be computer equipment and programs, e-mail, voice mail, fax transmissions, audio and video tape recordings, and information stored on computer hard drives or diskettes.¹⁵³ Under UETA, if a law requires that a record be maintained, this requirement can be met by retaining an electronic record of the information, as long as the record accurately reflects the information as it was first generated and is accessible for later reference.¹⁵⁴ Laws requiring a record to be maintained in an original form may be satisfied by having an electronic record.¹⁵⁵ Written records can now be converted to electronic records, including the retention or production of original canceled checks.¹⁵⁶

Although it can be argued that information copied from the hard drive of a computer to a floppy disk is not information in its original form, the focus and concern of this section of the Act aims more towards the integrity of the information.¹⁵⁷ In recognizing that information stored on floppy disks is more prone to disintegration and generally less stable than information stored on a hard drive, the accessibility of the information requirement in UETA must always be satisfied to validate electronically stored information.¹⁵⁸ Electronic records can also be used to satisfy a law that requires a person to retain records for evidentiary reasons, audits, or any other purpose.¹⁵⁹ Their admissibility into evidence cannot be denied solely on the basis that the record or signature is in an electronic form.¹⁶⁰

As paper is a tangible form, it is difficult to create an electronic token which embodies the intangible rights and obligations that paper negotiable instruments can provide.¹⁶¹ However, UETA includes a section whereby business parties can gain some of the benefits of negotiability in the electronic world.¹⁶² Section 16 of UETA provides a way to avoid the space

151. § 9 cmt. 4.

152. FLA. STAT. § 668.50(15)(a) (2000).

153. UETA § 2 cmt. 4, 7A U.L.A. 22 (West Supp. 2000).

154. FLA. STAT. § 668.50(12)(a) (2000).

155. UETA § 12(d), 7A U.L.A. 36 (West Supp. 2000).

156. § 12 cmt. 6.

157. § 12 cmt. 1.

158. § 12 cmt. 3.

159. FLA. STAT. § 668.50(12)(f) (2000).

160. UETA § 13, 7A U.L.A. 37 (West Supp. 2000).

161. § 16 cmt. 1.

162. *Id.*; see also FLA. STAT. § 668.50(16) (2000).

requirements that are needed to store numerous paper notes and documents and protect against the natural disasters that can destroy the types of documents required to be kept by paper instruments for purposes of being retained, retrieved, or delivered.¹⁶³ The meaning of a transferable record under this section only refers to the creation of the equivalent of paper promissory notes and documents, and those electronic records that would qualify as negotiable promissory notes or documents if they were in writing.¹⁶⁴ The issuer of an electronic record must expressly agree that it is a transferable record.¹⁶⁵ Conversion of a paper note to an electronic record is not possible because the issuer would not be the issuer of the electronic record.¹⁶⁶

If a law requires a signature or record to be notarized, electronic signatures can be used to fulfill that requirement if the notarized signature is attached with the signature or record.¹⁶⁷ Furthermore, an electronic notarization is legitimate without a rubber stamp or an impression type seal.¹⁶⁸ Florida's enactment of UETA adds an additional requirement to the uniform law in that first-time applicants for a notary commission must show proof that they have completed at least three hours of instruction, including instruction on electronic notarization, about the duties of a notary public.¹⁶⁹ However, there is no similar requirement for those who are already notaries to comply with this section upon their renewal or subsequent commission because they have to reapply for appointment every four years.¹⁷⁰

c. *Government Agencies*

Under sections 17 and 18 of UETA, government agencies in Florida have their own choice about whether they will use electronic records, and if they choose to use them, the extent to which they will create, retain, or use electronic signatures and electronic records or convert written materials into an electronic form.¹⁷¹ This applies to interactions both internally, among other government agencies, and externally, as a commercial party, when dealing with the private sector.¹⁷² Although these sections do not require

163. UETA § 16 cmt. 1, 7A U.L.A. 41 (West Supp. 2000).

164. *Id.*

165. FLA. STAT. § 668.50(16) (2000).

166. UETA § 16 cmt. 1, 7A U.L.A. 41 (West Supp. 2000).

167. FLA. STAT. § 668.50(11)(a) (2000).

168. *Id.*

169. FLA. STAT. § 668.50(11)(b) (2000).

170. ANALYSIS CS/HB 2416, *supra* note 141.

171. FLA. STAT. § 668.50(17)–(18) (2000).

172. UETA § 19 cmt. 1, 7A U.L.A. 45 (West Supp. 2000).

government agencies to use or accept electronic records or electronic signatures, they must recognize electronic records for evidentiary, audit, and other similar purposes.¹⁷³ If a government agency does choose to use electronic records or electronic signatures, it may consult with state technology offices to determine the details of use, such as the manner and format in which electronic records must be created, sent, or stored, the type of electronic signature required, and the types of control that will be used to ensure the “integrity, security, confidentiality, and auditability of electronic records.”¹⁷⁴ In choosing whether to use these electronic forms of communication, governmental agencies are required to be consistent, while retaining flexibility and adaptability, because requiring one particular system of communication may promote more barriers to e-commerce than those already in existence.¹⁷⁵ Showing its commitment to the development of e-commerce, the Florida legislature chose to adopt these sections of UETA, even though they are considered optional provisions to the Act.¹⁷⁶

2. E-commerce Concerns and Why Florida’s Enactment of UETA will Benefit Businesses, Consumers, and the State as a Whole

a. *Security Issues*

On a global scale, it has been suggested that the transition from paper-based transactions to electronic communications has increased security concerns regarding the authenticity and integrity of transacting business electronically.¹⁷⁷ Some people, especially consumer rights advocates, are skeptical about giving electronic records and signatures the same legally binding effect as handwritten records and signatures, and of the increased use of e-commerce to transact business.¹⁷⁸ However, there are a number of reasons why Florida’s enactment of UETA will benefit the state, businesses, and consumers. It will encourage the use of technology and business in the state, thus bringing more money and opportunities, while keeping the substantive law relating to contracts the same in the electronic world as it is for paper-based transactions.¹⁷⁹

173. FLA. STAT. § 668.50(18) (2000).

174. *Id.*

175. UETA § 19 cmt. 2, 7A U.L.A. 45 (West Supp. 2000).

176. FLA. STAT. § 668.50(17)–(19) (2000).

177. P.P. Kanthan, *Legal Aspects of Electronic Commerce and the Scope for Appropriate Legislation*, CYBERSPACE LAW, Jan. 2000, at 24.

178. Meehan, *supra* note 10, at 564.

179. Uniform Law Commissioners, *supra* note 81.

A fundamental issue raised by e-commerce is whether an individual can rely on an electronic message that he or she receive to transact some form of business and enter into binding contracts.¹⁸⁰ This reliance and trust is required to achieve the e-commerce goals of speed, efficiency, and economy.¹⁸¹ In electronic communications, the reliability usually associated with paper-based transactions, such as receiving a document signed with ink and delivered by the United States Postal Service, is not present.¹⁸² As e-commerce transactions can occur without talking or seeing another individual, making sure that a communication from a person is actually from that particular person and not a fraudulent representation may be a concern.¹⁸³ It could be argued that a manually generated ink signature on paper is an ideal method to ensure the integrity of a contract because it is difficult to forge a signature and change text that is already printed on a piece of paper.¹⁸⁴ However, even the results of handwriting experts seeking to determine the validity of a handwritten signature are not always accurate.¹⁸⁵ Furthermore, people often already rely on other forms of communication that do not use paper and handwritten ink signatures, such as signing a digitized signature for United Parcel Service parcels, faxes, and rubber-stamped signatures.¹⁸⁶ The security concerns regarding a lack of handwritten signatures and paper in e-commerce is misplaced.¹⁸⁷

b. *Consumer Transactions*

One of the major advantages of consumers being able to conduct transactions on-line will be convenience and cost savings.¹⁸⁸ Since March, customers of E*trade Securities have been able to use electronic signatures to open accounts.¹⁸⁹ Also, since July, two home loans in Broward County have been originated, signed, and recorded completely on-line through Mortgage.com, located in Sunrise, Florida.¹⁹⁰ The president of the company

180. Smedinghoff & Hill Bro, *supra* note 41, at 731.

181. *Id.*

182. *Id.* at 732–33.

183. *See id.* at 733.

184. Scoville, *supra* note 33, at 356.

185. D. Michael Risinger et al., *Exorcism of Ignorance as a Proxy for Rational Knowledge: The Lessons of Handwriting Identification "Expertise"*, 137 U. PA. L. REV. 731, 739.

186. Scoville, *supra* note 33, at 357.

187. *See generally id.*

188. Cindy Krisher Goodman, *Today it's O.K. to Sign on the Electronic Line*, MIAMI HERALD, Oct. 1, 2000, at E1.

189. *Id.*

190. *Id.*

stated that customers can save between \$750 and \$1000 in the cost of processing a home loan by using this form of electronic transaction.¹⁹¹ The reason for this is that the fees usually associated with paper-based transactions are eliminated.¹⁹² With regard to the potential to conduct mortgage transactions completely on-line, it is now possible to complete these transactions in ten minutes, as opposed to ninety days.¹⁹³

Some consumer advocates have expressed concern that allowing electronic signatures and records in consumer transactions will enable businesses to avoid the requirements of consumer protection statutes and exploit unwary consumers.¹⁹⁴ There may be a concern that a consumer can be forced to conduct business electronically by a seller including hidden notice or ambiguous terms in contracts.¹⁹⁵ However, UETA only applies to transactions between parties who agree to conduct transactions by electronic methods.¹⁹⁶ The agreement is determined from the context of the surrounding circumstances.¹⁹⁷ Parties to the transaction have the right to refuse to conduct future transactions electronically, and this right cannot be waived by an agreement.¹⁹⁸ Therefore, a consumer will be protected if a company places a hidden term in an e-mail or a standard contract stating that the consumer will receive all future notices, or conduct all future business with that company electronically, because this will not be considered an "agreement."¹⁹⁹ Also, consumers who agree to transact business using electronic contracts may even spend more time reviewing the details of a contract on a computer screen.²⁰⁰ They can review contractual terms at their leisure without feeling pressured into signing the contract quickly in the presence of a salesperson.²⁰¹

Once agreeing to conduct a particular transaction electronically, it will not be possible to revert to a paper-based method of communication.²⁰² This provision would not further the intent of UETA to encourage e-commerce transactions and enhance the speed and economy of business.²⁰³ In

191. *Id.*

192. *Id.*

193. Goodman, *supra* note 188.

194. Meehan, *supra* note 10, at 570.

195. *See id.* at 572.

196. FLA. STAT. § 668.50(15) (2000).

197. *See id.*

198. *Id.*

199. *See Meehan, supra* note 10, at 572; UETA § 16 cmt.

200. Kurt A. Wimmer, *E-Litigation: Clicks and Contracts*, NAT'L L.J., Sept. 27, 1999, at B18.

201. *Id.*

202. Meehan, *supra* note 10, at 577.

203. *Id.*

recognizing that companies who conduct their activities solely on-line also need protection from consumers, this provision allows these companies to conduct their business in electronic form without being forced to use and keep paper records.²⁰⁴ When a consumer agrees to conduct a transaction and receive notices or records electronically, the sender of that information cannot inhibit the ability of the recipient to store or print that record if a provision of law requires a person to provide, send, or deliver information in writing to another person.²⁰⁵ If the sender does this, the electronic record will not be enforceable against the recipient.²⁰⁶ This protection gives the ability to weaker parties in a transaction, who will likely be consumers, to record and prove the details of a transaction in court if any dispute arises.²⁰⁷ There should not be a concern that consumers may enter into transactions where they agree to receive notices at a rarely checked e-mail address.²⁰⁸ It is not unreasonable to expect people to check e-mail regularly for these notices, as they would check the regular mail for paper-based notices.²⁰⁹ The substantive laws relating to adhesion contracts and unconscionability are still applicable under UETA.²¹⁰ As consumers are able to keep records of their electronic transactions and show these records in court, with the substantive laws of contracts being unaffected by UETA, there will be no confusion or areas of ambiguity for Florida courts when they are asked to apply and enforce UETA in a lawsuit.

Any concerns that consumers may have regarding the reliability of electronic records and transactions are also misplaced, because UETA recognizes that electronic methods of communication sometimes experience technical problems and may not be successful.²¹¹ If parties to an electronic transaction agree to use a security procedure to detect changes or errors, and one party conforms while the other does not, and the person who did not conform would have been able to detect the change or error if he or she had conformed, the conforming party can avoid the effect of the change or error in the electronic record.²¹² This is a reasonable rule that protects those who follow the terms of an agreement.²¹³ Additionally, consumers are protected

204. *Id.*

205. FLA. STAT. § 668.50(8) (2000).

206. § 668.50(8)(c).

207. Symposium, *Responding to the Legal Obstacles to Electronic Commerce in Latin America*, 17 ARIZ. J. OF INT'L & COMP. L. 119, 128 (2000).

208. Meehan, *supra* note 10, at 572.

209. *Id.*

210. *Id.*; FLA. STAT. §§ 668.50(5), (6), (8) (2000).

211. Mark Grossman, *E-commerce Game Finally Gets Set of Rules*, BROWARD DAILY BUS. REV., June 27, 2000, at 2.

212. FLA. STAT. § 668.50(8) (2000); *see also* Grossman, *supra* note 211.

213. *See* Grossman, *supra* note 211.

if they experience an error while conducting business through an automated computer program.²¹⁴ For example, if consumers buy a book from Amazon.com advertised for \$25.99 after entering their credit card details on the site and agreeing to the sale, and the screen then provides a confirmation stating that “your credit card has been charged \$259.99,” they will just have to notify the seller of the error and state that they did not intend to be bound by the electronic record received.²¹⁵ Consumers will then have to take reasonable steps to cooperate and correct the error or return the book.²¹⁶

Although consumer protection advocates have encouraged state legislatures to adopt non-uniform provisions of UETA,²¹⁷ Florida has correctly followed the uniform principles of UETA. In an example of adopting non-uniform amendments of UETA, California included a list of bills to be excluded from the Act.²¹⁸ However, these non-uniform amendments were predicted to have far-reaching, adverse consequences for commercial transactions, increasing the harm to commercial and consumer parties rather than following the government’s principle that undue burdens should not be placed upon electronic commerce.²¹⁹ Other states have been advised to ignore following California in adopting nonuniform amendments.²²⁰

c. *Business to Business Transactions*

Substantively, UETA provides a balance between being technology-neutral and being specific enough to avoid granting inappropriate protections.²²¹ The world of business is adverse to uncertainty.²²² Before UETA, the benefits of conducting on-line business could not be maximized, because of the uncertainty in conducting electronic transactions.²²³ More Florida-based companies can now feel confident about conducting business on-line as they do not need to have such a concern that people are using false credit card information, checking account numbers, or mailing addresses.²²⁴ In addition to being substantively sound, UETA gives national,

214. FLA. STAT. § 668.50(10) (2000).

215. See Grossman, *supra* note 211.

216. *Id.*

217. Meehan, *supra* note 10, at 566.

218. Holly Towle, *The Uniform Electronic Transactions Act: The California Amendments*, CYBERSPACE LAW, Dec. 1999, at 18–19.

219. *Id.* at 19.

220. *Id.* at 21.

221. Scoville, *supra* note 33, at 392.

222. See Grossman, *supra* note 211.

223. See *id.*

224. Lui-Kwan, *supra* note 26, at 463.

multinational, and local businesses located in Florida a definite structure for contracting on-line, and there is no longer a need to be concerned with the legal effect of conducting business electronically. UETA is advantageous to businesses using electronic transactions because it preserves the ideals of freedom of contract while avoiding over-regulation.²²⁵ Many other states have also adopted UETA,²²⁶ and even if states have not yet adopted it, with ESGNCA as federal legislation, there is now definite jurisdiction over the national information infrastructure.²²⁷

d. *Attorneys and Governmental Entities*

As governmental agencies are not required to implement and use electronic signatures and records,²²⁸ Florida's enactment of UETA will not place significant financial burdens on government.²²⁹ If these agencies do choose to use electronic methods of communications, it will be beneficial for governmental administration both at the local and the state level. Florida's enactment of UETA is beneficial to attorneys because they now have a set of rules governing on-line transactions, and they will no longer have to deal with the inefficiencies of mailing hard copies of a contract to another client's attorney for a signature, then waiting before receiving a signed contract back in the mail.²³⁰ Attorneys should also not be concerned with the validity of the Act, as it is not preempted by federal legislation²³¹ and it is unlikely to raise any state constitutional issues in Florida.²³² Similarly, Florida courts also now have a standard for governing disputes regarding e-commerce transactions, allowing predictability and an equitable administration of the law. Even if a provision of the Act is found to be invalid, it will be severable from the other sections, not affecting the provisions or applications of the these sections.²³³ Although the use of e-commerce is dramatically increasing in the United States, by adopting UETA, Florida courts are unlikely to be burdened with a vast increase in litigation regarding e-commerce, electronic transactions, and UETA. In contrast, it seems that Florida's adoption of UETA will prevent lawsuits because Florida now has a defined set of legal

225. Grossman, *supra* note 211.

226. Kunze, *supra* note 90.

227. See Scoville, *supra* note 33, at 393.

228. FLA. STAT. § 668.50(17)–(18) (2000).

229. ANALYSIS CS/HB 1891, *supra* note 127.

230. See Grossman, *supra* note 211.

231. ESGNCA, Pub. L. No. 106-229, § 102(a)(1), 114 Stat. 464, 468 (2000) (to be codified at 15 U.S.C. §§ 7001–7031).

232. ANALYSIS CS/HB 1891, *supra* note 127.

233. FLA. STAT. § 668.50(20) (2000).

rules as to the status of electronic records and how to transact business on-line.

VI. CONCLUSION

By enacting UETA, consumers, businesses, and governments in Florida can now conduct business without using paper and a traditional handwritten "John Hancock." Removing some of the barriers to e-commerce, while retaining consumer protections, will be beneficial to Florida, as it will be able to avoid preemptive federal legislation, at the same time retaining some control over electronic transactions in the state. With the increasing use of the Internet and electronic forms of transacting business, there is also now a clear standard for courts in Florida to adjudicate disputes regarding e-commerce transactions. Florida will be recognized as a state that encourages electronic transactions, thus attracting businesses and increasing employment opportunities. Ultimately, there will be both an efficient administration of government and increased state revenues.

Mark D. Earles

Florida’s Vexatious Litigant Law: An End to the Pro Se Litigant’s Courtroom Capers?

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On the eve of the U.S. Senate primary, Colbath & Co. and the Fourth DCA—repeating a tactic they had used on the eve of the 1996 general election—again kidnapped petitioner on void and bogus legal process and sought to hold him through the election. On and on it goes, an unprecedented attempt to prevent a citizen from seeking office and exposing local and judicial corruption.¹

I. INTRODUCTION

Sounds like a scene out of a conspiracy theory novel, right? Guess again. This paragraph was excerpted from a petition filed in the Supreme Court of Florida in 1998. Colbath is Chief Judge Walter N. Colbath, Jr.,

1. Petition For Writ of Mandamus/Prohibition at 2, *Martin v. Colbath* (No. 94012), consolidated into *Martin v. State*, 747 So. 2d 386 (Fla. 2000) (Nos. 93573 & 94012) [hereinafter *Martin Petition I*].

who oversees the Fifteenth Judicial Circuit of Florida for Palm Beach County, and who has been the target of numerous personal attacks in the voluminous court filings of pro se² litigant Anthony R. Martin³ in the Fifteenth Judicial Circuit of Florida, the Fourth District Court of Appeal, the Supreme Court of Florida, and various federal courts. In the same petition in which he leveled the above allegation,⁴ Martin went on to say about Palm Beach County's Chief Judge: "Colbath is a pretty good politician, but not much of a lawyer or judge. He should go back to law school."⁵ And in a second petition filed in the Supreme Court of Florida that same year, Martin directed insults at newly appointed Supreme Court Justice Barbara J. Pariente, asserting that "Jewish judges are using their official positions to pervert the law against petitioner," and that Jewish judges have retaliated against him.⁶

So what happened to Martin's petitions for relief? In January 2000, the Supreme Court of Florida denied them on the grounds that Martin's claims were frivolous as well as abusive, and ordered that he could no longer file any pro se petitions unless they were accompanied by the appropriate filing fee.⁷ By reading Anthony Martin's numerous and repetitious petitions, one learns that he is frustrated because he wins few of his cases, and that he takes out his anger on all of those "who have unluckily crossed his path."⁸

2. When describing litigants, "pro se" litigant is defined as "[f]or oneself; on one's own behalf; without a lawyer." BLACK'S LAW DICTIONARY 1236 (7th ed. 1999). One who represents himself in court without counsel is a "pro se." *Id.* at 1237.

3. Anthony R. Martin is also known as Anthony R. Martin-Trigona. *Martin v. State*, 747 So. 2d 386, 387 (Fla. 2000).

4. The incident to which the petitioner Anthony Martin refers as his "kidnapping" was actually an arrest in which the petitioner was denied bail. Response to Order to Show Cause and Motion for Review by the Court En Banc at 3-4, *Martin v. State*, 747 So. 2d 386 (Fla. 2000) (Nos. 93573 & 94012) [hereinafter *Martin Petition 2*].

5. *Martin Petition 1* at 6, (Nos. 93573 & 94012).

6. Verified Emergency Petition for Writ of Mandamus at 8, n.4, *Martin v. Beutenmuller* (No. 93573), consolidated into *Martin v. State*, 747 So. 2d 386 (Fla. 2000) (Nos. 93573 & 94012) [hereinafter *Martin Petition 3*].

7. *Martin*, 747 So. 2d at 389-90, 392. Martin frequently files his petitions *in forma pauperis* so that he will not have to pay filing fees. *Id.* He is reportedly bankrupt. *Id.* at 387.

8. *Id.* at 391 (quoting *In re Martin-Trigona*, 737 F.2d 1254, 1256 (2d Cir. 1984)). In *Martin-Trigona*, the court described Martin as a person who considers himself to be the victim of imaginary conspiracies. *In re Martin-Trigona*, 737 F.2d 1254, 1257 (2d Cir. 1984). For example, the appendix to the opinion cites Martin's complaint in the United States District Court for the District of Connecticut, which levels accusations that the "entire bankruptcy court system in the entire United States is manipulated and controlled by Jewish judges and Jewish lawyers" who have conspired to steal his property and violate his civil rights by interfering with his right of access to courts. *Id.* at 1265-66. This footnote cannot

He is one of Florida's most vexatious⁹ litigants, and his hijinks, albeit extreme as an example of courtroom frivolity, represent a growing issue that Florida courts face as the number of pro se litigants entering the courtroom rises.

Pro se litigants, with their limited knowledge of the law and oversight of court rules, create serious problems for Florida courts and impose a heavy burden upon courts' administration of justice in today's litigious society. Those problems multiply when litigants become vexatious. The State of Florida passed new legislation in June 2000 that will bring relief from the barrage of frivolous lawsuits filed in Florida courts by vexatious pro se litigants.¹⁰ This article discusses how it will work, why it will work, and what opposition it will face.

Part I will set the stage. It will identify the pro se litigant, and describe what effects he or she has on Florida courts. It will also detail the current sanctions available to punish pro se litigants who file frivolous actions and will explain the drawbacks of those sanctions. Part II will discuss the Florida Vexatious Litigant Law ("FVLL") in detail, including the legislature's rationale for its passage and the methods used for labeling a person as a "vexatious litigant." It will also explain the prohibitions placed upon a vexatious litigant's case once he or she has been so labeled. In Part III, the FVLL will be compared to current case law, and the author will assert that the legislature merely codified into statute what courts have already been haphazardly enforcing and will explain why the statute will create a more efficient process for disposing of frivolous lawsuits. It will also compare the Florida statute to similar vexatious litigant laws enacted in other states.¹¹ Part IV will address the pro se litigant's arguments that the statute violates the right of access to courts guaranteed by the Florida Constitution¹² and will assert that those arguments ultimately fail because sufficient safeguards exist within the statute to limit the frivolous activity of such litigants without infringing upon their constitutional rights. Finally,

convey the full extent of Martin's offensive and anti-semitic slurs and attacks. For a better picture of Martin's offensiveness, a reading of the entire opinion is encouraged.

9. "Vexatious" is defined as being "without reasonable . . . cause or excuse; harassing; annoying." BLACK'S LAW DICTIONARY 1559 (7th ed. 1999). A vexatious suit is one that is "instituted maliciously and without good cause." *Id.*

10. FLA. STAT. § 68.093 (2000).

11. California enacted a vexatious litigant law in 1963. See CAL. CIV. P. CODE § 391 (West 1998 & Supp. 2000). Texas created a similar statute in 1997. See TEX. CIV. PRAC. & REM. CODE ANN. § 11.001-.004 (West Supp. 2000). Hawaii and Ohio have enacted vexatious litigant statutes as well. See OHIO REV. CODE ANN. § 2323.52 (Anderson 1998); see also HAW. REV. STAT. § 634J (1999).

12. FLA. CONST. art. I, § 21.

this article will conclude with a recap of why this law will help to unburden the Florida court system.

II. THE PRO SE LITIGANT'S ABILITY TO BRING THE WHEELS OF JUSTICE TO A HALT

To understand the problems that pro se litigants create for the judicial system, it is necessary to understand who sues and what they allege. Statistics on pro se litigants are sparse, but recent studies have shown that not all pro se litigants are indigent, as was once commonly thought.¹³ About twenty percent of pro se litigants say they can afford a lawyer but simply do not want one.¹⁴ Individuals with incomes less than \$50,000 are more likely to represent themselves.¹⁵ In state court, pro se litigants may represent themselves in various types of actions: divorce or family law proceedings, contract actions, tort suits, or probate matters, just to name a few. At least sixty-five percent of marriage dissolution cases in Florida involve at least one pro se litigant at some point during the case.¹⁶ Statistics on the number of pro se filings for each are unfortunately not compiled, but as the courts of Florida begin to study further the pro se litigant's needs for self-help services,¹⁷ such statistics should become available.

Even judges at the federal court level¹⁸ must contend with an increasing percentage of cases filed pro se, most commonly by both prisoners and individuals bringing employment discrimination suits under federal statutes.¹⁹ In federal courts, pro se cases have increased steadily—from

13. NAT'L CTR. FOR STATE COURTS, REPORT ON TRENDS IN THE STATE COURTS, 1997–1998 ED., at 47 [hereinafter TRENDS IN THE STATE COURTS]. The common misconception about pro se litigants is that they cannot afford a lawyer, but in reality some just prefer to do it themselves and may feel that they do not have any “resources or property to squabble about.” Jan Pudlow, *Access to Justice Panel to Study Issue of Pro Se Litigants*, FLA. BAR. NEWS, Jan. 1, 2000, at 11.

14. TRENDS IN THE STATE COURTS, *supra* note 13, at 47.

15. *Id.*

16. *Id.* at 50. See generally Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13 (1998).

17. Pudlow, *supra* note 13, at 11.

18. Frivolous litigation in federal courts is an important issue as well, but because the remedies for cure are different from those available in state courts, this note focuses only on the effect of the FVLL on state courts. Including a detailed discussion on federal courts would exceed the scope of this note.

19. Jerry Nagle, *Pro Se Litigation and Its Impact on the Courts* (Feb. 22, 1995), The Information Service of the National Center for State Courts, available at <http://www.ncsc.dni.us/is/MEMOS/S95-0724.htm>.

fifteen percent of total filings in 1991 to twenty-four percent in 1994.²⁰ Most cases filed by pro se prisoners are civil rights actions.²¹ Many pro se litigants (especially prisoners) are illiterate and unschooled in the law, and a good number are “frequent filers” who have more than twenty cases in court at any given time.²²

Pro se litigants increase case flow problems.²³ Because courts are aware that many pro se litigants are unfamiliar with both the legal system and legal procedure, great consideration is given to them in terms of how they are allowed to proceed with their cases.²⁴ Courts give them considerable latitude in the tone and pace of the trial. Pro se litigants often struggle with the completion of legal forms, as well as the process of filing and serving court papers.²⁵ In addition to the pro se litigant’s frustration with court rules, judges are also frustrated with having to continue cases or deny motions without prejudice in order to give pro se litigants a fair day in court.²⁶ Judges are uncomfortable with the slow pace of pro se litigants’ cases in their courtrooms (which results from the litigants being untrained in rules of evidence and procedure), as well as having to intervene to nudge litigants along at times.²⁷ The court is faced with a difficult task when a litigant represents him or herself, because the obligation to serve as an impartial referee conflicts with the need to assist the pro se litigant in procedural matters.²⁸

A. *Far Reaching Negative Effects of Frivolous Pro Se Litigation*

One should not make the assumption that “every pro se litigant is clueless.”²⁹ On the contrary, some pro se litigants are well versed in legal

20. Lurana S. Snow, *Prisoners in the Federal Courts*, 9 ST. THOMAS L. REV. 295, 296 (1997).

21. *Id.*

22. *Id.* at 301. The federal courts address the issue of frivolous and abusive lawsuits under Rule 11 of the *Federal Rules of Civil Procedure*. See FED. R. CIV. P. 11. There is no requirement of overwhelming abuse, although courts do have the discretion to take into account the circumstances of pro se litigants. Howard D. DuBosar & Ubaldo J. Perez, Jr., Comment, *Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11*, 40 U. MIAMI L. REV. 1267, 1283 (1986).

23. TRENDS IN THE STATE COURTS, *supra* note 13, at 49.

24. Nagle, *supra* note 19.

25. Jan Pudlow, *Searching for Pro Se Solutions*, FLA. BAR. NEWS, June 15, 2000, at 1.

26. *Id.*

27. *Id.*

28. Goldschmidt, *supra* note 16, at 16.

29. Pudlow, *supra* note 25, at 1.

terminology and capable of writing properly constructed motions.³⁰ Many pro se litigants make an honest effort to conduct themselves properly and abide by the procedural rules.³¹ However, those few that use the judicial system as a weapon to harass and intimidate others wreak havoc on the system and give the common pro se litigant a bad reputation.³²

A major problem with discussing the concept of frivolous pro se litigation in detail is that it is difficult to define the extent of the problem. Florida has recently addressed the needs of the pro se litigant in its development of an Access to Justice Task Force,³³ but no comprehensive study on the extent of pro se litigation, or the level of frivolity caused by it, has yet been completed.

Frivolous lawsuits by vexatious litigants cause delays in the legal system, consume substantial amounts of scarce judicial resources, and generate hours of work for court personnel because the litigants file meaningless documents to provoke arguments with judges about previous decisions.³⁴ But the problem with frivolous lawsuits goes beyond the impact on the court system. In one California case, a vexatious litigant's history of filing frivolous suits with questionable merit actually depreciated the property value of homes in her neighborhood because she was so fond of suing her neighbors.³⁵

Consequently, defendants named in frivolous actions are also impacted by the increase in frivolous litigation. Defendants in frivolous suits have two options: defend the suit, or settle the case for a *de minimis*³⁶ monetary award.³⁷ Both options are costly, since they require either that defendants seek legal counsel to defend their rights, or that they settle and pay out whatever sum will persuade the vexatious litigant to drop the lawsuit. Some defendants prefer to settle in order to avoid the vexatious litigant's harassment, but settling may actually create an incentive for a vexatious litigant to file even more frivolous litigation.³⁸

30. *Id.*

31. *Biermann v. Cook*, 619 So. 2d 1029, 1031 (Fla. 2d Dist. Ct. App. 1993).

32. Lee W. Rawles, Note, *The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?*, 72 S. CAL. L. REV. 275, 278 (1998).

33. Pudlow, *supra* note 13, at 11.

34. Rawles, *supra* note 32, at 281.

35. *Id.* at 282.

36. "*De minimis*" means small or trifling. BLACK'S LAW DICTIONARY 443 (7th ed. 1999).

37. Rawles, *supra* note 32, at 282.

38. *Id.* at 282-83.

The overwhelming number of frivolous suits also contributes to the public outrage at the judicial system in general.³⁹ Litigants with legitimate legal matters are delayed or postponed while clerks and judges deal with the frivolity and tying up of court resources by vexatious litigants. Vexatious litigants manage to slow the judicial system as a whole and create discontent and frustration for both the court administration and those litigants who appear in the courtrooms.

B. *Current Sanctions Available at the Court's Disposal*

Courts currently use a variety of sanctions in their attempt to curb the frivolous and harassing activity of vexatious pro se litigants. However, the means of enforcing sanctions against litigants is not uniform, and different courts at different points have been using different forms of punishment. This lack of uniformity has created chaos in Florida courtrooms and clerks' offices as personnel try to follow individualized decisions and orders for each litigant.

For many pro se litigants, court proceedings begin with a petition for leave to file under indigent status, known as *in forma pauperis*,⁴⁰ by asking the court to waive the costs of filing.⁴¹ By preparing an affidavit claiming poverty and providing the details of one's financial condition, a pro se litigant can have filing fees and court costs waived.⁴² This freedom to litigate without concern for the costs means that pro se litigants have nothing to lose (and everything to gain) by filing their lawsuits under indigent status. Courts, however, have observed their vexatious litigation patterns and have begun barring vexatious litigants from filing *in forma pauperis* (allowing their lawsuits to be filed only if they provide the appropriate filing fees).⁴³

39. *Id.* at 283.

40. "*In forma pauperis*" is defined as the manner in which an indigent is permitted to disregard filing fees and court costs in litigation. BLACK'S LAW DICTIONARY 783 (7th ed. 1999).

41. See FLA. STAT. § 57.081 (2000).

42. *Id.* Costs are waived only for the following services for persons filing *in forma pauperis*: filing fees, service of process, certified copies of orders and final judgments, single copies of court pleadings and documents, examining fees, mediation services, subpoena services, collection charges, and costs of transcripts and exhibits for appeals. *Id.*

43. See, e.g., *Martin v. State*, 747 So. 2d 386 (2000). In *Martin*, the supreme court criticized Anthony Martin, one of Florida's most vexatious litigants, who has filed over 30 petitions in the Supreme Court of Florida alone. *Id.* at 388. The supreme court issued an order imposing sanctions that barred him from filing any future petitions in its court without the proper filing fee. *Id.* at 387. In doing so, the court was using its authority to deny indigent status (regardless of actual financial position) in situations when the litigant is

A court can also sanction a vexatious litigant by prohibiting court filings that do not contain the signature of a member of the state bar association.⁴⁴ Litigants have a guaranteed right of access to the courts,⁴⁵ and while courts have given much leeway in the pleadings and other motions filed by pro se litigants,⁴⁶ they have also recognized that when litigants abuse the court's latitude, sanctions requiring the assistance of counsel are warranted.⁴⁷ In *Gladstone v. Smith*,⁴⁸ Florida's Fourth District Court of Appeal affirmed an order that required a pro se litigant to appear through an attorney if he wanted to refile his lawsuit after dismissal when the litigant had amended one complaint ten times.⁴⁹ The court held that a pro se litigant should not be held to a lesser standard than that of a reasonably competent attorney, applying the rationale that if the standards for pro se litigants are lowered, increased frivolous litigation would result.⁵⁰ In the interest of preventing pro se litigants from endlessly tying up judicial resources with frivolous matters, Florida courts frequently issue orders prohibiting particularly vexatious litigants who refuse to obtain the assistance of counsel from filing on their own if assistance is clearly warranted by the deficiencies in the litigant's court pleadings.⁵¹

Courts can also strike or dismiss pleadings when they are patently frivolous.⁵² A common problem with pro se litigants is that they lack sufficient legal knowledge of proper causes of action and often write pleadings so deficient that the courts have no choice but to strike them down. In *Hammond v. A. Vetsburg Co.*,⁵³ the Supreme Court of Florida held

abusive and the sanction will prevent future frivolous petitions. *Id.*; see *Martin v. Marko*, 651 So. 2d 819 (Fla. 4th Dist. Ct. App. 1995).

Similar sanctions are also available in the federal courts. See, e.g., *In re McDonald*, 489 U.S. 180 (1989) (holding that a petitioner who continually submitted frivolous requests for writs was not allowed to file any further actions to the Court *in forma pauperis*).

44. *Attwood v. Eighth Cir. Ct., Union County*, 667 So. 2d 356, 357 (Fla. 1st Dist. Ct. App. 1995).

45. FLA. CONST. art. I, § 21.

46. See, e.g., *Haines v. Kerner*, 404 U.S. 519 (1972) (holding that allegations in pro se complaints should be held to less stringent standards than pleadings drafted by counsel).

47. See, e.g., *Attwood*, 667 So. 2d at 356.

48. 729 So. 2d 1002 (Fla. 4th Dist. Ct. App. 1999).

49. *Id.* at 1003.

50. *Id.* at 1004.

51. See, e.g., *Emery v. Clifford*, 721 So. 2d 401, 402 (Fla. 3d Dist. Ct. App. 1998) (holding that an order requiring litigant to obtain counsel was proper given her vexatious pleadings); *Platel v. Maguire, Voorhis & Wells, P.A.*, 436 So. 2d 303, 304 (Fla. 5th Dist. Ct. App. 1983) (finding that a litigant who upsets the administration of justice to the point that it interferes with others should be restrained by requiring an attorney's signature on pleadings).

52. 10 FLA. JUR. 2D *Pleadings* § 183 (1982).

53. 48 So. 419 (Fla. 1908).

that when a plea is so plainly frivolous, even though it may conform to the rules of pleading, it may be stricken by motion if the subject matter is absolutely without merit.⁵⁴ A “frivolous plea” was later defined in *Rhea v. Hackney*⁵⁵ as one which may be true in fact but sets up no defense (or by extension, no cause of action).⁵⁶

A different situation arises when the pleadings prepared by litigants are clearly false in fact or based on incorrect details. When a plea is absolutely false in fact, it is called a “sham plea” and can be stricken in the same manner.⁵⁷ In *DiGiovanni v. All-Pro Golf, Inc.*,⁵⁸ Florida’s Second District Court of Appeal held that a motion to dismiss a pleading as sham was only to be granted when there was an absence of issues of material fact and a pleading sound on the surface but instituted in bad faith.⁵⁹ For example, Anthony Martin, discussed earlier, often misunderstands and misrepresents the facts of the situations he contests in his petitions and files motions with the clear intention to harass those with whom he deals in the court system. His petitions would likely come close to being outright “shams” and should be stricken or dismissed by the courts. However, this remedy is available only after a complaint has been filed in the court system; thus courts are still burdened with frivolous or sham lawsuits until the defendants in those lawsuits move to strike pleadings.

Finally, the courts in Florida have the statutory authority to award monetary sanctions for the costs of litigation to a prevailing party when there is a finding that an action is based on a complete absence of “a justiciable issue of either law or fact.”⁶⁰ The Second District Court of Appeal upheld a sanction awarding attorneys’ fees in *Biermann v. Cook*,⁶¹ where a litigant representing himself filed numerous inappropriate and unorthodox pleadings on appeal that had no justiciable issues of law or fact.⁶² The *Biermann* court stated that “[n]o court is obligated to permit a litigant ‘to take advantage of the court as the forum to express his personal criticism and castigation not

54. *Id.* at 420.

55. 157 So. 190 (Fla. 1934).

56. *Id.* at 194.

57. *Id.*

58. 332 So. 2d 91 (Fla. 2d Dist. Ct. App. 1976).

59. *Id.* at 93. The *Florida Rules of Civil Procedure* provide a remedy for striking “sham pleadings.” FLA. R. CIV. P. 1.150(a). A party can dismiss all or part of a pleading that is false in fact by verified motion at any time before trial. *Id.*; see *Decker v. County of Volusia*, 698 So. 2d 650 (Fla. 5th Dist. Ct. App. 1997).

60. *Biermann v. Cook*, 619 So. 2d 1029, 1030 (Fla. 2d Dist. Ct. App. 1993) (explaining FLA. STAT. § 57.105 (1999)).

61. *Id.* at 1029.

62. *Id.* at 1030.

only of his adversary but of opposing counsel, court staff, and judiciary.”⁶³ Similarly, in *Parker v. Parker*,⁶⁴ the Fourth District Court of Appeal held that an award of sanctions prescribed by Florida statute was appropriate where a litigant filed a frivolous motion asking the court to set aside a supposedly fraudulent judgment issued years before.⁶⁵

The problem with all of the above described sanctions is that they are not applied universally by the different courts in Florida. A pro se litigant can file his or her frivolous complaints under indigent status in a local circuit court until the court issues an order barring his or her indigent status, at which time the litigant simply moves on to the next higher court, or to a neighboring circuit court, and does the same thing.⁶⁶ When a vexatious litigant fails to obtain indigent status in any Florida court but manages to scrape together the appropriate filing fees, the litigant again has free reign to wreak havoc on the court system with vexatious lawsuits. This pattern continues until a court dismisses the suits as frivolous or shams, and issues an order forcing the losing litigant to pay the defendants' court costs and attorneys' fees.⁶⁷ Waiting for either of these occurrences can mean that a great deal of a court's time, as well as a defendant's time, is wasted. In fact, it may be futile to pursue any award for attorneys' fees under section 57.105 of the *Florida Statutes*, since many pro se litigants are indigent and judgment proof, being without the resources to pay any awards.⁶⁸

For all of these reasons, a mechanism for more uniformly and completely limiting the intrusion of frivolous lawsuits into Florida courtrooms was demanded. The Florida legislature responded with the FVLL.⁶⁹

63. *Id.* (quoting *Continental Nat'l Am. Group v. Majeske*, 305 A.2d 291, 292 (D. Conn. 1973)).

64. 585 So. 2d 328 (Fla. 4th Dist. Ct. App. 1991).

65. *Id.* at 329.

66. Pro se litigants often possess the misconception that they are entitled to litigate their claims in any Florida court regardless of the outcome at the initial trial court. Often they file appeals to the district courts of appeal or to the Supreme Court of Florida and attempt to frame previously litigated claims that should be procedurally barred (by the doctrine of *res judicata*) as new ones. However, the Supreme Court of Florida determined that the district courts now constitute the “courts of last resort” for most litigants. *Rivera v. State*, 728 So. 2d 1165, 1166 (Fla. 1998) (citing *In re Amendments to Fla. R. App. P.*, 609 So. 2d 516, 526 (Fla. 1992)).

67. FLA. STAT. § 57.105 (2000).

68. See *Kreager v. Glickman*, 519 So. 2d 666, 667 (Fla. 4th Dist. Ct. App. 1988) (discussing a vexatious pro se litigant who had a one and a half million dollar judgment entered against him that utterly failed to deter him from his malicious court filings). The implication here is that sanctions under section 57.105 of the *Florida Statutes* would not stop a litigant from future filings when the litigant evidences neither any means nor any desire to fulfill another court obligation.

69. FLA. STAT. § 68.093 (2000).

III. THE LEGISLATURE'S SOLUTION TO FRIVOLOUS PRO SE LITIGATION

The legislature has long recognized a need to curb the number of frivolous lawsuits being filed within state courts. As early as 1978, the legislature enacted the statutory provision that awarded costs of litigation to the prevailing party when the action was determined to have been devoid of merit at commencement.⁷⁰ However, this statute has proven ineffective against indigent pro se litigants for reasons previously discussed. Recognizing that prisoners initiated a great number of frivolous pro se suits, the legislature again tried to crack down on frivolous pro se litigation in 1996 when it passed legislation that sought to limit the ability of prisoners to file numerous lawsuits under indigent status.⁷¹ With strong conviction about the issue, the legislature prefaced the statute with the following language: "under current law frivolous inmate lawsuits are dismissible by the courts only after considerable expenditure of precious taxpayer and judicial resources."⁷² In the introduction to the new statutes created by the bill, the legislature said, in part, "state and local governments spend millions of dollars each year processing, serving, and defending frivolous lawsuits filed by self-represented indigent inmates, and . . . the overwhelming majority of civil lawsuits filed by self-represented indigent inmates are frivolous and malicious actions intended to embarrass or harass public officers and employees."⁷³ The problem is that the legislation impacts *only* prisoner litigants, so the impact from private citizens filing pro se is still staggering. So while the legislature has taken at least two statutory steps to reduce frivolous litigation, a renewed acknowledgment of the need for sanctions again arose, pushing for action to curtail the number of frivolous lawsuits filed by vexatious pro se litigants on a broad scope. The business law section of the Florida Bar perceived the need for a device that would restrict the frivolous activity of pro se litigants in Florida courts, and proposed the FVLL to the legislature.⁷⁴ The bill's sponsor in the Senate noted that the law would not affect people who are trying to resolve legitimate disputes;

70. Ch. 78-275, § 1, 1978 Fla. Laws 791, 792 (codified at FLA. STAT. § 57.105 (2000)).

71. Ch. 96-106, § 1, 1996 Fla. Laws 92, 92-3 (codified at FLA. STAT. §§ 57.081, .085, 92.351, 95.11, 944.279, & 944.28 (2000)). This legislation required greater proof of poverty from inmates who were requesting indigent status in the courts, allowed the courts to dismiss a prisoner's lawsuit when it appeared groundless, and allowed the forfeiture of gain time as a penalty for filing frivolous actions. *Id.* at § 1(1), 1996 Fla. Laws at 93.

72. *Id.* at 93.

73. *Id.* at 92.

74. Audio tape: Florida Vexatious Litigant Law: Hearing on H. 0557 Before the House of Representatives Comm. on Judiciary, 102d Legis., Interim Comm. Meeting, (Feb. 7, 2000) [hereinafter Audio Tape] (statement of Rep. J. Dudley Goodlette, sponsor).

rather the law is aimed at those individuals with a propensity for filing harassing civil actions.⁷⁵

The first task the legislature faced in passing the FVLL was determining at what point a pro se litigant was so bothersome as to be labeled vexatious. There was much debate in the House of Representatives Judiciary Committee over where to draw this line.⁷⁶ The bill signed by Governor Jeb Bush on June 19, 2000 defined a "vexatious litigant" as "[a] person⁷⁷ . . . who, in the immediately preceding 5-year period, has commenced, prosecuted, or maintained, pro se, five or more civil actions in any court in this state . . . which actions have been finally and adversely determined against such person."⁷⁸ Once a person has been labeled a vexatious litigant pursuant to the above definition, he or she retains the classification indefinitely.⁷⁹

A. *Becoming a Vexatious Litigant*

So how does a litigant become a vexatious litigant? The process used to classify a litigant as vexatious depends on whether the litigant has an action pending in court at the time. If an action is already pending, a defendant can move for a hearing and ask the court to enter an order that the pro se plaintiff furnish a security bond in the amount of the defendant's reasonably anticipated court costs and attorneys' fees on the grounds that the plaintiff is a vexatious litigant whose lawsuit is frivolous.⁸⁰ The hearing gives both parties the opportunity to present evidence relevant to the

75. *Bill Would Limit Frivolous Suits*, FLA. BAR. NEWS, Nov. 15, 1999, at 14.

76. Audio Tape, *supra* note 74 (statements of Rep. J. Dudley Goodlette and other committee members).

77. A "person" under section 1.01(3) of the *Florida Statutes* includes, but is not limited to, any individual, firm, association, partnership, estate, corporation, or group. FLA. STAT. § 1.01(3) (2000). Thus, a pro se litigant suing in the name of his business or corporation would still fall within the confines of the FVLL.

78. § 68.093(2)(d)(1). The terminology "finally and adversely determined against such person" receives little explanation in the legislature's bill. *See id.* The statute defines an action to be "finally and adversely determined" if no appeal in the action is pending. § 68.093(2)(d)(2). However, questions remain regarding what an adverse determination is and it is unclear whether actions which are settled out of court, removed to a different court, or dismissed voluntarily by the litigant are adverse determinations.

79. *Id.* The wording "[a]ny person or entity previously found to be a vexatious litigant pursuant to this section," referring to section 68.093(2)(d)(1), leaves open the possibility that even if a pro se litigant has not within the preceding five years received five adverse judgments, if he or she has ever been deemed by Florida courts to be a vexatious litigant, the restrictions would continue indefinitely. *Id.* The statute does not provide any method for pro se litigants to be removed from the courts' registry of vexatious litigants.

80. FLA. STAT. § 68.093(3)(a)-(b) (2000).

determination of the plaintiff's likelihood of succeeding with his or her claim.⁸¹ In order to have the motion granted, the defendant can provide documentation that the pro se plaintiff meets the statutory requirements in having received five adverse judgments in five years, show that the plaintiff is not likely to prevail on the merits of his or her case, and then ask the court to classify the plaintiff as a vexatious litigant, requiring the litigant to furnish a security bond for the anticipated court costs and attorneys' fees.⁸²

Additionally, even if a vexatious litigant does not currently have an action pending, a court may, either on its own motion or on the motion of any party, enter a pre-filing order that bars the vexatious litigant from filing any further pro se lawsuits in the courts of that circuit unless he obtains leave from the administrative judge.⁸³ If a pro se litigant makes a request, the administrative judge may grant leave to file a meritorious action, if it is determined at a hearing that the action is not filed for the purpose of harassment or delay.⁸⁴ The judge, if he or she chooses, can also still require the posting of the security bond previously discussed as a condition to be met before filing any such action.⁸⁵

B. *The Effects of Being Labeled a Vexatious Litigant*

Once a pro se plaintiff has been registered as vexatious, several things happen. If there is a pending action in one of the applicable courts and the judge determines that the plaintiff is not likely to win on the merits of his case, that plaintiff must furnish a security bond for the defendant's court costs and attorneys' fees.⁸⁶ If the plaintiff fails to post this bond, the court then dismisses the action with prejudice.⁸⁷

81. *Id.*

82. § 68.093(3)(b).

83. § 68.093(4).

84. *Id.*

85. FLA. STAT. § 68.093(4) (2000).

86. § 68.093(3)(a). According to the Florida House of Representatives Committee on the Judiciary, the plaintiff would presumably post bond with the court as done with replevin actions; however, the Committee noted that the statute as drafted required the plaintiff to furnish the bond directly to the moving defendant rather than placing it in the court's trust, and provided no means of return of the bond to the plaintiff should he prevail. STAFF OF HOUSE OF REPRESENTATIVES COMM. ON JUDICIARY, ANALYSIS OF HB (FLORIDA VEXATIOUS LITIGANT LAW) 8 (Fla. 2000) 557 [hereinafter ANALYSIS OF HB 557]. An amendment to the House Bill was proposed, but the changed language did not ultimately become part of the final bill approved by Governor Bush because the House version of the bill died on the floor. Compare House of Representatives Committee on Judiciary, *Amendment No. 01 to H. 557*, (Feb. 8, 2000) available at <http://www.leg.state.fl.us/citizen/documents/statutes/1998/> with Florida Vexatious Litigant Law, FLA. STAT. § 68.093(3)(b) (2000). This could prove

If the court has issued a prefiling order that requires the pro se plaintiff to obtain leave of the court to file an action, the clerk of the court is under order not to file any actions from vexatious litigants absent that court's permission.⁸⁸ If the vexatious litigant violates this order and attempts to file an action anyway, his or her disobedience can be punished as contempt of court.⁸⁹ Furthermore, the relief provided by the FVLL is cumulative to any other relief currently provided by section 57.105 of the *Florida Statutes*.⁹⁰ Thus, even if a suit is dismissed for failure to post the required security bond, monetary sanctions for filing a frivolous lawsuit and causing a defendant to incur needless litigation expenses up to that point can still be assessed against a vexatious pro se litigant.⁹¹ Finally, the clerk of the court must maintain copies of all prefiling orders issued by the court, and must also forward copies of all prefiling orders to the Supreme Court of Florida, which will maintain a registry of vexatious litigants for central reference.⁹²

IV. THE VEXATIOUS LITIGANT LAW AS A NOT-SO-NOVEL APPROACH

The FVLL simply codifies the sanctions that the courts have already been using haphazardly. As previously discussed, courts have applied sanctions such as denying indigent status, requiring counsel in order to file a complaint, dismissing frivolous or sham pleadings, and awarding monetary damages for pursuing frivolous causes of action for years. However, until now there have been no guidelines that tell the courts when to enforce each particular sanction. Decisions to sanction have been made individually by each court. Consequently, the same litigant who is barred from filing *in*

problematic for courts until a method for handling the posting of a security bond is established.

87. FLA. STAT. § 68.093(3)(b)–(c) (2000).

88. Article V of the Florida Constitution describes how the supreme court and the district courts of appeal appoint a clerk, who is charged with “perform[ing] such duties as the court directs.” FLA. CONST. art. V, § 3, cl. c & § 4, cl. c. Thus, if a judge or justice orders a clerk not to accept filings without the appropriate fees, a clerk must follow that order. ANALYSIS OF HB 557, *supra* note 86.

If a court clerk files an action instigated by a registered vexatious litigant by mistake, any party to the action can file a notice with the court stating that the plaintiff is a pro se vexatious litigant subject to a prefiling order. FLA. STAT. § 68.093(5) (2000). This filed notice stays the litigation process, and unless the pro se plaintiff moves for leave to file the action, the judge can dismiss his action with prejudice 10 days after the notice is filed. *Id.*

89. § 68.093(4).

90. § 57.105.

91. § 68.093. However, as previously discussed, most pro se litigants are judgment proof, so attempts to collect these monetary sanctions may prove to be fruitless.

92. § 68.093(6).

forma pauperis in one court after filing five unsuccessful lawsuits can sometimes still walk into another court and continue filing and harassing his or her targets time and time again. The FVLL draws a line for the courts, giving them a guide for when to say that a vexatious litigant has crossed the line into being abusive of the judicial system.

A. *Reducing Frivolous Litigation More Efficiently*

The FVLL combines several of the currently used sanctions and simply prescribes an efficient manner for enforcing them. This law sets at five the number of cases in which a pro se litigant must receive an adverse judgment and tells the court that a litigant is becoming abusive of the court system at that point.⁹³ In the past, litigants have sometimes been allowed to file up to forty petitions before courts ended their abusive behavior by refusing to allow further complaints to be filed.⁹⁴ Thus, one of the ways that the FVLL makes the process more effective is by allowing a judge to say that a vexatious litigant has caused enough trouble at a much earlier point in his or her dealings with the court.

A second advantage to this law is that it provides a mechanism whereby a frivolous cause of action can be dismissed with prejudice⁹⁵ early in litigation.⁹⁶ If motions to strike frivolous and sham pleadings are granted, a court still has the option of giving the party an opportunity to amend or submit additional pleadings to correct the errors.⁹⁷ Because the FVLL requires an order of dismissal *with prejudice* if a party does not furnish the required bond, it does not leave courts with the latitude to allow amendments.⁹⁸ Thus, another benefit of the FVLL is that it allows a court to enter a final judgment against frivolous claims early on in the litigation

93. § 68.093(2)(d)(1).

94. See generally *Martin v. State*, 747 So. 2d 386, 387–88 (Fla. 2000) (recognizing that petitioner had filed 43 petitions to the Fourth District Court of Appeal, and 30 petitions to the Supreme Court of Florida); *Rivera v. State*, 728 So. 2d 1165, 1165 (Fla. 1998) (noting that petitioner had filed at least 20 petitions to its court alone); *Attwood v. Eighth Cir. Ct., Union County*, 667 So. 2d 356, 356 (Fla. 1st Dist. Ct. App. 1995) (noting that litigant had filed 17 appeals or petitions in its court, most of which received adverse judgments); *Platel v. Maguire, Voorhis, & Wells, P.A.*, 436 So. 2d 303, 304 (Fla. 5th Dist. Ct. App. 1983) (commenting that petitioner had filed nine notices of appeal in 14 months).

95. A dismissal with prejudice means that a lawsuit cannot be amended and refiled. BLACK'S LAW DICTIONARY 482 (7th ed. 1999).

96. FLA. STAT. § 68.093(2)(d)(1) (2000).

97. FLA. R. CIV. P. 1.150(a).

98. § 68.093(3)(c); see also *Gladstone v. Smith*, 729 So. 2d 1002, 1003 (Fla. 4th Dist. Ct. App. 1999) (noting that petitioner had been allowed to amend his initial complaint 10 times before he was ordered to obtain counsel to proceed with the litigation).

process, rather than having to allow repeated amendments that further tie up court resources.

The FVLL does not outright require a litigant to obtain counsel in order to continue filing complaints. However, the FVLL only applies to actions filed pro se. This means that once litigants have been prohibited from further pro se filings, if they present valid complaints and have attorneys sign those complaints, they will not face barriers to getting those complaints filed and starting the litigation process. The rationale behind having attorneys sign the filings presented to the court is to ensure that filings are legally sound and properly drafted.⁹⁹ The law is written only to prevent those litigants from filing suits that no lawyer would sign their names to in good conscience. Legitimate complaints which are recognized and accepted by counsel, as well as those filed pro se that express legitimate claims, will not be barred by this law.

The obvious advantage of the FVLL over the current monetary sanctions under section 57.105 of the *Florida Statutes* is that costs of litigation are addressed at earlier stages of litigation. Section 57.105 sanctions require that one party must prevail, meaning that in most cases there has to be a final judgment.¹⁰⁰ At that point, a vexatious litigant has possibly harassed and abused the defendants, witnesses, and judicial staff for years. Additionally, the litigant likely will not possess the resources to pay any judgment of attorneys' fees, and he or she is unlikely to have learned the intended lesson that filing frivolous suits is wrong. Since the intent of frivolous suits is to harass, once a litigant has seen a lawsuit through to completion, even if it results in an adverse judgment, the objective has been successfully completed. With pro se litigants, the monetary sanctions under section 57.105 do not have the deterrent effect that was intended.

In contrast, the FVLL requires that a vexatious litigant post a bond in order to proceed with his or her frivolous lawsuit.¹⁰¹ In forcing this action, the courts are guaranteeing that a defendant who is hauled into court is protected to some degree from bearing the costs of litigation. By raising the issue of costs of litigation early in the process, the court forces the vexatious pro se litigant to examine the claims made and to determine whether claims are important enough to proceed. This law ensures that a defendant will not waste countless days and precious monetary resources on litigation, only to learn at the end of the road that he or she will not be reimbursed for his or her troubles. For these reasons the FVLL will prove to be more effective

99. *McAliley v. McAliley*, 704 So. 2d 611, 614 (Fla. 4th Dist. Ct. App. 1997) (Farmer, J., concurring).

100. FLA. STAT. § 57.105(1) (2000). The award for attorneys' fees is ordered at the end of litigation. *See id.*

101. § 68.093(3)(b).

than sanctions currently in place, and the courts should expect to see a more effective process for reducing the burden of frivolous lawsuits.

B. *Following the Trend in Other States*

Four other states have also introduced similar statutes into their courts.¹⁰² California's statute is the most similar to the FVLL. Indeed, the California Vexatious Litigant Statute was the model upon which Florida's law was based.¹⁰³ Most of the other states' laws use essentially the same language, with the exception of the Ohio Vexatious Litigator Statute.¹⁰⁴ All except Ohio's specify a certain number of cases in which a litigant must receive an adverse judgment in order to qualify for categorization as a vexatious litigant.¹⁰⁵ However, the statutory period differs from that chosen by Florida's legislature. In California, Hawaii, and Texas, a litigant is vexatious after he or she has received five or more adverse judgments in a *seven-year* period, as opposed to a *five-year* period stated in Florida's law.¹⁰⁶ This means that Florida's law is slightly more restrictive than those of other states.

A second distinction between the Florida law and others is that the others (except Ohio's) define litigation as any civil action in either state or federal court.¹⁰⁷ Ohio's law applies only to state courts.¹⁰⁸ Although Florida's law is silent on whether it applies to federal courts, a plain reading of the statute defining an "action" as one in a court governed by the *Florida Rules of Civil Procedure* (or the *Florida Probate Rules*) seems to imply that federal courts in Florida do not benefit from the law's restrictions.¹⁰⁹ One possible effect of this omission is that vexatious litigants who have been

102. See, e.g., CAL. CIV. P. CODE § 391 (West 1998 & Supp. 2000); OHIO REV. CODE ANN. § 2323.52 (Anderson 1998); HAW. REV. STAT. § 634J (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 11.001-104 (West Supp. 2000).

103. Audio Tape, *supra* note 74.

104. OHIO REV. CODE ANN. § 2323.52 (Anderson 1998).

105. CAL. CIV. P. CODE § 391(b)(1) (West 1998 & Supp. 2000); HAW. REV. STAT. § 634J-1(1) (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(1) (West Supp. 2000). Ohio does not require a litigant to receive adverse judgments in a specific number of cases within a chosen time frame. Instead, the state classifies a vexatious litigant as one who has "habitually, persistently, and without reasonable grounds engaged in vexatious conduct." OHIO REV. CODE ANN. § 2323.52(A)(3) (Anderson 1998).

106. CAL. CIV. P. CODE § 391(b)(1) (West 1998 & Supp. 2000); HAW. REV. STAT. § 634J-1(1) (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(1) (West Supp. 2000).

107. CAL. CIV. P. CODE § 391(a) (West 1998 & Supp. 2000); HAW. REV. STAT. § 634J-1 (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 11.001(2) (West Supp. 2000).

108. OHIO REV. CODE ANN. § 2323.52(A)(3) (Anderson 1998).

109. FLA. STAT. § 68.093(2)(a) (2000).

prohibited from filing in state courts might begin filing in federal courts, thereby increasing the strain of frivolous litigation on the federal courts. One way to correct this would be for the United States District Courts located in Florida to issue a local rule stating that judges may refer to the FVLL for the purpose of issuing sanctions against vexatious parties.¹¹⁰

There are other minor differences between the FVLL and the vexatious litigant laws in other states. For example, Texas' law gives a party just ninety days from the date the answer was filed to make a motion for the plaintiff to furnish a security bond.¹¹¹ Conversely, Florida's law is silent regarding the timing of filing such a motion, but without such restrictions as Texas places on bringing the motion, it seems a party has until the entry of final judgment to ask for a bond to be furnished.¹¹²

Finally, the only other notable difference between the FVLL and other states' vexatious litigant laws is the inclusion of additional definitions of a "vexatious litigant" in California, Hawaii, and Texas. All three state statutes include provisions that allow litigants to be termed vexatious if they allow lawsuits to remain pending for at least two years with no trial date (in addition to being termed vexatious because of adverse judgments).¹¹³ In all three states, litigants can also earn the vexatious label by repeatedly relitigating issues already finally determined in previous actions, and repeatedly filing meritless motions, pleadings, or other papers to delay or harass the other party.¹¹⁴ In contrast, Florida's law does not provide such mechanisms for terming parties to be vexatious; rather, parties only earn the title if they receive five adverse judgments in five years.¹¹⁵

Overall, in comparison to other vexatious litigant laws, the FVLL is somewhat less broad. Florida frames the definition of a vexatious litigant more narrowly and allows the statute to affect only certain courts within the state. The FVLL applies only to actions governed by the *Florida Rules of*

110. See Rawles, *supra* note 32, at 288, n.80 (describing how California handled this issue before the statute was amended to include federal courts in the state).

111. TEX. CIV. PRAC. & REM. CODE ANN. § 11.051 (West Supp. 2000). California and Hawaii allow such a motion until a final judgment has been entered. CAL. CIV. PROC. CODE § 391.1 (West 1998 & Supp. 2000); HAW. REV. STAT. § 634J-2 (1999). Ohio does not provide a mechanism by which a party can move the court to order the plaintiff to furnish a security bond. See OHIO REV. CODE ANN. § 2323.52(A)(3) (Anderson 1998).

112. See FLA. STAT. § 68.093(3)(a) (2000).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(1)(B) (West Supp. 2000); CAL. CIV. P. CODE § 391(b)(1)(ii) (West 1998 & Supp. 2000); HAW. REV. STAT. § 634J-1(1)(B) (1999).

114. TEX. CIV. PRAC. & REM. CODE ANN. § 11.054(2)(A)-(B) (West Supp. 2000); CAL. CIV. PROC. CODE § 391(b)(2) (West 1998 & Supp. 2000); HAW. REV. STAT. § 634J-1(2)-(3) (1999).

115. FLA. STAT. § 68.093(2)(d) (2000).

Civil Procedure and the *Florida Probate Rules*, as well as actions governed by the *Florida Small Claims Rules*.¹¹⁶ It specifically excludes any actions in courts governed by the *Florida Family Law Rules of Procedure*, meaning that pro se actions for divorce, child custody, or other family law matters would not be restrained.¹¹⁷ It likewise does not apply to criminal actions, or to petitions for writs of habeas corpus.¹¹⁸ This is a departure from the vexatious litigant laws enacted in the other states, in which actions in family courts and writs of habeas corpus can apparently be subjected to the restrictions of the vexatious litigant statutes.¹¹⁹ Florida's law declines to encompass all of the definitions of a "vexatious litigant" that its counterparts in other states do. Due to its narrower construction, the Florida law is likely to affect only the most vexatious of litigants, and should draw less criticism from pro se litigants claiming that it impinges on constitutional rights of access to courts.

V. CLOSING THE COURTROOM DOORS TO FRIVOLOUS LITIGATION

Initial responses to the FVLL will consist of claims of constitutional violations of a right of access to the courts. The Florida Constitution states,

116. § 68.093(2)(a), (3)(a).

117. *Id.*; STAFF OF SENATE COMM. ON JUDICIARY, 102D CONG., ANALYSIS AND ECONOMIC IMPACT STATEMENT ON CS/SB 154 (VEXATIOUS LITIGANTS) 4 (Fla. 2000); *see also*, Audio Tape, *supra* note 74. The statute is also silent as to whether the law applies to federal courts within the state. *See* § 68.093(2)(a), (3)(a). Obviously, Florida legislatures have no authority over federal courts, so this may be the reason for the omission. However, the inclusion of federal court adverse judgments against a pro se litigant was mentioned at the House of Representatives Committee on Judiciary's Hearing, and the Committee seemed favorable to including those decisions when tallying the five adverse judgments. Audio Tape, *supra* note 74. This is an important point to note because many pro se litigants file federal civil rights violations suits as a blanket basis for their alleged harms after they fail to gain relief in state courts.

Adverse judgments for actions in courts governed by the *Florida Small Claims Rules* are not tallied for the purposes of establishing the threshold number to meet the statute's requirements for terming a party a vexatious litigant. So while a pro se litigant's adverse judgment in a small claims court is not held against him for purposes of totaling up the number of adverse judgments, if he otherwise meets the criteria, he *can* be restrained from filing lawsuits in small claims court under the statute's language. § 68.093(2)(d)(1).

118. Audio Tape, *supra* note 74.

119. The vexatious litigant statutes in California, Hawaii, and Texas place no restrictions on the courts in which a vexatious litigant's activities can be restricted. CAL. CIV. PROC. CODE § 391 (West 1998 & Supp. 2000); HAW. REV. STAT. § 634J-1 (1999); TEX. CIV. PROC. & REM. CODE ANN. § 11.001 (West Supp. 2000). Ohio's statute applies only to the actions governed by the *Ohio Rules of Civil Procedure*. OHIO REV. CODE ANN. § 2323.52(C) (Anderson 1998).

in pertinent part, that “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”¹²⁰ Traditionally, courts have liberally construed the right of access to guarantee everyone the opportunity to have their day in court.¹²¹ However, courts have a responsibility to see that limited resources are allocated in a way that “promotes the interests of justice.”¹²² They recognize a need to reserve the resources of the court system for genuine dispute resolutions.¹²³ When one person’s vexatious and harassing activities upset normal court procedure, it becomes necessary to invoke some sort of restraint.¹²⁴ Courts have recognized a legislative right to restrict access in certain circumstances if a reasonable alternative remedy is shown.¹²⁵ If there is no alternative remedy, there must be an overpowering public necessity for the abolishment of the right of access.¹²⁶

A pro se litigant who feels that his or her rights have been abused may assert arguments that the constitutional right of access to courts restricts the placing of financial barriers to bringing claims or defenses to court.¹²⁷ In *Don’s Sod Co. v. Department of Revenue*,¹²⁸ the Fifth District Court of Appeal held that “[n]o bond requirement . . . can be employed by the Legislature to prevent a constitutional challenge to those very provisions.”¹²⁹ This statement is problematic because some pro se litigants will construe it to mean that absolutely no bond requirement can be enacted by the legislature. However, what the holding actually suggests is that if a litigant wants to challenge a bond requirement (or other restriction) on his or her right of access to courts, the litigant cannot be barred from doing so by the bond requirement. It says nothing about the constitutionality of a bond itself. Another likely argument is found in *Psychiatric Associates v. Siegel*,¹³⁰ where the Supreme Court of Florida explained that a statute requiring that a bond for attorneys’ fees be posted as a condition for bringing an action violates the right of access to courts guaranteed by the Florida Constitution.¹³¹ As a blanket statement, this is simply not true.

120. FLA. CONST. art. I, § 21.

121. *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992).

122. *In re McDonald*, 489 U.S. 180, 184 (1989).

123. *Rivera v. State*, 728 So. 2d 1165, 1166 (Fla. 1998).

124. *Shotkin v. Cohen*, 163 So. 2d 330, 332 (Fla. 3d Dist. Ct. App. 1964).

125. *Siegel*, 610 So. 2d at 424.

126. *Id.*

127. 10 FLA. JUR. 2D *Constitutional Law* § 316 (1997).

128. 661 So. 2d 896 (Fla. 5th Dist. Ct. App. 1995).

129. *Id.* at 898.

130. 610 So. 2d 419 (Fla. 1992).

131. *Id.* at 424–25.

While access to courts must not be unreasonably burdened, requiring a bond as a condition of bringing an action under some circumstances does not violate the right of access to the courts.¹³² Courts recognize a public need to impose a significant restraint on those who abuse the judicial system.¹³³ However, courts must be careful that when limiting one's right of access to the courts, they safeguard those rights to essential due process.¹³⁴ A restraint on a right of access to courts should not amount to a total denial of access.¹³⁵

Issues of due process arise when the right of access to courts is restricted as mandated by the FVLL. According to the Supreme Court of Florida in *Siegel*, the test used to determine whether a statute violates the due process clause is whether the statute "bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive."¹³⁶ In *Siegel*, a bond requirement for bringing actions challenging medical peer review board decisions was found to be unconstitutional because it did not reasonably relate to the goal of reducing frivolous suits by physicians, since the bond requirement was required of *all* plaintiffs before filing, regardless of the merits of the case.¹³⁷ This statute discriminated against those who could not afford to post a bond.¹³⁸ A denial of due process does not occur when a state restricts the right of access to courts by means of a reasonable procedural requirement.¹³⁹ For example, when courts afford a litigant a reasonable opportunity to be heard (i.e., evaluating the likelihood of the plaintiff's success) prior to requiring a posting of a security bond, due process rights are not violated.

The California Vexatious Litigant Law was challenged in *Taliaferro v. Hoogs*,¹⁴⁰ in which a pro se litigant disputed the constitutionality of the statute that required him to post a security bond.¹⁴¹ His claim was subsequently dismissed when he failed to do so.¹⁴² The California statute was upheld, and the court held that the provisions of the statute were not

132. 10 FLA. JUR. 2D *Constitutional Law* § 318 (1997).

133. *Martin v. State*, 747 So. 2d 386, 391-92 (Fla. 2000).

134. *Martin v. Cir. Ct., Seventeenth Judicial Cir.*, 627 So. 2d 1298, 1300 (Fla. 4th Dist. Ct. App. 1993).

135. *Emery v. Clifford*, 721 So. 2d 401, 402 (Fla. 3d Dist. Ct. App. 1998) (holding that a prohibition on filing pro se was not a complete denial of access).

136. *Siegel*, 610 So. 2d at 425 (citing *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 15 (Fla. 1974)).

137. *Id.*

138. *Id.*

139. Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 678 (1988).

140. 46 Cal. Rptr. 147 (Cal. 1st Dist. Ct. App. 1965).

141. *Id.* at 147.

142. *Id.* at 148.

unreasonable, and that the statute did not discriminate against any group of persons unconstitutionally, or deny a litigant due process of law.¹⁴³ One could expect a similar result if Florida's law should be so challenged.

Thus, the FVLL will not violate the constitutional rights of pro se litigants who come before the court. The statute serves a legitimate governmental interest in preventing the wheels of justice from becoming so clogged with frivolous litigation that they cannot effectively provide judicial remedy for other well-meaning litigants. It does not discriminate unfairly against those who are without funds, since litigants with legitimate claims will not be denied access to the courts. Further, alternative means exist, such as posting the security bond, even if claims are deemed meritless. The statute does not require the posting of such a bond before filing; it only requires that a vexatious litigant either obtain leave by telling the judge that he or she has a new and meritorious claim, or, if brought as a motion during litigation, that the litigant show the judge at a hearing that his or her claim is valid. Judicial consideration will be given prior to issuance of an order requiring a bond. In this manner, the litigant enjoys an opportunity to be heard, and his or her due process rights are not violated. The bond requirement is not an absolute bar to litigation; rather, it is an impediment to those who would otherwise take advantage of the judicial system. The requirements of the FVLL are narrow enough to protect the courts from frivolous litigation without infringing upon rights of litigants.

VI. CONCLUSION

The FVLL is a valuable new tool in the hands of Florida courts. It will make the process of disposing of frivolous claims more efficient and will ensure that the judicial process runs more smoothly. While there will be vexatious litigants who challenge the new law and the restrictions it imposes, the statute as it is currently framed should withstand the pressure. It will be interesting to see how the FVLL affects vexatious litigants like Anthony Martin. It may be too soon to tell, but perhaps it really will curtail the courtroom capers that vexatious pro se litigants exhibit every day in today's courtrooms.

Deborah L. Neveils

143. *Id.* at 151–52.

Proving Employer Intent: *Turner v. PCR, Inc.* and the Intentional Tort Exception to the Workers' Compensation Immunity Defense

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“If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance.”¹

Oliver Wendell Holmes, Jr.

1. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 1 (1894).

I. INTRODUCTION

Workers' compensation is a form of strict liability.² It is a system where employers are responsible for their employees' injuries despite fault. In return, the *Florida Statutes* preclude employees from suing their employers for damages available under the common law tort system.³ The exclusive remedy provision of the Florida Workers' Compensation Act provides this preclusive effect and gives rise to the workers' compensation immunity defense to tort actions.⁴ Certain situations exist, however, where an employer may still be exposed to tort liability.⁵ The intentional tort exception is such a situation.⁶

Recently, in *Turner v. PCR, Inc.*,⁷ the Supreme Court of Florida recognized and reaffirmed the existence of an intentional tort exception.⁸ Additionally, the court held that an objective standard may be used to judge an employer's conduct.⁹ Now, employers may be accountable under this exception for conduct that a reasonable person, in the employer's position, would understand as "substantially certain" to result in injury or death to an employee.¹⁰

This comment discusses the Supreme Court of Florida's decision in *Turner*, as it addresses the intentional tort exception to workers' compensation as an exclusive remedy. In addition, it considers the impact the *Turner* decision may have on future litigation against employers. Part II gives a brief overview of workers' compensation in Florida as it describes benefits and disadvantages of the current system, and discusses case law concerning this exception prior to *Turner*. Part III outlines the facts of *Turner*, and Part IV summarizes the procedural posture of the case.

Next, Parts V and VI analyze the arguments presented by both sides of this dispute as they pertain to the intentional tort exception and employer conduct. Part VII describes in detail the Supreme Court of Florida's decision. Part VIII reflects on the decision and discusses its impact, particularly questioning what the court considers "substantial certainty," and providing a possible interpretation. This section additionally discusses the

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984).

3. FLA. STAT. § 440.11 (2000).

4. *Id.*

5. Robert L. Dietz & Robert E. Mansbach, Jr., *Workers' Compensation Law: Dual Challenges to Exclusive Employer Liability*, 66 FLA. BAR J. 53, 55 (1992).

6. *Id.*

7. 754 So. 2d 683 (Fla. 2000).

8. *Id.* at 691.

9. *Id.*

10. *Id.* at 688.

procedural aspect as it relates to surviving summary judgment in this type of case. Part IX concludes that holding employers responsible for intentional acts, as defined by this court's opinion, is appropriate. However, extending an objective standard to employees' conduct may also help in creating a system where both employers and employees are encouraged to behave responsibly and promote workplace safety.

II. AN OVERVIEW OF WORKERS' COMPENSATION

A. *Benefits and Disadvantages*

In Florida, the legislature enacted workers' compensation law to provide benefits including medical care and lost wages to employees for accidental injuries arising in the course and scope of employment.¹¹ The intent was to assure a "quick and efficient delivery of disability and medical benefits" and facilitate the employee's return to work at a reasonable cost to the employer.¹² The legislature designed the workers' compensation system to: replace uncertain remedies with certain ones; avoid the expenses of litigation; and resolve employment injury disputes through a more efficient and less costly system.¹³

Generally, to receive benefits, employees need only to inform their employer of an injury within thirty days.¹⁴ Employers must pay benefits despite who is at fault.¹⁵ Additionally, certain occupational illnesses are covered.¹⁶ Therefore, employees benefit from prompt guaranteed medical care and disability benefits for lost wages. On the other hand, litigation within the workers' compensation system is increasingly a disadvantage. Originally intended to be the exception rather than the rule, litigation is becoming more frequent as employees try to prove eligibility, injury causation, and pursue washout settlements.¹⁷ Additionally, although medical

11. FLA. STAT. § 440.015 (2000).

12. *Id.*

13. Joan T.A. Gabel, *Escalating Inefficiency in Workers' Compensation Systems: Is Federal Reform the Answer?*, 34 WAKE FOREST L. REV. 1083, 1089 (1999).

14. § 440.185(1); *see also* JOHN J. DUBREUIL, FLORIDA WORKERS' COMPENSATION HANDBOOK, § 2.02 (1999) (explaining employee reporting of injuries and occupational illnesses in general).

15. DUBREUIL, *supra* note 14, §§ 1.01[4], 1.02[1]; KEETON, *supra* note 2, § 80, at 573.

16. DUBREUIL, *supra* note 14, § 8.01[1]–[8]; KEETON, *supra* note 2, § 80, at 575.

17. DUBREUIL, *supra* note 14, § 1.01[5].

care is paid, if an employee loses time from work, he or she only receives a percentage of his or her lost wages.¹⁸

The benefits and disadvantages for employers are similar. Generally, employers benefit because they are immune from tort liability if they participate in the system.¹⁹ Thus, employers for the most part escape the expense of litigating employee injury claims.²⁰ Unfortunately, the system, intended as an efficient and less expensive alternative, has still been costly for employers. Medical care is not cheap and lost-time costs can be considerable. For instance, nationally in 1984, employers spent an estimated thirty billion dollars in annual workers' compensation costs.²¹ In 1993, that figure rose to seventy billion dollars.²² However, due to reform measures over the last few years, costs have slightly declined.²³ Still, many criticize the effectiveness of the system as a solution for injured employees or a remedy for businesses faced with costly claims, demands for settlements, and increasing insurance premiums.²⁴

B. *Intentional Tort Exception*

Although workers' compensation is generally an exclusive remedy for employees, in 1986 the Supreme Court of Florida, in *Fisher v. Shenandoah General Construction Co.*,²⁵ remarked that employers were not immune from suit if they have engaged in intentional acts either designed to result in, or substantially certain to, harm an employee.²⁶ In *Fisher*, an employer ordered an employee to clean the inside of an underground pipe with a high pressure hose, resulting in the employee's death due to methane gas fumes.²⁷ The employee's personal representatives sued his employer, alleging Shenandoah's conduct constituted an intentional tort and therefore did not fall within the scope of Florida workers' compensation law.²⁸

The original question certified to the Supreme Court of Florida in *Fisher* addressed whether Florida workers' compensation law precluded actions by employees against their employers for intentional torts, if the

18. FLA. STAT. § 440.15 (2000).

19. See generally KEETON, *supra* note 2, § 84, at 601.

20. *Id.*

21. See Gabel, *supra* note 13, at 1089.

22. *Id.*

23. *Id.*

24. See *Id.*

25. 498 So. 2d 882 (Fla. 1986).

26. See *id.* at 883.

27. *Id.*

28. *Id.*

injuries occurred within the scope of their employment.²⁹ However, the court refrained from answering the question directly, because it held that the facts in *Fisher* did not state an intentional tort cause of action.³⁰ The complaint alleged that the employer required the deceased employee to engage in an activity that would “‘in all probability’ cause injury or death.”³¹ Instead, the court restated the certified question and addressed whether an employer commits an intentional tort when he orders his employee to engage in an activity that the employer knows to be dangerous, and that will “in all probability result in injury to the employee.”³²

Expectedly, the court answered no; probable injury was insufficient to prove an intentional tort.³³ In doing so, however, it essentially addressed the original question stating, “[i]n order for an employer’s actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death.”³⁴ What was missing in *Fisher*’s complaint was the “substantial certainty” element.³⁵ Decided the same day, *Lawton v. Alpine Engineered Products, Inc.*,³⁶ met the same fate. In *Lawton*, the court held that a willful and wanton disregard for the safety of employees is different from committing an intentional tort.³⁷ Additionally, “[f]his [intentional tort] standard requires more than a strong probability of injury. It requires *virtual* certainty.”³⁸

Now, in *Turner v. PCR, Inc.*, the Supreme Court of Florida recognizes and reaffirms that “workers’ compensation law does not protect an employer from liability for an intentional tort against an employee.”³⁹ This opinion specifically addresses and explains the alternative bases for recovery under this exception and how it takes a step back from the requirement of virtual certainty.⁴⁰

29. *Id.* at 882–83.

30. *Fisher*, 498 So. 2d at 883.

31. *Id.*

32. *Id.*

33. *Id.* at 883–84.

34. *Id.* at 883.

35. *Fisher*, 498 So. 2d at 884.

36. 498 So. 2d 879 (Fla. 1986).

37. *Id.* at 880.

38. *Id.* (emphasis added).

39. 754 So. 2d 683, 687 (Fla. 2000).

40. *Id.*

III. THE FACTUAL SITUATION OF *TURNER V. PCR, INC.*

On November 22, 1991, an explosion occurred at a chemical plant in Alachua County, Florida, killing Paul Turner and seriously injuring James Creighton.⁴¹ At the time of the explosion, PCR, Inc. ("PCR"), employed both Turner and Creighton as technicians.⁴²

E.I. DuPont Nemours & Co. hired PCR to develop a chemical replacement compound for Freon 113.⁴³ The creation of the replacement compound (F-pentene-2) involved complicated chemical processes.⁴⁴ Initially, requiring a difficult and unstable three-step procedure, the process resulted in several explosions and meltdowns.⁴⁵ Subsequently, PCR modified the process.⁴⁶ Before the November 22 explosion, PCR made thirty-six runs of the F-pentene-2 process.⁴⁷ Thirty of those runs involved quantities less than or equal to twenty gallons.⁴⁸ Six involved two-hundred gallon runs.⁴⁹ The explosion at issue occurred during the seventh, two-hundred gallon run.⁵⁰ Appellants produced evidence showing "at least three" other explosions involving the manufacture of F-pentene-2, although the processes involved differed.⁵¹ However, the November 22 explosion resulted from mixing three chemicals required to produce F-pentene-2, in a one hundred pound liquid fuel cylinder lacking any pressure relief device.⁵²

Turner and Creighton retained two chemical experts to investigate the circumstances surrounding the incident.⁵³ The experts provided affidavits stating it was substantially certain an explosion would result from mixing large quantities of the chemicals at issue, tetrafluoroethylene ("TFE"), hexafluoropropene ("HFP"), and aluminum chloride, in a propane tank, rather than in a reactor equipped with pressure release valves and other safety features.⁵⁴ The experts stated that TFE in particular, was "highly

41. *Id.* at 684.

42. Respondent's Answer Brief on Merits at 4, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

43. *Turner*, 754 So. 2d at 684.

44. Initial Brief of Appellants at 1, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

45. *Id.* at 2.

46. *Id.*

47. *Turner*, 754 So. 2d at 685.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Turner*, 754 So. 2d at 685.

53. *Id.*

54. *Id.*

reactive,' 'prone to spontaneous and violent decomposition when heated or compressed,'" and required special equipment and precautions when handled.⁵⁵ Evidence was also presented that ICI, the manufacturer of TFE, had notified PCR that it was discontinuing supplying TFE due to its hazardous nature.⁵⁶

Both experts concluded that due to intense pressure placed on PCR and the nearing phase-out date for the legal use and manufacture of Freon, PCR intentionally changed the protocol for producing F-pentene-2 to accommodate the existing reaction facility that was unsuited for that purpose.⁵⁷ Furthermore, evidence was presented that Turner voiced concerns regarding the safety of the project and PCR never informed Creighton regarding the hazards.⁵⁸ Finally, PCR, knowing TFE was dangerously unstable, allowed the practice of manually inverting the chemical containers thus, making it substantially certain employees would be harmed.⁵⁹

IV. PROCEDURAL POSTURE OF *TURNER V. PCR, INC.*

Turner's estate, along with Creighton and his wife, sued PCR for wrongful death and personal injuries arising out of alleged intentional torts including: intentional exposure to injury, battery, fraudulent misrepresentation, and intentional infliction of emotional distress.⁶⁰ PCR claimed immunity as Turner and Creighton's employer and alleged they were only entitled to workers' compensation benefits.⁶¹ The trial court granted summary judgment for PCR based on workers' compensation immunity pursuant to section 440.11(1) of the *Florida Statutes*.⁶² Additionally, the trial court held the experts' affidavits amounted to conclusory statements rather than evidence of facts.⁶³ The First District Court of Appeal affirmed the trial court's order but certified the following question of "great public importance" to the Supreme Court of Florida:

55. *Id.*

56. *Id.*

57. *Turner*, 754 So. 2d at 685.

58. Initial Brief of Appellants at 4, *Turner* (No. 94,468).

59. *Turner*, 754 So. 2d at 685.

60. Respondent's Answer Brief on Merits at 2, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

61. *Id.*

62. *Turner*, 754 So. 2d at 686.

63. Respondent's Answer Brief on Merits at 19-20, *Turner* (No. 94,468).

IS AN EXPERT'S AFFIDAVIT, EXPRESSING THE OPINION THAT AN EMPLOYER EXHIBITED A DELIBERATE INTENT TO INJURE OR ENGAGED IN CONDUCT SUBSTANTIALLY CERTAIN TO RESULT IN INJURY OR DEATH TO AN EMPLOYEE, SUFFICIENT TO CONSTITUTE A FACTUAL DISPUTE, THUS PRECLUDING SUMMARY JUDGMENT ON THE ISSUE OF WORKERS' COMPENSATION IMMUNITY?⁶⁴

V. THE APPELLANTS URGE THE SUPREME COURT OF FLORIDA TO ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE

Turner and Creighton (Appellants) in their initial brief asked the Supreme Court of Florida to answer the certified question in the affirmative for two reasons.⁶⁵ First, Appellants argued the experts' affidavits proffered on their behalf must be considered before rendering summary judgment in favor of PCR (Appellee).⁶⁶ Second, Appellants argued the experts' affidavits "present genuine issues of material fact precluding Appellee's motion for summary judgment and the order of the district court should be reversed."⁶⁷

Addressing their first argument, Appellants acknowledged that the lower courts in this case questioned the applicability of experts' affidavits and the weight they must be given in summary judgment proceedings.⁶⁸ Defending the applicability, Appellants cited *Buchman v. Seaboard Coast Line Railroad*,⁶⁹ where the Supreme Court of Florida set forth the elements for admissibility of expert testimony.⁷⁰ The two elements required for admitting expert testimony are: first, "the subject must be beyond the common understanding of the average layman"; and second, the witness must possess knowledge that will aid the trier of fact in determining the truth.⁷¹ Likewise, Appellants argued the subject matter in this case was "highly technical and well outside the common knowledge of the jury," and additionally, the affidavits supporting a showing of material issues of fact.⁷²

64. *Turner*, 754 So. 2d at 684.

65. Initial Brief of Appellants at 11, 16, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

66. *Id.* at 11.

67. *Id.* at 16.

68. *Id.* at 11.

69. 381 So. 2d 229 (Fla. 1980).

70. *Id.* at 230.

71. *Id.*

72. Initial Brief of Appellants at 14, *Turner* (No. 94,468).

In particular, the experts' findings were necessary to create, at a minimum, a question of fact for the jury. Appellants claimed the issue was whether Appellee knew or should have known its specific actions or omissions, such as allowing highly volatile gases to be manually mixed in containers without pressure relief valves, were substantially certain to result in injury or death to an employee.⁷³ In further support of their argument, Appellants cited several other cases where courts relied upon expert witness affidavits in granting or denying motions for summary judgment.⁷⁴

For example, Appellants cited *Roster v. Moulton*,⁷⁵ a Fourth District Court of Appeal case addressing the significance of experts' affidavits in summary judgment proceedings.⁷⁶ *Roster* involved a personal injury action filed against a bar after a customer struck the plaintiff, a bicyclist, with his vehicle while leaving.⁷⁷ The trial court considered the affidavits of two expert witnesses stating that the amount of alcohol the defendant consumed over a short period, with no outward evidence of physical impairment, would have put a reasonable server of alcoholic beverages on notice that the defendant was "habitually addicted."⁷⁸ These affidavits helped in creating an issue of fact, whether bar employees knew the defendant was addicted to alcohol.⁷⁹

Additionally, Appellants cited *Lugo v. Florida East Coast Railway Co.*⁸⁰ In *Lugo*, a negligence and strict liability action brought under the Federal Employer's Liability Act, the trial court excluded the plaintiff's expert witness from testifying because he had not been listed as a witness, violating the court's pretrial order.⁸¹ However, the Third District Court of Appeal refused to affirm for other reasons but stated, "we must assume that the trial court found the expert qualified to render an opinion, and his affidavit testimony reasonably credible, as it was the only evidence it could have relied upon in denying defendants' motions for summary judgment."⁸² As these examples suggest, judges consider expert testimony in summary judgment proceedings and use the affidavits as evidence to deny motions for summary judgment.

Appellants not only claimed the court must consider their experts' affidavits, but that the affidavits set forth evidence creating disputable issues

73. *Id.* at 26.

74. *Id.* at 12-14.

75. 602 So. 2d 975 (Fla. 4th Dist. Ct. App. 1992).

76. Initial Brief of Appellants at 13-14, *Turner* (No. 94,468).

77. *Roster*, 602 So. 2d at 975.

78. *Id.* at 976 n.2.

79. *See id.* at 976.

80. 487 So. 2d 321 (Fla. 3d Dist. Ct. App. 1986).

81. *Id.* at 323.

82. *Id.* at 324.

for trial.⁸³ In favor of their second argument, Appellants cited the *Florida Rules of Civil Procedure* for granting summary judgment stating, summary judgment will be rendered if the “pleadings, depositions, answers to interrogatories, and admissions on file *together with the affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”⁸⁴ Therefore, the moving party has the burden of proving there is no genuine issue of material fact for trial.⁸⁵

Appellants used *Holl v. Talcott*⁸⁶ to illustrate this point.⁸⁷ *Holl* was a medical malpractice action where the petitioner claimed she suffered complications due to the negligence of her surgeons and others.⁸⁸ Here, the Supreme Court of Florida discussed experts’ affidavits and the alleged deficiencies of such when offered by respondents in support of summary judgment.⁸⁹ In fact, the court found the respondents’ affidavits did not demonstrate conclusively that the respondents were not negligent and therefore, they were not entitled to judgment as a matter of law.⁹⁰ Therefore, the respondents, as movants, did not meet their burden and this being so, the sufficiency of the petitioner’s affidavit should never have been reached.⁹¹

Using these arguments, Appellants clarified that they were not alleging that Appellee’s conduct was designed or *actually intended* to result in serious bodily injury or death.⁹² Instead, they claimed that intentional acts by Appellee, perhaps motivated by business concerns, were *substantially certain* to cause harm, and the experts’ testimony explains the conditions that support this position.⁹³ Additionally, all inferences must be resolved in favor of the non-moving party.⁹⁴ Thus, the affidavits illuminated material issues of *objective intent* and *substantial certainty* that can only be resolved at trial.⁹⁵

83. Initial Brief of Appellants at 16, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

84. *Id.* (citing FLA. R. CIV. P. 1.510).

85. *Id.* at 16–17.

86. 191 So. 2d 40 (Fla. 1966).

87. Initial Brief of Appellants at 16, *Turner* (No. 94,468).

88. *Holl*, 191 So. 2d at 42.

89. *Id.* at 44–45.

90. *Id.* at 45.

91. *Id.*

92. Initial Brief of Appellants at 19, *Turner* (No. 94,468).

93. *Id.*

94. *Id.* at 20.

95. *See id.* at 27.

VI. THE APPELLEE URGES THE SUPREME COURT OF FLORIDA TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE

In response to the Appellants' arguments, PCR acknowledged disagreement with much of the Appellants' statement of the facts and claimed Appellants' version was not supported by the record.⁹⁶ Appellee's main arguments consisted of: first, an affidavit from a scientific expert does not preclude summary judgment if the affidavit does not create a dispute as to a material issue of fact; and second, a conclusory affidavit is insufficient to create a factual issue as to an intentional tort.⁹⁷

Supporting the first argument, Appellee stated the affidavits opposing summary judgment must demonstrate the existence of a material issue of fact.⁹⁸ To determine this, it is necessary to judge the affidavits against the standard for proving an intentional tort.⁹⁹ This is not contrary to Appellants' arguments.¹⁰⁰ However, Appellee stated the issue was whether the employer committed an intentional tort against its employees.¹⁰¹ Proving this required evidence suggesting that the employer had *actual subjective* knowledge that its conduct was substantially certain to cause injury or death.¹⁰² Therefore, to create a material issue of fact, the experts' affidavits must provide evidence that the employer *subjectively knew* this result was substantially certain to occur and set forth facts supporting this claim.¹⁰³

Appellee admitted that the affidavits in question could be used to establish that the employer knowingly created an unsafe workplace.¹⁰⁴ However, Appellee claimed that, in order to defeat a motion for summary judgment, the affidavit must show that the employer knew that his or her conduct was substantially certain to result in injury or death.¹⁰⁵ Therefore, because Appellants failed to show actual knowledge on the part of the employer as to the consequences of its acts, the affidavits were insufficient to defeat summary judgment.¹⁰⁶

96. Respondent's Answer Brief on Merits at 3, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

97. *Id.* at 9, 15.

98. *Id.* at 9.

99. *Id.* at 10.

100. *See* Initial Brief of Appellants at 18–21, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

101. Respondent's Answer Brief on Merits at 7, *Turner* (No. 94,468).

102. *Id.*

103. *Id.*

104. *Id.* at 8.

105. *Id.* at 15.

106. Respondent's Answer Brief on Merits at 8, *Turner* (No. 94,468).

Supporting its second argument, Appellee stated Florida courts have held that conclusory affidavits are insufficient to create a genuine issue of material fact.¹⁰⁷ For example, Appellee cited *Clark v. Gumby's Pizza Systems, Inc.*,¹⁰⁸ where the plaintiff-employee alleged that the employer knew with substantial certainty one of its employees would be assaulted while delivering pizza to a particular college campus at night.¹⁰⁹ The First District Court of Appeal in *Clark* stated, "conclusory allegations of 'substantial certainty' do not raise otherwise insufficient allegations of fact to the level of [an] intentional tort."¹¹⁰ Important in *Clark* is the court's definition of substantial certainty. There, the court cited *Fisher*, equating substantial certainty with virtual certainty.¹¹¹ Therefore, the affidavit in *Clark* was ineffective because it did not provide facts supporting a level of virtual certainty on the part of the employer.¹¹² Likewise, considering the court's prior holding regarding substantial certainty as virtually sure, Appellee argued the affidavits of Appellants' experts did not provide facts supporting this claim.¹¹³

Appellants replied, stating that Appellee misinterpreted the alternative bases for showing an employer had the requisite intent to prove the commission of an intentional tort and actual *subjective* knowledge was not required under the substantial certainty test.¹¹⁴ As a result, the Supreme Court of Florida decided a clarification of this issue was necessary; whether actual *subjective* knowledge of the employer was required to find intent, and refrained from addressing the certified question.¹¹⁵

VII. THE SUPREME COURT OF FLORIDA DECLINES TO ADDRESS THE CERTIFIED QUESTION & ALTERNATIVELY DECIDES PROOF NEEDED FOR INTENTIONAL TORT EXCEPTION

The Supreme Court of Florida declined to address the certified question.¹¹⁶ Instead, the court clarified what a claimant-employee must show when attempting to prove the commission of an intentional tort, thereby

107. *Id.* at 15.

108. 674 So. 2d 902 (Fla. 1st Dist. Ct. App. 1996).

109. Respondent's Answer Brief on Merits at 16, *Turner* (No. 94,468).

110. *Clark*, 674 So. 2d at 904.

111. *Id.*

112. *Id.*

113. See Respondent's Answer Brief on Merits at 23, *Turner* (No. 94,468).

114. Reply Brief of Appellants at 1, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

115. *Turner v. PCR, Inc.*, 754 So. 2d 683, 684 (Fla. 2000).

116. *Id.* at 684.

disallowing an employer from invoking an otherwise valid workers' compensation immunity defense.¹¹⁷ Neither argument made by Appellants nor Appellee claimed expert testimony should be completely disregarded in summary judgment proceedings.¹¹⁸ As previously noted, the Appellee essentially addressed the underlying issue implying that if actual knowledge requiring an inquiry into the subjective state of mind of the employer is necessary to prove an intentional tort, an expert's opinion that does not address the actual knowledge issue is of little use in creating a genuine issue of material fact.¹¹⁹ Noting this line of thought, the court cited previous decisions setting forth two alternative bases for proving an intentional tort, including one allowing an *objective* finding of intent based on a reasonable person standard.¹²⁰

A. *The Objective vs. Subjective Standard*

The Supreme Court of Florida in *Fisher* set forth the disjunctive two part test for proving an intentional tort.¹²¹ The court takes note that Appellants do not claim that Appellee acted with deliberate malice toward them.¹²² Therefore, the first part of the *Fisher* test is not at issue.¹²³ Instead, Appellants claimed the conduct of Appellee fell under the second part of the *Fisher* test; Appellee engaged in acts substantially certain to result in injury or death.¹²⁴ Thus, the court decided the issue was whether a subjective or objective standard is appropriate for judging the conduct of an employer under the second part of the *Fisher* test.¹²⁵

An objective standard requires an analysis of the facts of a case to determine if the employer's conduct was substantially certain to result in injury or death.¹²⁶ The employer's actual intention to harm is not determinative.¹²⁷ The court pointed out that if subjective intent were required under the second part of the *Fisher* test, there would be no alternative basis for recovery against an employer.¹²⁸ A consequence of this

117. *Id.*

118. See Initial Brief of Appellants at 11, *Turner v. PCR, Inc.* 754 So. 2d 683 (Fla. 2000) (No. 94,468); Respondent's Answer Brief on Merits at 7, *Turner* (No. 94,468).

119. Respondent's Answer Brief on Merits at 7–8, *Turner* (No. 94,468).

120. *Turner*, 754 So. 2d at 688.

121. *Id.* at 687; see *supra* notes 25–35 and accompanying text.

122. *Turner*, 754 So. 2d at 688.

123. *Id.*

124. *Id.*

125. *Id.* at 688–89.

126. *Id.* at 688.

127. *Turner*, 754 So. 2d at 688.

128. *Id.*

holding would be that an employee could only recover in those situations where the employer actually intended to harm the employee.¹²⁹ In fact, in many previous cases, Florida courts held the employer must subjectively know that injury or death was virtually certain to rise to the level of an intentional tort.¹³⁰

However, the Supreme Court of Florida in *Turner* attributed the second part of the *Fisher* test to *Spivey v. Battaglia*,¹³¹ where it held if a reasonable person would believe a particular result was substantially certain to follow, the law finds he intended it.¹³² Therefore, intention may be imputed where the facts indicate a reasonable person in the employer's position would realize or *should have realized* certain acts were substantially certain to cause injury.¹³³ In other words, proving intent under the second part of *Fisher* requires evidence showing conduct which a reasonable person in the employer's position should know is substantially certain to result in injury or death.¹³⁴

B. *Virtual vs. Substantial Certainty*

The court recognized that in previous cases, particularly *Fisher* and *Lawton*, it declined to answer explicitly whether an intentional tort was a valid exception to workers' compensation immunity.¹³⁵ As stated earlier, this was due to the complainant's failure to allege a prima facie case of an intentional tort.¹³⁶ Specifically, both cases spoke of "probable injury" when in fact, substantial certainty is required.¹³⁷ Presenting evidence in support of an objective finding of intent requires an understanding of what "substantial certainty" means. The court recedes from equating substantial certainty with

129. *Id.*

130. *See Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882 (Fla. 1986); *Lawton v. Alpine Eng'rd Prods., Inc.*, 498 So. 2d 879 (Fla. 1986); *Kenann & Sons Demolition, Inc. v. Dipaolo*, 653 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1995); *UPS v. Welsh*, 659 So. 2d 1234 (Fla. 5th Dist. Ct. App. 1995).

131. 258 So. 2d 815 (Fla. 1972).

132. *Turner v. PCR, Inc.*, 754 So. 2d 683, 688 (Fla. 2000) (citing *Spivey*, 258 So. 2d at 817). The court cited and relied upon the *Second Restatement of Torts* when forming the basis for its holding. *Id.*

133. *Spivey*, 258 So. 2d at 816–17.

134. *See id.*; *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882, 883 (Fla. 1986).

135. *Turner*, 754 So. 2d at 687; *Fisher*, 498 So. 2d at 883; *Lawton v. Alpine Eng'rd Prods., Inc.*, 498 So. 2d 879, 880 (Fla. 1986).

136. *Turner*, 754 So. 2d at 687.

137. *Id.*

virtual certainty, and explains the concept as something greater than gross negligence but less than being virtually sure.¹³⁸

In *Turner*, the court hinted that substantial certainty may be something closer to “culpable negligence.”¹³⁹ Citing *Eller v. Shova*,¹⁴⁰ the Supreme Court of Florida defined culpable negligence as “reckless indifference” or “grossly careless disregard” of human life.¹⁴¹ The court considers culpable negligence greater than gross negligence, but it is clear the distinction involves a matter of degree.¹⁴² Some clues to the type of conduct or circumstances supporting a finding of substantial certainty are provided by two cases cited in this opinion.

In *Connelly v. Arrow Air, Inc.*,¹⁴³ the Third District Court of Appeal reversed summary judgment based on the workers’ compensation immunity defense for an employer airline.¹⁴⁴ The court stated:

It is quite reasonable to conclude, as a matter of law, that a passenger aircraft which is routinely overloaded and poorly maintained, with known mechanical deficiencies including a leaking hydraulic system, regular engine stalls, overheating, and faulty thrust reversers, will—to a substantial certainty—eventually succumb to the incessant forces of gravity causing serious injury to, or the death of, those aboard.¹⁴⁵

Furthermore, the facts of *Connelly* suggested that the airline withheld knowledge of the defects and hazards from its employees so they were not permitted to exercise an informed judgment of whether to perform their assigned duties.¹⁴⁶

Likewise, in *Cunningham v. Anchor Hocking Corp.*,¹⁴⁷ the First District Court of Appeal reversed summary judgment for the employer.¹⁴⁸ The allegations and supporting evidence in this case described a situation where a glass manufacturer, the employer, diverted the smokestack of the plant’s exhaust system allowing toxic fumes to flow into, rather than out of the working environment, and periodically turned off the ventilation system,

138. *Id.* at 687 n.4.

139. *Id.* at 687 n.3.

140. 630 So. 2d 537 (Fla. 1993).

141. *Turner*, 754 So. 2d at 687 n.3.

142. *See Eller*, 630 So. 2d at 541 n.3.

143. 568 So. 2d 448 (Fla. 3d Dist. Ct. App. 1990).

144. *Id.* at 451.

145. *Id.*; *see Turner*, 754 So. 2d at 690–91.

146. *Connelly*, 568 So. 2d at 451; *Turner*, 754 So. 2d at 691.

147. 558 So. 2d 93 (Fla. 1st Dist. Ct. App. 1990).

148. *Id.* at 100.

intensifying the employees' level of exposure.¹⁴⁹ Additionally, they removed warning labels from chemical containers, misrepresented the nature of toxic substances, and ignored the need for safety equipment.¹⁵⁰ Therefore, the repeated and continuous exposure, intentionally increased and worsened by the employer, supported the employees' contention that injury was substantially certain to occur.¹⁵¹ Thus, these actions supported an intentional tort cause of action.¹⁵² Of note, in both cases there was evidence that the deliberate actions or omissions of the employer were done to increase profits at the expense of employee safety.¹⁵³

The facts of *Turner* are similar to *Connelly* and *Cunningham*. In *Turner*, the court specifically stated the alleged conduct of PCR, if proven, was at least as disturbing.¹⁵⁴ Appellants' experts claimed that serious danger existed due to the known hazardous activity involved, based on personal knowledge obtained through their investigation.¹⁵⁵ Additionally, the experts offered evidence of at least three other explosions that occurred at the plant in less than two years involving a chemical used in the fatal November 22 explosion.¹⁵⁶ Furthermore, the evidence suggested that PCR intentionally stepped up production, intentionally disregarded the safety of its employees, and failed to warn them of the highly explosive nature of TFE, in order to meet an approaching deadline and increase profits.¹⁵⁷ Significantly, like *Connelly* and *Cunningham*, this case "share[s] a common thread of evidence that the employer tried to cover up the danger, affording the employees no means to make a reasonable decision as to their actions."¹⁵⁸

Once an act by an employer is considered actually or constructively intentional and results in harm to an employee, the court stated such an event should not be covered under workers' compensation immunity for the following reasons.¹⁵⁹ First, under the statute, compensation is payable for accidental disability or death arising out of and in the course of employment.¹⁶⁰ Furthermore, an accident is defined as an unexpected or

149. *Id.* at 95–97; *Turner*, 754 So. 2d at 690.

150. *Cunningham*, 558 So. 2d at 96; *Turner*, 754 So. 2d at 690.

151. *Cunningham*, 558 So. 2d at 97.

152. *Id.*

153. *Id.* at 96; *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 449 (Fla. 3d Dist. Ct. App. 1990).

154. *Turner*, 754 So. 2d at 690.

155. *See id.*

156. *Id.* at 691.

157. *See id.* at 690–91.

158. *Id.* at 691.

159. *Turner*, 754 So. 2d at 689.

160. *Id.*; FLA. STAT. § 440.09(1) (2000).

unusual happening or event, occurring suddenly.¹⁶¹ Therefore, the court pointed out that if an event is substantially certain to occur as the result of an employer's act, then it is neither unexpected nor unusual and thus, does not meet the definition of an accident under the Workers' Compensation Act.¹⁶²

Finally, the court stressed that workers' compensation is not intended to shield employers from liability for intentional torts and is not to be construed in favor of the employer or the employee.¹⁶³ The existence of "workers' compensation should not affect the pleading or proof of an intentional tort."¹⁶⁴ In sum, the workers' compensation immunity defense is not intended to block intentional tort suits at the summary judgment phase.¹⁶⁵

VIII. OPINION

A. *Surviving Summary Judgment*

This decision by the Supreme Court of Florida is a logical and well-reasoned summary of the alternative bases available to prove the commission of an intentional tort resulting in injury to an employee. The court points out that it makes good public policy to hold employers responsible for intentional conduct resulting in injury.¹⁶⁶ The decision provides a road map for plaintiffs' attorneys filing claims under this exception.

To get a claim to trial successfully, it is necessary to allege either the employer committed intentional acts designed to harm the employee and/or alternatively, committed intentional acts the employer *should have known* were *substantially certain* to cause harm.¹⁶⁷ This case, unlike previous cases, survived summary judgment because substantial certainty of harm was alleged and supported with credible evidence thereby creating an issue of material fact.¹⁶⁸

B. *Defining Substantial Certainty*

An understanding of what is meant by "intent" and "substantial certainty" is important when pleading an intentional tort exception. An actor

161. § 440.02(1).

162. *Turner*, 754 So. 2d at 689.

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.*

167. *See Turner*, 754 So. 2d at 688-89.

168. Compare *Fisher v. Shenandoah Gen. Constr. Co.*, 498 So. 2d 882 (Fla. 1986), with *Lawton v. Alpine Eng'rd Prods., Inc.*, 498 So. 2d 879 (Fla. 1986).

manifests intent when he or she desires to cause the consequences of the act.¹⁶⁹ However, if the actor knows, or should know, the consequences of his or her actions are substantially certain to occur and still proceeds, the law treats the actor as having intended to produce the result.¹⁷⁰

Proving substantial certainty may be difficult. Acquiring an understanding of what substantial certainty means is important when setting forth the facts of the case. No bright line rule currently exists defining substantial certainty. However, the court provided a few excellent clues regarding what sort of evidence may support a finding of substantial certainty on the part of the employer.¹⁷¹ First, the court states it has retreated from a requirement of *virtual* certainty.¹⁷² What is virtual certainty? Perhaps the simplest interpretation is also the most common. In everyday terms, the meaning of virtual is “almost entirely,” “nearly,” or “for all practical purposes.”¹⁷³ Applying this plain or common meaning, one could say he or she is virtually sure of something if for all practical purposes it is inevitable. In essence, this probably means as close as one can come to being completely certain about something in an uncertain world. Now, it appears something less than this may do.¹⁷⁴

In contrast, the court now states *substantial* certainty will suffice.¹⁷⁵ Again, looking to the common meaning of the word “substantial,” interpretations include: “considerable in quantity,” “significantly great,” or “largely but not wholly that which is specified.”¹⁷⁶ Yet, what is large or significant in terms of certainty? Most reasonably, this can only be determined on a case by case basis, allowing flexibility in weighing the various social policies involved.¹⁷⁷ It is the quantum of evidence, provided by the particular circumstances surrounding the event, that allows a finding of substantial certainty. For instance, looking to cases surviving this issue, it appears that evidence eliciting particular behavior is especially condemning.¹⁷⁸

169. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

170. *Id.*

171. *Turner*, 754 So. 2d at 689–91.

172. *Id.* at 687–88 n.4.

173. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1320 (10th ed. 1993).

174. *Turner*, 754 So. 2d at 687–88 n.4.

175. *Id.*

176. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 173, at 1174.

177. Shannan Clare Sweeney, *The Intentional Act Exception to the Exclusivity of Workers' Compensation*, 44 LA. L. REV. 1507, 1516 (1984).

178. *See* *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 96–97 (Fla. 1st Dist. Ct. App. 1990); *see also* *Connelly v. Arrow Air, Inc.*, 568 So. 2d 448, 451 (Fla. 3d Dist. Ct. App. 1990).

The following circumstances may support a finding of an employer's substantial certainty of inevitable harm. First, a hazardous work environment existed at the time the harm occurred.¹⁷⁹ Second, prior to the harmful incident, the employer engaged in intentional or deliberate acts or omissions which created or increased the danger of harm to employees.¹⁸⁰ Third, the employer willfully withheld facts from employees concerning the hazards.¹⁸¹ Fourth, the employer provided no reasonable defense for its conduct.¹⁸² Finally, the employer exhibited behavior placing profits before employee safety.¹⁸³ Therefore, the quantity and quality of the evidence eliciting the employer's acts and motivations must present a set of circumstances supporting a finding that a reasonable employer would know its acts were substantially certain to cause harm.

C. Procedural Considerations

When an employee brings a tort action against his or her employer, the employer must plead the workers' compensation statute as a defense.¹⁸⁴ In other words, the employer must claim workers' compensation immunity. The employer has the burden to prove: first, the employee was subject to the workers' compensation act; and second, the act is the employee's exclusive remedy.¹⁸⁵ However, an employer is relieved of this burden in three situations. The employer does not need affirmative proof when: 1) the employment relationship is apparent; 2) a worker admits the injury occurred during employment; and 3) when the employee prosecutes a claim and accepts compensation.¹⁸⁶

On the other hand, when the employee's complaint alleges facts admitting coverage under workers' compensation, the complaint must also allege facts showing an exception to the statute applies.¹⁸⁷ For instance, if the complaint fails to allege facts sufficient to apply the intentional tort exception, no civil action will lie and the complaint is subject to a general demurrer.¹⁸⁸ This pleading requirement is jurisdictionally based.¹⁸⁹ The trial court lacks jurisdiction if the complaint does not allege facts supporting a

179. *Cunningham*, 558 So. 2d at 95; *Connelly*, 568 So. 2d at 451.

180. *Cunningham*, 558 So. 2d at 96; *Connelly*, 568 So. 2d at 449-51.

181. *Cunningham*, 558 So. 2d at 96; *Connelly*, 568 So. 2d at 451.

182. *See Cunningham*, 558 So. 2d at 95-97; *see also Connelly*, 568 So. 2d at 449-51.

183. *Cunningham*, 558 So. 2d at 96; *Connelly*, 568 So. 2d at 449.

184. 82 AM. JUR. 2D *Workers' Compensation* § 90 (1992).

185. *Id.*

186. *Id.*; DUBREUIL, *supra* note 14, § 3.01[b][iii].

187. 82 AM. JUR. 2D *Workers' Compensation* § 90 (1992).

188. *Id.*

189. *Id.*

civil action.¹⁹⁰ Therefore, the action must be dismissed and workers' compensation law will apply.¹⁹¹

Notice, Appellants argued that Appellee did not meet its burden of proof.¹⁹² Applying the above rule to sustain a motion to dismiss, Appellee had the burden to prove the employee was subject to workers' compensation law, *and* the intentional tort exception did not apply. Additionally, Appellants had to state sufficient facts in their complaint to assert an intentional tort exception. Appellants met their burden with the assistance of expert opinions.¹⁹³ On the other hand, Appellee failed to show conclusively that the intentional tort exception did not apply.¹⁹⁴ Appellee's only hope was that the *Fisher* test would be read narrowly, and the court would support an "actual knowledge" theory or hold with the "virtual certainty" standard. Unfortunately, for Appellee, the court did neither.¹⁹⁵

Allowing an objective finding of intent based upon substantial certainty of harm, if pled correctly and supported by evidence, may allow more claims to get past the summary judgment phase. This may encourage more claims as employees attempt to evade the exclusivity provision of workers' compensation. Considering the costs of litigation, this is a significant concern to employers. The hope is that employers will consider the potential liability and reexamine their workplace practices. Ideally, the decision will prevent or discourage employers from turning a blind eye toward workplace safety.¹⁹⁶

IX. CONCLUSION

Common sense tells us successfully creating and maintaining a safe work environment requires both employers' and employees' participation. It is clear employers have a recognized moral duty to refrain from conduct placing employees in danger. Now employers are also legally accountable for objectively intentional conduct resulting in harm.¹⁹⁷ However, in many cases employees are sometimes in the best position to recognize potential hazards and determine what needs to be done to improve or prevent a dangerous situation. Therefore, to remain true to the original intent of the

190. *Id.*

191. *See id.*

192. Initial Brief of Appellants at 22, *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) (No. 94,468).

193. *Turner v. PCR, Inc.*, 754 So. 2d 683, 691 (Fla. 2000).

194. *See id.* at 691.

195. *See id.*

196. *Id.*

197. *Id.*

Florida legislature, so as not to construe the law in favor of the employer or employee, perhaps we should apply a similar standard to employees' conduct that is substantially certain to cause harm to themselves and others.¹⁹⁸ If employees may sue their employer for imputed objective intentional harm, then allowing an employer to withhold benefits or defend on the basis of an employee's similar conduct may only be fair. Imposing responsibility into a system immune from blame may be beneficial.

Theresa J. Fontana

198. FLA. STAT. § 440.015 (2000) (discussing the legislature's intent that the Workers' Compensation Act is not to be construed in favor of the employer or employee).