

Nova Law Review

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THE 1996 SURVEY OF FLORIDA LAW

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Keynote Address at the Annual Nova Law Review Banquet
March 29, 1996

Honorable Gerald Kogan^{*}

It is always very nice to appear here with the Nova Law Students. For those of you who do not realize it, at one time, while I was living in this area, I taught at Nova on the adjunct faculty. I taught trial advocacy and I also taught professional responsibility, and I always loved the students here because you are so active and so alive and it is a great pleasure for someone to teach in that type of environment.

I am proud to say I think that certainly, in recent years, we have come down with some very important, and in some respects, monumental decisions from our Court. Our Court has really been on the cutting edge of a lot of things. I am also proud to say that many of the reforms we have instituted in regard to the regulation of the practice of law; with regard to our relationships with the attorneys that are practicing, have really been a model for the rest of the nation. Some of our programs have been adopted all over the country. You ought to be proud that your Court has been able to do these things and I am very proud that I am part and parcel of that entire operation. Hopefully, over the next years, during my term as Chief Justice, we can increase our visibility around the nation and do things for the people of the State of Florida, as well as the legal profession, that have never been done before.

We are very excited about our "Home Page" on the Internet and you might be interested in this: a "kid's court" which you might be able to dial into this summer. And we are thinking about having the "talking gavel" where school children will be able to dial in, ask questions about the legal system, and we will be able to answer these questions for them. This is our attempt to make the Court more accessible to people and also to allow school children, from the youngest age, to understand what the legal system is, and what it can, and at the same time, cannot do for them. We are looking

^{*} Chief Justice, Supreme Court of Florida, 1996 to present; Justice, Supreme Court of Florida, 1987–1996. B.A., University of Miami, 1955; J.D., University of Miami, 1955.

forward to this and we are excited about it. Personally, the computer, in my opinion, will never replace the law book because I get neck strain and eye strain trying to read opinions off of the computer screen. I still like to sit back in my chair, cross my legs, and put that Southern Reporter in my lap, and read it that way. It's much more entertaining and besides, it's hard sometimes to "teach an old dog new tricks." And speaking of teaching an old dog new tricks . . . when I first started practicing law, it was a whole different world. Nowadays you are fortunate, especially at Nova, where you have a super clinical program, one of the finest around. I had the pleasure of meeting your Dean about two weeks after he became Dean. I headed a committee to study the Board of Bar Examiners. We brought Dean Harbaugh in to talk to us about an exciting new principle in taking the bar exam called "performance testing." And one day you may all see that in Florida. As soon as we bring some of these people into the twenty-first century, who have the say about these things, we may be able to put that on-line. It is an exciting concept, and I am really looking forward to hopefully one day adopting it.

Now, I want to discuss with you a few matters and then I am going to give you the opportunity which you may never have again in your lifetime, and that is the opportunity to ask questions of a Justice on the Florida Supreme Court. The only things you cannot ask me about are pending cases or something which may come before the Court. Do not worry, you will not embarrass me. I have been around long enough now where absolutely no question is embarrassing.

What I do want to discuss with you are a couple of subjects that I do think are very important, especially for those of you who are going into the practice of law. I am going to make some statements to you which some of you may acknowledge and some of you may not want to accept. But I'll tell you at the onset as I lead into what I want to talk to you about: most of you will never ever get rich practicing law. So if any of you think you will one day be able to sit back, and rake in the money, and watch it pile up high, very few of you will be in that position. The practice of law is not for the purpose of making yourself wealthy. It is for the purpose of assisting people within our society and our community to find their way through our legal system. It is the job of the attorney to assist our citizens in working their way through that complicated and mysterious world of the legal system. It is a profession in the truest sense. What has happened recently, and this distresses me a great deal, is that we have, by our fee-setting practices, managed to price out of the legal system (except in the case of contingent fees), that great middle income group that makes up the majority of people

who live in this country. If you are indigent, truly indigent, you've got Legal Aid. If you are a defendant in a criminal case, you've got the Public Defender. If you're wealthy, you don't have a problem, you can afford to pay attorney's fees. But the great mass of Americans are out there unable, or find it extremely difficult, to buy their way into the legal system. Now I told you before, "don't expect to get rich." And I know there are a number of you out here worried, "Will I get a job?" "Can I pay these loans?" "How am I going to be able to manage this?" Well, I want to tell you something: there is a lot of work out there if you are willing to look for it. But you have to say to yourself: "Okay I am not going to live in a million dollar mansion or drive a Rolls Royce or Mercedes, and I am not going to Europe for vacation every summer. Instead, I'll live in a much more affordable home, I'll drive a Chevrolet, and I'll go to the Great Smokies or the Grand Canyon instead of going overseas each year." And the reason you will do that is that you will create and establish the service which the legal profession was designed to do. That is: provide access and effective access to the legal system. You are going to make your fees more affordable so that we can bring back into the fold those many many people who make up our middle income group in this country and give them better access to our legal system. And, along with that, you are going to give only twenty hours per year of pro bono work. And, by the way, pro bono does not mean that "I sent the client a bill and he never paid it." Pro bono means: "I started out knowing that I was not going to charge for the service and I knew I was not going to get paid when I started it because the client could not afford my regular fee." Twenty hours per year—that's only two and one-half days per year in a forty hour week and most of you going into the legal profession will work a lot more than forty hours in one week. But this is an absolute necessity in our society because we cannot have a legal system for the wealthy; a legal system for the elite. We need a legal system that is going to meet the needs of all of our people. So you have got to get out there and you have got to give back to the system for the privilege of practicing law. Which brings us to: "How am I going to practice law?"

I'll tell you how you're going to practice law. You are going to say to yourselves: "I am going to practice in a professional manner, and I am not going to be a 'Rambo-type litigator.'" A Rambo-type litigator is someone who sends you a Notice of Hearing the next morning on your fax machine after you've closed the office at five o'clock that night. Then the next morning shows up in court and says, "Judge, I faxed them a notice of the hearing and I do not know why they are not here." Or somebody who files interrogatories by the pound and drives the other side crazy. Let me tell you

something: you can be a good, tough litigator; you can represent your client in the best traditions of the profession and win cases for your client without destroying the integrity of this profession.

This may sound strange to you but many years ago when I was a young lawyer—and despite the color of my hair, I was a young lawyer—and I was a young prosecutor many years ago, I remember convicting people who were sentenced to life in prison who would shake my hand and say, “Mr. Kogan, I want to thank you for giving me a fair trial.” So you can win your cases, you can win the tough ones, but you have to do it with dignity and with honor. I am not telling you anything new. All of you know that the legal profession is not admired. I think the only people who we actually rank ahead of in the mind of the public are the politicians. That is a horrible way for us to even look at something. We are a noble and an honorable profession. We can only remain a noble and honorable profession if we give up that feeling of greed—that desire to make piles and piles of money and we don’t care how we make it or what we have to do to make it. If you can reconcile in your own mind that you are able to put that aside and do what you know you have to do and be a professional, we’re all going to be a lot better off, including the people that we serve.

I want you to understand one thing and this is very, very important. There will be times where you will be sitting in your office, especially as a young lawyer, and you will say, “the mortgage payment is due, the student loan payment is due, I have got to make the car payment, and I do not know where the money will come from.” And there will be temptations to find that money in a way which is not consistent with the honesty, dignity, and integrity of the legal profession. I want to tell you right here and now, that there is no case and there is no client that is worth your sacrificing your honesty and your integrity and dignity as a lawyer, because the entire system rests upon the honesty and the integrity of the persons who make up that system, and lawyers are an integral part. So say to yourself, “If I am going to be a lawyer, I am going to be what I am supposed to be and that is someone of the highest reputation and someone who, whatever you do, you can be proud of.” I remember my old boss, State Attorney, Richard Gerstein. Some of you may have heard of him, some of you may have known him, and he always said to us when he spoke about honesty and integrity, “Never do anything in the practice of law that you would not want to read about the next morning in the *Miami Herald*.” I think there is a lot to that and I think that tells you what is right and what is wrong. The Florida Bar has an ethics hotline you can call if you have close questions, but I think all of you should have a sense of what is right and a sense of what is wrong, and whenever you

are faced with those problems to ask yourself: "Is it right, or is it wrong?" You need to do right. That's my little lecture for this evening and now I want to open it up for questions.

Question: How do you react to the quality of advocacy of the lawyers who appear before you and what, if anything, would you like to see law schools do a better job in training?

Answer: First of all, learn to read, learn how to write, and learn how to speak. Some of the briefs filed with the highest court in the state: the sentence structure is abominable, punctuation is terrible. It is just unbelievable! These are not just new graduates of law schools but these are people who have practiced for a long time in the profession. Also, all communication is just as important as the written word because many of you will not be writing briefs or legal memos but will be dealing with clients, appearing in court, so you have to learn to communicate. The one thing I think you have got to do is make sure that the students, upon graduation, can communicate both in writing and orally. The quality of argument in front of us ranges from "outstanding" to "abominable." Quite frankly, at times I really feel embarrassed for the attorneys who appear in front of us with the arguments they present. If they would make a concentrated effort to learn how to communicate we would be a lot better off.

Question: About a week ago, a tort reform measure in California failed and the evening news reported that big business was defeated by consumerism or consumer advocates. On the other hand, it is even more commonplace to see disgruntled consumers of legal service as the primary motive behind tort reform. From your perspective, do you see this legal reform / tort reform primarily motivated by corporate America, or consumers who have been "ripped off" by unethical attorneys?

Answer: Let me say this to you. I think if I were a big corporation, I would not want to be sued for a defective product that I might put out. I do not want big verdicts against me. I do not want to see especially punitive damages which really entirely outweigh what the actual compensatory damages are. So, I don't want to put the blame on anything. But my philosophy has always been this: these cases essentially go to juries who are citizens selected by both sides during the lawsuit and the trial. This is the way that our system works. If that jury finds for a particular side, so be it. I have my own personal opinion but, as a Justice on the Supreme Court, I don't want to give it to you so I am skirting around the edge. But I think that the fact that these are not juries that are picked out of the sky by plaintiff's attorney; these are juries picked by both the Plaintiff and the Defense, and

they are the ones who render the final decision in a particular case and that is something you have to consider.

Question: There is also an amendment to limit the percentage of the claim which the lawyer can collect on. What is the Court's view on this?

Answer: We have already come out with an opinion which limits, on a contingent fee basis, the amount of fees which an attorney can make in the State of Florida. There are arguments both ways. One of the arguments is that the client would not have gotten anything if it were not for the attorney's efforts. So, really, why does the client complain when the attorney gets "x" percentage of that recovery? That is one of the arguments. The other argument is that really it is the client that is entitled to it and not the attorney. So there are arguments on both sides of that.

Question: You were a practicing lawyer and judge, which one do you prefer?

Answer: Really want to know? Practicing lawyer. That is the greatest part of this profession: the ability to go into court and represent somebody. I was a trial lawyer for twenty-five years. The glory that goes with it: the arguing to the Judge, the questioning of witnesses, the cross examination, the arguing of the case to the jury. And then the true moment in every trial lawyer's life is when the knock is on the door and the Bailiff says, "Do you have a verdict?" and the answer is "Yes" and the Bailiff looks at you and says, "I am going to get the Judge, the jury has a verdict." From that moment on, as your heart sinks gradually into your stomach, you wait. There is no greater feeling of exaltation than when the clerk reads the verdict form and they get to the end and you have won that case. That to me is the greatest feeling in the world. I miss trying cases, but I'll be honest with you, what really happened to me was that after twenty-five years of battling these things, I had just reached a point. Call it burnout or whatever. It was just time to do something different. But I love the courtroom so much that when the opportunity came along to be a trial judge, I jumped at that opportunity. That was fun also. Quite frankly, I miss sitting on the trial court, the dynamics that go on in the trial court. Those of you who have been in there know what I am talking about. There is something about the attorneys, the litigants, the witnesses, the juries, and the excitement of the courtroom drama that really is what I go for. That's my kind of thing.

Where I sit right now is very sterile and very antiseptic. You just have the attorneys arguing the cases. The good part about it is how I used to read the cases in the Southern Reporter and think, "How can these confounded idiots come down with a decision like that?" Of course now I am one of the "confounded idiots." But it is nice to be able to say what the law is. You

would be amazed at the tremendous power you have when you sit on the Supreme Court of a State because unless there is a U.S. Constitutional issue involved, that is the last stop. For most litigants in the state system, that's it. I remember when I was sitting there in the very beginning in 1987 and an issue came up and everybody was discussing, "Well that really is outdated and I really do not know why we follow that principle anymore," and someone else popped up and said, "Why are we talking about this, we're the Supreme Court let's change the law." And we did! You can't do that in the trial court and you can't do that as an attorney who is practicing. Also, you realize the tremendous and awesome responsibility.

When you sit as a trial court judge, your decision in one particular case really only affects the persons involved in that one case. It does not even have an affect on your fellow or sister judges down the hall, or has no lasting jurisprudence. But I am telling you, when we make that decision, we are conscious that it affects nearly fourteen million people who live in this State not to mention the forty million plus visitors who come to this State each year. So the awesome responsibility is there. Also, we are the chief administrative agency of the entire court system and every one of the Justices sits on committees and commissions and chairs them; and a lot of our work is administrative. It is the hardest job I have ever had in my life. You're talking to someone who used to be a homicide prosecutor and who used to defend people charged with capital crimes. Someone who used to really sweat out those juries. Yet of all the work I've done, this is the hardest one of all. It is a seven day a week job. You stay at it and go from one place to another. It's good in that you really see the whole system. And it is even better because it's enjoyable. Like tonight, I love coming here and speaking to prospective lawyers and lawyers and faculty. It's great, that is one of the advantages of the job.

Question: You mention that both sides pick the jury. I had an experience when I was called to jury duty in Broward County. I don't know if this was a fluke or not but there were about 500 of us the first day. They gave the jury pool a talk and said all of you who want to be excused, line up. All of a sudden I saw every person who looked like they had a responsible job line up to be excused. I stood up, the clerk never asked what the reason was. This occurred about 1990.

Answer: I am familiar with the jury pool system in Dade County and I know that the only person who can excuse a prospective juror is the judge assigned to the jury pool. We actually had a bench in the jury pool room and we would have them come forward one by one and find out what their excuses were. That is the proper way to do it.

Question: The only people left were retired, unemployed, or had labor jobs who would rather be in an air conditioned courtroom.

Answer: That does not mean they were not competent. There are lots of persons that are retired, unemployed, or laborers, who make good jurors. But you are correct, there should be a judge there who will listen to the excuses and make that determination.

Question: Currently there is a push to get away from the court system and get into arbitration and mediation, particularly in the securities area. The problem that I saw, and I was wondering about the Court's view, is that one does not need to be an attorney to represent someone in an arbitration.

Answer: The question is: are you practicing law and what capacity that comes in. You raise a good point and I want to tell you now that we will never have enough money appropriated by the state legislature to have the number of judges and court facilities that we need to handle everything through the court system, so mediation and arbitration are here. This certainly is the wave of the future. Most cases down the line, no matter what the field is, are going to be mediated and there is going to be arbitration. You are going to have to do it that way or else it will be impossible to handle the cases that we have. We have a crisis right now on criminal cases. In the large metropolitan areas in the State of Florida, the judges don't "hear" cases anymore they "process" the cases. Especially when—let's take Dade County—because that is a pretty jammed up court system. Every Monday, a criminal court judge comes out and there may be anywhere from thirty to seventy-five cases set for jury trial that week. Now you know that you are not going to be able to try that. As a matter of fact, you're lucky if you can even try two cases because along with the trial, there are motions, arraignments and everything else that you need to do. So what happens? Well, obviously you've got the plea bargain. Now even if you didn't have a speedy trial rule, what are you going to do with all those people? You can't put them back in and say, "We'll try this case next week" because next week you've got thirty to seventy-five more cases. So you've got to dispose of them somehow. That is why we've developed all of these pre-trial intervention programs we now have. We developed plea bargaining, domestic violence, and other intervention programs. This State is very fortunate that the Public Defenders have a sense of responsibility. You know, if the Public Defenders decided not to plea bargain anymore and take every case to trial, the legal system in this State would collapse. Even if you brought every judge from the civil side to try these cases, you will have monumental logistical problems carting prisoners back and forth trying these cases; with many judges not experienced in the criminal law; and it would be an abso-

lute mess. So you have to find alternate systems. We will have to learn to do things differently than we thought about doing them before. And if you think you can get away with the way you've been doing it, you have another thought coming.

Question: What do you think about having cameras in the courtroom and televising the trials to the general public?

Answer: Originally, when this first was approved for the State of Florida, I was absolutely opposed to it. I thought what was going to happen is that the attorneys would play to the cameras; that the judges in some instances would play to the cameras; that it would have a chilling effect on jurors who would be afraid because people would know who they are and et cetera. But I have now come 180 degrees the other way. I think that if you broadcast a trial complete from beginning to end, I think you go a long way in letting people know what our system is all about. And when they start seeing that, they begin to realize that trials like O.J. Simpson are an abomination. That is not an average run-of-the-mill criminal trial. Far from it. It does not even resemble the average, run-of-the-mill trial. But you have to run it from beginning to end. You can't give people thirty second sound bites on the six o'clock news and then have them understand why a case comes out the way it does because news media have a way of showing you that which they would like you to see. That is not to say they are doctoring the news. But I saw, sixteen years ago, a riot that resulted in eighteen people dying and tens of millions of dollars of property destroyed in Dade County because of the news media, in a trial which was moved from Dade County to Tampa. People in Dade County were fed thirty second sound bites and honestly believed that the police officers on trial in Tampa for murdering a motorist in Dade County were going to be convicted—when anybody who sat in that trial knew from the evidence that was presented that there was not going to be a conviction. And sure enough, I'll never forget the night the jury returned the acquittal. I'll remember this because I represented one of the police officers in that case. I came back to Dade County, I turned on the television and saw one of our leading educators in Dade County (who will remain nameless), get on the air and tell everybody to go down to the metro justice building in Dade County to protest this outrageous verdict. I remember that night we were having dinner in a restaurant in Miami Beach and coming over the 836 and seeing the fires in front of the metro justice building as people were trying to break in. That was the beginning of the riot. I had spoken to one of the newspaper men covering the trial who was a personal friend of mine for many years. I said to him, "You know you are not reporting what is going on here. You are building up hopes of the folks

down in Dade County that there is going to be a conviction here and you know there is not going to be one.” And his comment to me was, “I know, but that is not the way the editors want it.” What can I tell you? So I got a little far afield in answering that question but I think you have to show it from beginning to end and then people will understand what is happening.

Question: Two things you said tonight strikes a cord in freshmen students: the student loans and the competition we face when we graduate. Right now there are six ABA law schools in Florida and two more opening. What advantage is there, if any, to the public and the profession, in opening more law schools in the State of Florida?

Answer: I think you are now seeing a decrease in the amount of applications in the last ten years. The word has gotten out that there is not that great gold mine out there for jobs. What happened is that, during the 1980s, the law profession really flourished and there were a lot of jobs out there and a lot of high-paying jobs and people went out and this was “it.” My wife, Irene, worked for awhile at the Student Aid Resource Center at FSU. That is where students came in looking for scholarships. They would use the computer and research and she would get into conversations with a lot of the students and ask them their plans after graduation. They would say, “Well, I don’t really know what I want to do so I think I’ll go to law school.” And this became the popular thing and people said, “I think I’ll go to law school because no matter what I do, the law degree will probably help me.” And consequently, there are a lot of lawyers.

It’s not new to have a lot of lawyers out there. When I got out of law school, we had the same problem. We had a lot of lawyers and it was very difficult to get a job. Now I know things are relative, but when I got out of law school, in Dade County, you were lucky to get a job with a law firm at fifty dollars a week. Of course, fifty dollars in those days is more than fifty dollars today, but it was still not a lot of money. You were fortunate if you could just convince a lawyer to allow you to just sit in his or her law office and in return for that space, do work for them. I know I started out where my law office had been a supply closet. They took out some shelving and they put in a desk which was not much larger than this podium—just enough room for two other people to sit there. And the unique thing was that the bathroom was right behind my desk. Every time someone in the office had to use that facility, they had to walk through my office to get there. But I considered myself very fortunate. I did not get paid at all—not one single red cent—and I did services for the attorneys in exchange for that. The only money I ever saw in the time that I was there was when Irene and I got married. The attorney that I was working for gave us a \$100 check and that

was for about three to four month's work in the office. Now, \$100 went a long way then but, believe me, it did not go as far as you would think. And that is the situation I was looking at when I got out of law school. Today you are running into a similar situation—jobs are very very difficult to get. Although there are some statistics I have seen that by the year 2000, there is going to be a need for thirty percent more lawyers than we have now. So hang in there another four years.

Question: You mentioned about going out to offer services to the middle class, is there anything being done in the legislature to alleviate the burden of student loans?

Answer: Not that I know of. You may have the burden of student loans but as someone once said, "It's a business." You took out the loan, signed your name and said you would pay it back and that is what the banks expect you to do: pay it back. Lawyers do not invoke sympathy of the general public and not in the state legislature, and worse than that, not in Congress one bit. So don't expect to get any relief. I don't think you will see any.

Question: In light of the unacceptable legal system and shoddy lawyering you've mentioned, what do you think about putting some teeth into section 57.105 or moving toward a prevailing party attorney fee system?

Answer: The question is where do you draw the line? You can still have a good, valid legal basis for bringing a lawsuit but you might lose it. So if you start saying "you file that lawsuit at your peril," then what will happen down the road is that it will have a chilling effect on people who have legitimate lawsuits. I think that is something you want to guard against. If you say it absolutely is not a justiciable issue at all, as we do now in the Florida Statutes, that you are entitled to attorney's fees, I don't think we need to put any more teeth into it. I don't want to see people chilled out of filing what is a legitimate lawsuit. That is what you are going to do if you say, "File at your own risk. If you lose it, we'll wipe you out financially."

Question: What about the prevailing party system?

Answer: Again you've got that same problem. You have the same, "chilling effect." You have a legitimate lawsuit here. Let's assume you win at trial. You go to the District Court of Appeal and win it there and you come up to our Court and lose it by a 4-3 vote. That is just not fair. You would give up what was a legitimate lawsuit. I think it has a disastrous effect on the legal rights of people.

Thank you again for the privilege of being here. I really enjoyed it.

Appellate Practice: 1996 Survey of Florida Law

Anthony C. Musto*

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I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida. Although this article will focus primarily on cases decided between July 1, 1995, and June 30, 1996, it will also deal with certain cases decided shortly before and after that period which are either of particular interest to the appellate practitioner or which provide the background for, or the culmination of, issues that were addressed by cases decided during that period.

In a broad sense, every appellate decision falls within the scope of appellate practice. Decisions relating to substantive areas of the law, however, are more properly dealt with in articles relating to those substantive areas and therefore will not be discussed here. Rather, this article will focus on matters relating to practice in the appellate courts and will deal with substantive areas only with regard to appellate considerations unique to those areas. Additionally, this article will not discuss cases relating to the preservation of issues, nor the question of whether particular errors were harmless.

II. AMENDMENTS TO FLORIDA'S RULES OF PROCEDURE

The Supreme Court of Florida adopted several amendments to the various sets of Florida procedural rules that will impact the field of appellate practice.

A. *Florida Rules of Appellate Procedure*

Rule 9.130(a)(5) of the *Florida Rules of Appellate Procedure* was amended¹ to allow for appellate review of orders entered on motions filed under Rule 12.540 of the *Florida Family Law Rules of Procedure* requesting

1. Amendment to Florida Rule of Appellate Procedure 9.130, 663 So. 2d 1314 (Fla. 1995).

relief from judgment, decrees or orders. This amendment was necessitated by creation of the *Florida Family Law Rules of Procedure*² and is intended only to continue allowing appeals from orders in family law cases that were previously entered pursuant to Rule 1.540 of the *Florida Rules of Civil Procedure*.

Responding to concerns expressed by the fourth district in *McFadden v. West Palm Beach Police Officer*³ regarding the need for an amendment to the rules that would allow determinations of indigency for appellate purposes to be made at the appellate level,⁴ the supreme court, in *McFadden v. Fourth District Court of Appeal*,⁵ adopted an amendment accomplishing that purpose for incarcerated parties. The amendment adds to the existing language of Rule 9.430 of the *Florida Rules of Appellate Procedure*, which deals with the process for obtaining an indigency determination in the lower tribunal, the following paragraph:

In lieu of the above procedure, an indigent incarcerated party may file in the appellate court a motion for an order of indigency, along with an affidavit showing the party's inability either to pay fees and costs or to give security therefor. The affidavit shall be sufficient without more for the court to rule on the appellant's indigency unless an objection is filed. If an objection is filed the appellate court may determine the issue or remand it to the lower tribunal for determination.⁶

Although the amended rule was made "effective immediately,"⁷ the court allowed any interested person to file comments regarding the matter.⁸ As a result of that process, seven days later, the court entered an order staying until further order of the court implementation of the amendment nunc pro tunc to the date of the court's decision. Subsequently, an alternative proposal was submitted by the Appellate Court Rules Committee and it is presently pending before the court.

The supreme court created an interesting situation when it amended both the criminal and appellate rules in an effort to ensure that criminal

2. *In re Family Law Rules of Procedure*, 663 So. 2d 1049 (Fla. 1995).

3. 658 So. 2d 1047 (Fla. 4th Dist. Ct. App. 1995).

4. *Id.* at 1048.

5. 21 Fla. L. Weekly S183 (Apr. 25, 1996).

6. *Id.* at S184.

7. *Id.*

8. *Id.*

defendants will have the opportunity to raise sentencing errors on appeal. In *Amendments to Florida Rules of Appellate Procedure 9.020(g) and Florida Rules of Criminal Procedure 3.800*,⁹ the court created a new Rule 3.800(b) of the *Florida Rules of Criminal Procedure*, which provides: “(b) Motion to Correct Sentencing Error. A defendant may file a motion to correct the sentence or order of probation within ten days after rendition of the sentence.”¹⁰ At the same time, the court amended Rule 9.020(g) of the *Florida Rules of Appellate Procedure* to provide that a timely filed motion to correct a sentence or an order of probation delays rendition of the sentence or order until the motion is ruled upon.¹¹

Taken together, these two amendments appear to create an anomaly. The criminal rule indicates that a motion to correct a sentencing error is timely if filed within ten days after rendition, but the appellate rule states the timely filing of such a motion acts to delay rendition until its disposition. The net effect is that the time period within which the motion must be filed does not start to run until the motion has been disposed of.

At the time it adopted these amendments, the court also amended Rule 9.020(g)(3) of the *Florida Rules of Appellate Procedure* to state that “a pending motion to correct a sentence or order of probation shall not be affected by the filing of a notice of appeal from a judgment of guilt.”¹²

B. *Florida Rules of Judicial Administration*

Rule 2.050(h) of the *Florida Rules of Judicial Administration* was amended¹³ to provide that in any case in which a defendant has been sentenced to death, the circuit judge assigned to the case “shall take such action as may be necessary to assure that a complete record on appeal has been properly prepared”¹⁴ and that “the judge shall convene a status conference with all counsel of record as soon as possible after the record has been prepared . . . to ensure that the record is complete.”¹⁵

9. 675 So. 2d 1374 (Fla. 1996).

10. FLA. R. CRIM. P. 3.800(b). This rule is entitled “Motion to Correct Sentencing Error.”

11. *Amendment to Florida Rules of Appellate Procedure 9.020(g) and Florida Rules of Criminal Procedure 3.800*, 675 So. 2d at 1375.

12. *Id.* at 1375–76.

13. *In re Amendments to Florida Rules of Judicial Administration Regarding Death Cases*, 672 So. 2d 523 (Fla. 1996).

14. *Id.* at 524.

15. *Id.*

C. Florida Rules of Workers' Compensation Procedure

The supreme court adopted extensive revisions to the portion of the *Florida Rules of Workers' Compensation Procedure* that deals with appellate proceedings.¹⁶ In light of the large number of changes to the rules, no effort will be made here to detail every amendment that was approved. However, some of the more significant revisions will be discussed.

An effort was made to streamline the rules by deleting rules that were unnecessary or duplicative of the appellate rules and by creating a new rule, rule 4.156, which provides that “[a]ppellate review proceedings in workers’ compensation cases shall be governed by the *Florida Rules of Appellate Procedure* (civil) except as otherwise provided by these rules.”¹⁷ The rules deleted in their entirety and their appellate rule counterparts [in brackets] are rules 4.180(e) [9.200(f)(2)]; 4.225 [9.210(g)]; 4.240 [9.320]; 4.250 [9.330]; 4.255 [9.331]; 4.260 [9.340].¹⁸

Rule 4.160 was amended in response to the first district’s invitation in *Hines Electric v. McClure*¹⁹ to the Workers’ Compensation Rules Committee to address certain problems that arose from the fact that the rule made review of certain non-final orders discretionary with the court.²⁰ The amended rule requires the court to consider appeals of some of the orders in question and divests it of the jurisdiction to consider appeals from certain other orders.²¹ A new provision was added indicating that nothing in the rule should be interpreted as precluding other original proceedings in the district court as provided in the appellate rules.²² Presumably, this provision was intended to clarify that when the appropriate requirements are met, orders that formerly fell within the court’s discretionary appellate jurisdiction can still be considered by certiorari.

Rule 4.161(b) was amended to reflect that the district court upon motion shall decide disputes as to whether challenges to certain benefits have been abandoned.²³

16. *In re* Amendments to the Florida Rules of Workers’ Compensation Procedure, 664 So. 2d 945 (Fla. 1995).

17. *Id.* at 945.

18. 1995 Committee Note to Florida Rule of Workers’ Compensation Procedure 4.156. *In re Workers’ Compensation Procedure*, 664 So. 2d at 946.

19. 616 So. 2d 132 (Fla. 1st Dist. Ct. App. 1993).

20. For a discussion of the problems identified in *Hines Electric*, see Anthony C. Musto, *Appellate Practice: 1993 Survey of Florida Law*, 18 NOVA L. REV. 1, 28–30 (1993).

21. *Workers’ Compensation Procedure*, 664 So. 2d at 946.

22. *Id.* at 947.

23. *Id.* at 948–49.

Rule 4.165 was amended to require that a conformed copy of the order or orders designated in a notice of appeal be attached to the notice²⁴ and to provide that notices of cross-appeal are no longer to be filed with the judge, but are to be filed directly with the district court.²⁵

Deleted from rule 4.180(a)(1) was a provision which allowed the district court to consider matters not introduced into evidence if necessary for the determination of the issues on appeal.²⁶

Rule 4.180 (g)(1) was renumbered as (f)(1) and was revised to make the procedures for relief from the filing fee and from the costs of the record on appeal consistent with changes to section 57.081(1) of the *Florida Statutes*, as amended by Chapter 94-318 section 18 of the *Laws of Florida*, and with the dictates of caselaw,²⁷ specifically *Schwab v. Brevard County School Board*²⁸ and *Miller v. Hospitality Care Center*.²⁹

III. COURT DIVISIONS

In an unpublished order captioned *Local Rule Concerning Divisions in First District Court of Appeal*, the supreme court approved as a local rule an administrative order³⁰ adopted by the First District Court of Appeal that created a criminal division of that court. The administrative order provides that the new division will consider “[a]ll criminal cases and all cases that originate from prisoners involving their conviction or sentence, juvenile delinquency cases, and criminal derivative actions such as gain time or parole decision challenges, original writ proceedings, including but not limited to habeas corpus.”³¹

The approval of this rule gives the first district, which had previously created a General and an Administrative Division,³² three subject matter divisions. It remains the only Florida appellate court to sit in divisions.

24. *Id.* at 950.

25. *Id.* at 951.

26. *Workers' Compensation Procedure*, 664 So. 2d at 951.

27. See 1995 Committee Note to Florida Rule of Workers' Compensation Procedure 4.180. *Workers' Compensation Procedure*, 664 So. 2d at 955-56.

28. 650 So. 2d 1099 (Fla. 5th Dist. Ct. App. 1995). For a discussion of the decision in *Schwab*, see Anthony C. Musto, *Appellate Practice: 1995 Survey of Florida Law*, 20 NOVA L. REV. 1, 23-25 (1995).

29. 431 So. 2d 254 (Fla. 1st Dist. Ct. App. 1983).

30. Fla. First District Court of Appeal Admin. Order No. 95-2.

31. *Id.* at 1.

32. See *In re Court Divisions*, 648 So. 2d 761 (Fla. 1st Dist. Ct. App. 1994).

IV. SUPREME COURT JURISDICTION

In *St. Paul Fire & Marine Insurance Co. v. Indemnity Insurance Co. of North America*,³³ the supreme court dealt with a case in which the fourth district had upheld a judgment against two defendants.³⁴ One of the defendants timely filed a motion for rehearing, which was denied some three months later.³⁵ Within thirty days of the denial, but 114 days after the opinion, the other defendant filed a notice invoking the supreme court's discretionary jurisdiction.³⁶

The plaintiff moved to strike the notice as untimely and to dismiss for lack of jurisdiction, claiming that the notice was not filed within thirty days of rendition, as required by Rule 9.120(b) of the *Florida Rules of Appellate Procedure*.³⁷ The plaintiff relied on rule 9.120(g), which provides that rendition is delayed by the pendency of motions for rehearing, but which also states that when such a motion is pending, "the final order shall not be deemed rendered with respect to any claim between the movant and any party against whom relief is sought by the motion."³⁸

The court found this rule to be inapplicable, however, concluding that it applied only to orders entered by trial courts.³⁹ The court buttressed its finding by noting that when the rule was amended to include the relevant portion, both the court's opinion⁴⁰ and the Report of The Florida Bar Appellate Court Rules Committee explained that the amendment was to clarify that in a multi-party situation, a single order can be rendered at different times depending on when the trial court resolved authorized post-trial motions.⁴¹

"In contrast,"⁴² the court continued, "the motions permitted in an appellate proceeding follow the procedure set forth in" Rule 9.300 of the *Florida Rules of Appellate Procedure*.⁴³ That rule states that "service of a

33. 675 So. 2d 590 (Fla. 1996).

34. See *Florida Medical Malpractice Underwriting Ass'n v. Indemnity Ins. Co. of North America*, 652 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1995).

35. *St. Paul Fire*, 675 So. 2d at 591.

36. *Id.*

37. *Id.*

38. FLA. R. APP. P. 9.120(g)(1).

39. *St. Paul Fire*, 675 So. 2d at 591.

40. *In re Amendments to the Florida Rules of Appellate Procedure*, 609 So. 2d 516, 517 (Fla. 1992).

41. *St. Paul Fire*, 675 So. 2d at 591-92.

42. *Id.* at 592.

43. *Id.*

motion shall toll the time schedule of any proceeding in the court until disposition of the motion.”⁴⁴ This provision, the court found, “is clear on its face that it suspends the time schedule of any and all proceedings irrespective of the movant.”⁴⁵ The court therefore denied the plaintiff’s motion, concluding “that appellate motions are governed by rule 9.300(b), and a district court’s order is not ‘rendered’ until there has been a disposition of all motions relative to that order.”⁴⁶

V. VENUE

A. *When Changes of Venue Are Deemed Effective*

In *Cottingham v. State*,⁴⁷ the supreme court clarified an aspect of its decision in *Vasilinda v. Lozano*,⁴⁸ which established the standards for determining in which court appellate jurisdiction lies when the trial court has granted a change of venue to a circuit court located within another district. In *Vasilinda*, the court found that if a change of venue has not yet become effective when appellate jurisdiction is invoked, the appellate proceeding goes to the district court to which appeals are taken from the transferor court.⁴⁹ Conversely, the court found, when the change of venue has become effective, the appellate proceeding goes to the district court to which appeals are taken from the transferee court.⁵⁰

The decision in *Cottingham* focused on the issue of when changes of venue are deemed effective in civil cases. The court in *Vasilinda* had discussed that question, concluding that changes of venue in civil cases become effective when the court file has been received in the transferee court and costs and service charges required by the applicable statutes and rules of procedure are paid.⁵¹

In the decision under review in *Cottingham*, the first district had certified as being of great public importance the question of whether the date

44. FLA. R. APP. P. 9.300(b).

45. *St. Paul Fire*, 675 So. 2d at 592.

46. *Id.*

47. 672 So. 2d 28 (Fla. 1996).

48. 631 So. 2d 1082 (Fla. 1994).

49. *Id.* at 1087.

50. *Id.*

51. *Id.*

of payment of the costs and charges is the date they are mailed by the party responsible for payment or the date of receipt by the transferee court.⁵²

The supreme court found that the date of receipt by the transferee court is deemed to be the date of payment, and thus the date on which the change of venue is effective.⁵³

B. *Venue in Appeals from Orders of the Unemployment Appeals Commission*

In *Mendelman v. Dade County Public Schools*,⁵⁴ the third district had for review a decision of the Unemployment Appeals Commission. The unemployment appeal hearing had been conducted by telephone, with the claimant participating from Key Largo, the employer from Miami, and the appeals referee from Tallahassee.⁵⁵

The Commission moved to transfer the case to the first district, relying on section 443.151(4)(e), of the *Florida Statutes*, which states that appeals of commission orders are to go to the district court “in the appellate district in which the issues involved were decided by an appeals referee”⁵⁶ The Commission reasoned that since the written ruling was issued by its Tallahassee office, the appeal could only go the first district.⁵⁷

The third district disagreed, noting that the proceeding at which the referee reaches a decision is the final hearing and concluding that when the participants are located in two appellate districts, “the fairest interpretation of the statute is that the appeal will lie in either appellate district.”⁵⁸

The court indicated that a factor demonstrating that its interpretation of the statute is workable is the “many years’ experience under the Florida Administrative Procedure Act, which provides for judicial review either in ‘the district court of appeal in the appellate district where the agency

52. *Cottingham*, 672 So. 2d at 28. For a recitation of the complicated factual circumstances that led to the certified question, as well as a more complete statement of the standards established by *Vasilinda*, see *Musto*, *supra* note 28, at 18–20.

53. *Cottingham*, 672 So. 2d at 29–30.

54. 674 So. 2d 195 (Fla. 3d Dist. Ct. App. 1996).

55. Key Largo is located in Monroe County, which constitutes the sixteenth circuit, a part of the third district. Miami is located in Dade County, which constitutes the eleventh circuit, a part of the third district. Tallahassee is located in Leon County, which is one of the counties in the second circuit, a part of the first district.

56. FLA. STAT. § 443.151(4)(e) (1995).

57. *Mendelman*, 674 So. 2d at 196.

58. *Id.*

maintains its headquarters or where a party resides.”⁵⁹ The court also stated that in taking its view, it was “influenced by practical considerations,”⁶⁰ specifically the fact that it generally grants requests for oral argument in unemployment compensation appeals and the court’s belief that its interpretation would therefore “provide more convenient access to the appellate courts.”⁶¹

The decision in *Mendelman* raises a number of questions about the rule of law applicable to other factual situations. For instance, if a claimant and an employer participate from locations in two different districts, while the appeals referee is in a third, is a party taking an appeal able to select venue from among three district courts? Does the rule of law set forth in *Mendelman* apply if a party who lives in one district travels to another district and participates in a hearing for the sole purpose of being able to subsequently appeal to the court of appeal for that district? Can parties and their attorneys expand the number of possible venues by participating from different locations? If a party participates on a cellular phone while driving through several districts, can an appeal go to any of those districts? To the extent that the practical consideration of providing convenient access for oral argument underlies the rule of law adopted in *Mendelman*, would a different conclusion be reached when the oral argument in the more distant court would be heard by video teleconference?⁶²

These questions and others will likely have to be dealt with at some point. If they prove too troublesome, consideration of whether the third district’s approach should be abandoned in favor of the position advocated by the commission in *Mendelman* might also become a question that will need to be addressed.

59. *Id.* at 196 (footnote) (citing FLA. STAT. § 120.68(2) (1995)).

60. *Id.* at 196.

61. *Id.*

62. In *In re Oral Argument By Video Teleconference Network*, 648 So. 2d 763 (Fla. 1st Dist. Ct. App. 1994), the first district established remote facilities for arguments by video teleconference. That court is presently conducting such arguments only when all attorneys expected to present argument are located near a single remote facility. Since the attorney representing the commission in *Mendelman* was from Tallahassee, and since it appears that the appellant, who represented himself on appeal, was from south Florida, this factor apparently had no applicability in that case. It may well play a role in striking the proper balance in future cases, however. For instance, if the parties are both from Ft. Myers, one of the locations at which the first district has established a remote facility, it would clearly be more convenient for the parties to present oral argument to the first district by video teleconference than it would be to travel to either Tampa or Lakeland, the locations at which the second district, which includes Ft. Myers, generally hears oral arguments.

VI. ORDERS REVIEWABLE

The courts decided a large number of cases dealing with the issue of whether certain orders were reviewable, either by appeal or by certiorari. The sheer volume of such cases precludes discussion of the reasoning of each case. This article will therefore focus on some of the more significant cases in this regard and set forth a sampling of other decisions, noting the type of order involved, and the conclusion reached by the court as to whether it was reviewable.

A. *Orders Denying Motions to Dismiss Based on Claims of Untimely Service*

Concluding that an order denying a motion to dismiss based on the failure to effect service within 120 days, as required by Rule 1.070(i) of the *Florida Rules of Civil Procedure*, is not appealable, the second district dismissed the appeal in *Nowry v. Collyar*.⁶³ The court recognized, however, that its decision was in conflict with decisions of other districts⁶⁴ and it certified the following question to the supreme court:

DOES AN ORDER DENYING A MOTION TO DISMISS A COMPLAINT CLAIMING UNTIMELY SERVICE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.070(i) FAIL TO CONSTITUTE AN ORDER DETERMINING THE JURISDICTION OVER THE PERSON,⁶⁵ THUS MAKING IT A NONAPPEALABLE, NON-FINAL ORDER?⁶⁶

The first district addressed the same issue in *Novella Land, Inc. v. Panama City Beach Office Park, Ltd.*,⁶⁷ noting the conflict recognized in *Nowry* and agreeing with the second district that such orders are not appeal-

63. 666 So. 2d 555 (Fla. 2d Dist. Ct. App. 1995).

64. See *Comisky v. Rosen Management Servs., Inc.*, 630 So. 2d 628 (Fla. 4th Dist. Ct. App. 1994) (en banc); *Mid-Florida Assocs., Ltd. v. Taylor*, 641 So. 2d 182 (Fla. 5th Dist. Ct. App. 1994).

65. Orders determining the jurisdiction of the person are appealable pursuant to Rule 9.130(a)(3)(C)(I) of the *Florida Rules of Appellate Procedure*.

66. *Nowry*, 666 So. 2d at 556.

67. 662 So. 2d 743 (Fla. 1st Dist. Ct. App. 1995).

able.⁶⁸ The first district also pointed out that the third district in *RD & G Leasing, Inc. v. Stebnicki*⁶⁹ had reached a similar conclusion.⁷⁰

B. Declaratory Judgments

In *Canal Insurance Co. v. Reed*,⁷¹ the supreme court determined that when an insurance coverage issue has been decided in a third party declaratory judgment action between an insurer and its insured prior to a final determination of liability in the underlying action, and, as a result, the insurer must provide liability coverage for the insured in the underlying action, the order entered in the declaratory judgment action is a final order subject to appellate review.⁷² Pointing out that under section 86.011 of the *Florida Statutes*, “a declaratory judgment has ‘the force and effect of a final judgment,’”⁷³ the court found itself “compelled to find that a declaratory judgment is appealable as a final order regardless of whether the judgment is rendered in a separate declaratory judgment action or as part of a third-party action such as that at issue here.”⁷⁴

Although finding the declaratory judgment regarding a determination of insurance coverage to be reviewable as a final order, the court stated that it “must also stress that such a judgment will not *automatically* result in a stay in the independent underlying cause of action.”⁷⁵ The court explained that “[t]his is because the underlying personal injury action is separate and distinct from the insurance coverage dispute”⁷⁶ and that “[t]he trial judge has the discretion to stay the underlying action between the parties pending resolution of the appeal or to permit it to continue concurrently with the appeal process.”⁷⁷

The court acknowledged that “it would be in the best interests of all the parties for coverage issues to be resolved as soon as possible.”⁷⁸ The court therefore “suggest[ed] that the district courts expedite review of appeals

68. *Id.* at 794.

69. 626 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1993).

70. *Novella Land*, 662 So. 2d at 743.

71. 666 So. 2d 888 (Fla. 1996).

72. *Id.* at 889–90.

73. *Id.* at 891 (quoting FLA. STAT. § 86.011 (1995)).

74. *Canal Ins. Co.*, 666 So. 2d at 891.

75. *Id.* at 892.

76. *Id.*

77. *Id.*

78. *Id.*

involving the sole issue of coverage”⁷⁹ and “that the Appellate Court Rules Committee consider an appropriate method for providing expedited review of these cases to avoid unnecessary delays in the final resolution of the underlying actions.”⁸⁰

C. Orders Denying Motions for Summary Judgment Based on Claims of Sovereign Immunity

In *Department of Education v. Roe*,⁸¹ the supreme court rejected an effort to extend to claims of sovereign immunity the rationale of *Tucker v. Resha*,⁸² which held that with regard to federal civil rights claims brought in state courts, public officials are entitled to interlocutory review of orders denying motions for summary judgment based on the defense of qualified immunity.⁸³ The decision in *Tucker* was based on the fact “that qualified immunity of a public official best achieves its purpose as an immunity from suit rather than a mere defense to liability”⁸⁴ and the fact that such immunity “is effectively lost if a case is erroneously permitted to go to trial.”⁸⁵

The court relied on a number of factors in declining to extend the *Tucker* rationale beyond the facts of that case. These factors included: 1) the fact that permitting interlocutory appeals when claims of sovereign immunity are rejected would “add substantially to the caseloads of the district courts of appeal;”⁸⁶ 2) the fact that since “the applicability of the sovereign immunity waiver is [often] inextricably tied to the underlying facts, [thus] requiring a trial on the merits . . . , many interlocutory decisions would be inconclusive and . . . a waste of judicial resources;”⁸⁷ 3) the fact that “qualified immunity is rooted in the need to protect public officials from undue interference, whereas sovereign immunity is not;”⁸⁸ and 4) the fact that in *Tucker*, the court “had an interest in affording federal causes of action brought in state court the same treatment they would receive if brought in

79. *Canal Ins. Co.*, 666 So. 2d at 892.

80. *Id.*

81. 21 Fla. L. Weekly S311 (July 18, 1996).

82. 648 So. 2d 1187 (Fla. 1994).

83. *Id.* at 1190.

84. *Roe*, 21 Fla. L. Weekly at S311.

85. *Tucker*, 648 So. 2d at 1189 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

86. *Roe*, 21 Fla. L. Weekly at S312.

87. *Id.*

88. *Id.*

federal court,”⁸⁹ while sovereign immunity cases deal “with a state law defense to an ordinary state law cause of action.”⁹⁰

D. *Nonappealable Orders*

Orders deemed to be nonappealable included: An order denying a motion to amend a complaint to add a punitive damage claim;⁹¹ a partial summary judgment on liability as to four counts of a six-count complaint, when those counts, although based on different legal theories, were interrelated with and interdependent on the two remaining counts;⁹² a non-final order striking a pleading as a discovery violation sanction;⁹³ a final order of the Board of Clinical Laboratory Personnel granting a petition for a clinical laboratory supervisor license;⁹⁴ an order setting aside a clerk’s default;⁹⁵ an order denying a motion to dissolve an agreement to engage in alternative dispute resolution when the parties had already entered into the resolution process;⁹⁶ and a non-final order striking a defendant’s compulsory counterclaim.⁹⁷

E. *Orders Reviewable by Certiorari*

Orders found to be reviewable by certiorari included: An order transferring a case from circuit court to county court;⁹⁸ an order granting a motion to conduct a postverdict jury interview;⁹⁹ and an order requiring production of records and documents asserted to be confidential as work product and by operation of the attorney-client privilege, or, in the alternative, the construction of a log which indicated the date of each document, its type, and its general contents.¹⁰⁰

89. *Id.*

90. *Id.*

91. *King v. Odle*, 665 So. 2d 378 (Fla. 4th Dist. Ct. App. 1996).

92. *El Segundo Original Rey De La Pizza Cubana, Inc. v. Rey Pizza Corp.*, 676 So. 2d 1031 (Fla. 3d Dist. Ct. App. 1996).

93. *Hi-Tech Mktg. Group, Inc. v. Thiem*, 659 So. 2d 479 (Fla. 4th Dist. Ct. App. 1995).

94. *Agency For Health Care Admin. v. Board of Clinical Lab. Personnel*, 673 So. 2d 531 (Fla. 1st Dist. Ct. App. 1966).

95. *Collins v. Penske Truck Leasing*, 668 So. 2d 343 (Fla. 5th Dist. Ct. App. 1996).

96. *Department of Health and Rehabilitative Servs. v. Electronic Data Sys. Corp.*, 664 So. 2d 332 (Fla. 1st Dist. Ct. App. 1995).

97. *Cole v. Bayley Prods., Inc.*, 661 So. 2d 1299 (Fla. 4th Dist. Ct. App. 1995).

98. *David v. Prime Hospitality Corp.*, 676 So. 2d 1049 (Fla. 3d Dist. Ct. App. 1996).

99. *Pesci v. Maistrellis*, 672 So.2d 583 (Fla. 2d Dist. Ct. App. 1996).

100. *Calzon v. Capital Bank*, 20 Fla. L. Weekly D2603 (3d Dist. Ct. App. Nov. 29, 1995).

F. Orders Not Reviewable by Certiorari

Orders held not to be reviewable by certiorari included: An order denying a motion to consolidate two separate lawsuits when the case does did fall within the category of cases in which the possibility of repugnant and inconsistent verdicts would result in a manifest injustice and a material injury to the petitioners;¹⁰¹ an order denying a motion to strike a demand for a jury trial;¹⁰² an order denying a motion in limine to exclude expert scientific testimony;¹⁰³ an order determining that a prior judgment of dissolution of marriage was not *res judicata* on the issue of paternity;¹⁰⁴ an order on a motion in limine precluding the introduction of evidence regarding insurance coverage;¹⁰⁵ and an order prohibiting a plaintiff from engaging in *ex parte* communications with any of the defendant's employees.¹⁰⁶

VII. RENDITION

A. Delay in Rendition Due to Pendency of Motion for Rehearing

In *Pennington v. Waldheim*,¹⁰⁷ the trial court entered a series of final summary judgments in favor of the defendants.¹⁰⁸ Within the time period contemplated by the *Florida Rules of Civil Procedure* for service of motions for new trial or rehearing, the plaintiff filed, but did not serve, a motion for rehearing.¹⁰⁹ Several weeks later, the defendants learned of the motion and moved to strike it.¹¹⁰ The plaintiff asserted that the failure to serve the defendants was due to clerical error and contended that the defendants had

101. *Friedman v. Desoto Park N. Condominium Ass'n*, 678 So. 2d 391 (Fla. 4th Dist. Ct. App. 1996).

102. *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So. 2d 646 (Fla. 2d Dist. Ct. App. 1995).

103. *Florida Power & Light Co. v. Glazer*, 671 So. 2d 211 (Fla. 3d Dist. Ct. App. 1996).

104. *Elder v. Department of Revenue*, 670 So. 2d 1032 (Fla. 2d Dist. Ct. App. 1996).

105. *Riano v. Heritage Corp. of S. Fla.*, 665 So. 2d 1142 (Fla. 3d Dist. Ct. App. 1996).

106. *Boyd v. Pheo, Inc.*, 664 So. 2d 294 (Fla. 1st Dist. Ct. App. 1995).

107. 669 So. 2d 1158 (Fla. 5th Dist. Ct. App. 1996).

108. *Id.* at 1159.

109. Rule 1.530(b) of the *Florida Rule of Civil Procedure* provides that such motions shall be served not later than 10 days after the judgment. In *Pennington*, the 10th day was a Sunday, so the time period for seeking rehearing was extended by the dictates of rule 1.090(a) until the following day. The motion in the case was filed on that following day and was therefore timely.

110. *Pennington*, 669 So. 2d at 1159.

not been prejudiced.¹¹¹ The plaintiff also filed a pleading entitled ““Motion for Relief in Accordance with Florida Rules of Civil Procedure 1.540,””¹¹² requesting ““relief” from ‘damage resulting from clerical error in failing to properly serve defendants on a timely basis.’”¹¹³ The trial court granted the defendants’ motions and denied the motion filed by the plaintiff.¹¹⁴ On the thirtieth day after the trial court’s ruling, the plaintiff filed a notice of appeal from the orders granting final summary judgment.¹¹⁵

The defendants moved to dismiss, asserting that the appeal was untimely. The fifth district, “writ[ing] to warn counsel of the danger posed by the failure to comply with *Florida Rule of Civil Procedure 1.530(b)*,”¹¹⁶ agreed. The court noted that under Rule 9.110(b) of the *Florida Rules of Appellate Procedure*, notices of appeal must be filed within thirty days of rendition of the order to be reviewed¹¹⁷ and that under rule 9.020(g), rendition is suspended by a motion for rehearing only when the motion is “authorized and timely.”¹¹⁸ The court concluded that rendition was not suspended in *Pennington* because, under the civil rules, the motion had to be served within ten days in order to be timely.¹¹⁹ Since the motion was untimely, so was the notice of appeal and dismissal was therefore mandated.¹²⁰ “Although it may be counter-intuitive for civil lawyers to view *service* as an event of jurisdictional dimension,”¹²¹ the court wrote, “in the case of this particular rule, timely *filing* is of no moment, timely *service* is everything.”¹²²

The question of whether a motion had to be served or filed within the appropriate time period was also at issue in *Department of Revenue v. Loveday*.¹²³ There, the appellee moved to dismiss as untimely an appeal from a child support judgment, asserting that the pendency of a motion to vacate under former Rule 1.491(f) of the *Florida Rules of Civil Procedure*,

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Pennington*, 669 So. 2d at 1159.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Pennington*, 669 So. 2d at 1160.

121. *Id.*

122. *Id.*

123. 659 So. 2d 1239 (Fla. 2d Dist. Ct. App. 1995).

served on the tenth day after the judgment was entered, did not delay rendition of the judgment.¹²⁴

The court pointed out that “[u]nlike most of the rules of civil procedure”¹²⁵ this rule, which allowed parties to “move to vacate the order within 10 days from the date of entry”¹²⁶ did not state whether the motion had to be served or whether it had to be filed within the ten days.¹²⁷ “Because this motion is similar to a motion for rehearing, which must be served within 10 days,”¹²⁸ the court stated, “and because most other time requirements in the rules are governed by service, we interpret the rule as requiring a party to serve a motion to vacate within ten days of the entry of the order.”¹²⁹

This determination did not end the court’s inquiry, however. The court noted that only “authorized and timely” motions under Rule 9.020(g) of the *Florida Rules of Appellate Procedure* delay rendition of an order and that the list of such motions in that rule does not include motions to vacate under former rule 1.491.¹³⁰ Drawing the same analogy it drew in deciding the issue of whether the motion had to be served or filed within ten days in order to be timely, the court found that the motion “functions as a motion to rehear, alter, or amend a judgment.”¹³¹ Since such motions are listed in rule 9.020(g) as being among those that suspend rendition, the court found that the motion to vacate had that effect as well.

Given these two conclusions,¹³² the court found that the thirty-day period within which a notice of appeal must be filed¹³³ did not start to run until the trial court’s disposition of the motion to vacate, and that the notice

124. *Id.* at 1240.

125. *Id.* at 1241.

126. *Id.*

127. *Id.*

128. *Loveday*, 659 So. 2d at 1241.

129. *Id.* It is not likely that the court’s conclusion in this regard will have a significant precedential impact. The rule that the court interpreted has been deleted from the civil rules and incorporated into the new family rules as Rule 12.491(f) of the *Florida Family Law Rules of Procedure*. The new family law rule states that a party “may move to vacate the order by filing a motion to vacate within ten days from the date of entry.” FLA. FAM. LAW R. P. 12.491(f).

130. *Loveday*, 659 So. 2d at 1241.

131. *Id.*

132. The court also rejected a claim that the motion did not delay rendition because it was not heard within 10 days. *Id.* at 1242.

133. FLA. R. APP. P. 9.110(b).

in *Loveday*, filed within that period, was therefore timely.¹³⁴ The motion to dismiss was therefore denied.¹³⁵

B. *Orders Denying Motions*

In *Turner v. State*,¹³⁶ the second district found no appealable order to exist when the record disclosed a handwritten margin note on the face of a motion for post-conviction relief that read “Denied 11/2/95”¹³⁷ and that was followed by some symbol that appeared to be initials.¹³⁸ Noting that in *Gibson v. State*,¹³⁹ it had disapproved of the use of a rubber stamped denial signed by a trial judge and entered on the face of a motion for postconviction relief, the court stated: “Here we have even less.”¹⁴⁰ The appeal was therefore dismissed with directions to the trial court to reconsider the motion and to “render an appropriate order susceptible of this court’s review.”¹⁴¹

C. *Relinquishment of Jurisdiction*

In *State v. Siegel*,¹⁴² the state attempted to appeal an order granting a motion to suppress evidence.¹⁴³ When it was learned that no signed, written order was ever entered,¹⁴⁴ the state moved to temporarily relinquish jurisdiction for the entry of an order.¹⁴⁵ The fifth district denied the motion and dismissed the appeal.¹⁴⁶ The court recognized that Rule 9.110(m) of the *Florida Rules of Appellate Procedure* “permits an appeal to proceed where an appealable order is rendered prior to dismissal of a premature appeal,”¹⁴⁷ but pointed out that this provision is applicable only to final orders.¹⁴⁸

134. *Loveday*, 659 So. 2d at 1242.

135. *Id.*

136. 667 So. 2d 882 (Fla. 2d Dist. Ct. App. 1996).

137. *Id.* at 882.

138. *Id.*

139. 642 So. 2d 43 (Fla. 2d Dist. Ct. App. 1994).

140. *Turner*, 667 So. 2d at 882.

141. *Id.*

142. 662 So. 2d 1013 (Fla. 5th Dist. Ct. App. 1995).

143. *Id.* at 1014.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Siegel*, 662 So. 2d at 1014.

148. *Id.*

VIII. NOTICE OF APPEAL

In *Westfield Insurance Co. v. Sloan*,¹⁴⁹ the fifth district considered a motion to dismiss that was based on the fact that, after the time for filing a notice of appeal had run, an amended notice was filed adding an appellant to the single appellant that had been named on the original, timely-filed notice.¹⁵⁰

The court noted that Rule 9.110(d) of the *Florida Rules of Appellate Procedure* requires that the notice contain the name and designation of at least one party on each side¹⁵¹ and that the 1977 Committee Note to the rule states that the advisory committee did not intend for defects on a notice of appeal to be “jurisdictional or grounds for disposition unless the complaining party was substantially prejudiced.”¹⁵² The court also pointed to rule 9.040(d), which provides:

At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits. In the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties.¹⁵³

Finding no substantial prejudice to have been alleged or to be apparent, the court denied the motion to dismiss.¹⁵⁴

The fifth district’s approach in this case appears to conflict with the conclusion reached by the third district in *Ashraf v. Smith*,¹⁵⁵ a case in which a motion to amend a notice of appeal to include the appellant’s insurer was denied.¹⁵⁶ Although the court found the amendment “entirely unnecessary”¹⁵⁷ under the facts of the case, the denial of the motion was based on the court’s determination that it “lack[ed] the jurisdiction to permit such an amendment.”¹⁵⁸

149. 671 So. 2d 881 (Fla. 5th Dist. Ct. App. 996).

150. *Id.* at 882.

151. *Id.*

152. *Id.*

153. FLA. R. APP. P. 9.040(d)

154. *Westfield*, 671 So. 2d at 883.

155. 647 So. 2d 892 (Fla. 3d Dist. Ct. App. 1994), *review denied*, 658 So. 2d 989 (Fla. 1995).

156. *Id.* at 893.

157. *Id.*

158. *Id.*

Despite the decision in *Ashraf*, the third district, in *Eisman v. Ross*,¹⁵⁹ applying an analysis virtually identical to that of the fifth district in *Westfield*, granted a motion to amend mandate to include as a party appellant the name of an individual who was not named on the notice of appeal but who was listed as a party litigant on the supersedes bond posted for the appeal.¹⁶⁰

IX. BOND

The appellee moved to dismiss the appeal in *School Board of Hillsborough County v. Lara*,¹⁶¹ because the appellant, a public body, failed to post the bond required by section 440.25(5)(c) of the *Florida Statutes*, for appeals from orders of judges of compensation claims.¹⁶² The first district concluded that the application of this statutory bond requirement to the appellant would conflict with the dictates of Rule 9.310(b)(2) of the *Florida Rules of Appellate Procedure*, which provides that the filing of a notice of appeal by a public body operates as an automatic stay pending review¹⁶³ and which, as is made clear by the Committee Note to the rule,¹⁶⁴ contemplates that the automatic stay is to be without bond.¹⁶⁵ The court stated that to the extent that the statute and the rule conflict, the rule must control.¹⁶⁶ In light of this determination, the court denied the motion to dismiss.¹⁶⁷

X. BRIEFS

A. Form

In *Kennedy v. Guarantee Management Services, Inc.*,¹⁶⁸ the third district found that the circuit court, acting in its appellate capacity, had erred in dismissing an appeal because the appellant submitted his brief in handwritten form, rather than having it typed.¹⁶⁹ The district court concluded that

159. 664 So. 2d 1128 (Fla. 3d Dist. Ct. App. 1995).

160. *Id.* at 1129.

161. 667 So. 2d 368 (Fla. 1st Dist. Ct. App. 1995).

162. *Id.* at 368.

163. *Id.*

164. 1977 Committee Note to *Florida Rule of Appellate Procedure* 9.310.

165. *Lara*, 667 So. 2d at 368–69.

166. *Id.* at 369.

167. *Id.*

168. 667 So. 2d 1013 (Fla. 3d Dist. Ct. App. 1996).

169. *Id.* at 1014.

the circuit court's action had deprived the appellant of his right of access to the courts.¹⁷⁰

B. *Supplemental Briefs*

In *Dagostino v. State*,¹⁷¹ a case in which the appellant was represented by the Public Defender's office, the fourth district dealt with a request by the appellant's attorney to accept the appellant's pro se brief as a supplemental brief.

The court denied the motion,¹⁷² pointing out that when defendants are represented by counsel on appeal, they do not have an absolute right to participate and represent themselves.¹⁷³

The court "caution[ed] that the filing of pro se briefs after the public defender has briefed the case does not aid in"¹⁷⁴ resolving appeals "in some orderly process."¹⁷⁵

Noting the high regard it has for the Public Defender's office, the court indicated that its action in denying the motion was "to reinforce that confidence, not to undermine it"¹⁷⁶ and that accepting supplemental briefs in such situations "would weaken the constitutional right to counsel afforded to all indigent criminal appellants."¹⁷⁷

XI. CERTIORARI

A. *Procedure*

Two opinions provided insight into the manner in which district courts analyze petitions for certiorari. Reviewing a petition that sought review of the denial of a motion to strike a demand for jury trial in *Parkway Bank v. Fort Myers Armature Works, Inc.*,¹⁷⁸ the second district discussed the "confusing distinction between a dismissal of a certiorari petition for lack of

170. *Id.*

171. 675 So. 2d 194 (Fla. 4th Dist. Ct. App. 1996).

172. *Id.* at 195.

173. *Id.*

174. *Id.* at 196.

175. *Id.*

176. *Dagostino*, 675 So. 2d at 196.

177. *Id.*

178. 658 So. 2d 646 (Fla. 2d Dist. Ct. App. 1995).

jurisdiction and a denial of a petition after a review of the nonfinal order on its merits.”¹⁷⁹

The court noted that “case law usually explains that a certiorari petition must pass a three-prong test before an appellate court can grant relief from an erroneous interlocutory order.”¹⁸⁰ Under this test, the court explained, “[a] petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on postjudgment appeal.”¹⁸¹ The court stated that “[w]hile this traditional test is correct, the grammar of the test places the description of the appellate court’s standard of review on the merits before the two threshold tests used to determine jurisdiction.”¹⁸²

This characterization of the test was based on the court’s determination that the second and third prongs deal with the court’s jurisdiction to consider a petition for certiorari and that the first prong establishes the standard to be applied on the merits if jurisdiction is found to exist. As stated by the court, “a petitioner must establish that an interlocutory order creates material harm irreparable by postjudgment appeal before this court has power to determine whether the order departs from the essential requirements of the law.”¹⁸³ After drawing the distinction between the jurisdictional prongs of the test and the one relating to the merits of the case, the court proceeded to address the proper manner for disposing of petitions. “If the jurisdictional prongs of the standard three-part test are not fulfilled,”¹⁸⁴ the court said, “then the petition should be dismissed rather than denied.”¹⁸⁵

In *Bared & Co., Inc. v. McGuire*,¹⁸⁶ the fourth district, with the exception of one “small quibble,”¹⁸⁷ expressed its “complete agreement” with *Parkway Bank*.¹⁸⁸ Concluding that “harm is not irreparable if it can be corrected on final appeal,”¹⁸⁹ the court decided to “merge the second and third prongs into a single one.”¹⁹⁰

179. *Id.* at 648.

180. *Id.*

181. *Id.* (citations omitted).

182. *Id.*

183. *Parkway Bank*, 658 So. 2d at 649.

184. *Id.*

185. *Id.*

186. 670 So. 2d 153 (Fla. 4th Dist. Ct. App. 1996) (en banc).

187. *Id.* at 156 n.3.

188. *Id.*

189. *Id.* (emphasis omitted).

190. *Id.*

Noting, in the same manner as did the second district in *Parkway Bank*,¹⁹¹ that “in the past we have not been careful to make our jurisdictional decisions in these cases manifest,”¹⁹² and that “[m]ore often than not, we have denied such petitions when we were really deciding that we lacked jurisdiction,”¹⁹³ the court “seized on the present occasion to clarify our dispositions and manner of proceeding.”¹⁹⁴

The court stated that when it receives a certiorari petition that seeks review of a nonfinal order, it will “initially study it only to determine if petitioner has made a prima facie showing of the element of irreparable harm.”¹⁹⁵

If the petitioner has failed to make such a showing, the court will dismiss the petition.¹⁹⁶ On the other hand, if the petitioner meets this burden, the court will then “study the petition to determine whether it makes a prima facie showing that the order to be reviewed departs from the essential requirements of law.”¹⁹⁷

If the petition fails to make a prima facie demonstration of a departure, the petition will be denied.¹⁹⁸ If it does make such a showing, an order to show cause why the petition should not be granted will be entered.¹⁹⁹ After considering the response, if the court determines that there has been an insufficient showing of irreparable harm or injury, it will dismiss the petition.²⁰⁰ If it determines that the order under review does not depart from the essential requirements of law, or if it decides that it will not exercise its discretion to grant the writ, the court will deny the petition.²⁰¹

The court went on to discuss the effects of the two manners of rejecting petitions for certiorari. “[A] dismissal of a petition seeking common law certiorari represents only a determination that we lack jurisdiction and nothing more,”²⁰² the court said. “[A] bare denial by simple order of a petition for common law certiorari review of a pretrial order will not

191. *Parkway Bank*, 658 So. 2d at 649 n.1.

192. *Bared*, 670 So. 2d at 157.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Bared*, 670 So. 2d at 157.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Bared*, 670 So. 2d at 157.

represent a determination on the merits of the order to be reviewed,”²⁰³ the court continued, “unless an opinion denying the petition indicates that preclusive effect is intended.”²⁰⁴

The court noted its agreement with the second district’s decision in *Don Mott Agency, Inc. v. Harrison*,²⁰⁵ which found that a denial without opinion of a petition for a writ of certiorari is not an affirmance, does not establish the law of the case, cannot be construed as passing upon any of the issues in the litigation, and would not be *res judicata* as to the issues raised in the petition.²⁰⁶

B. Record

In *DSA Marine Sales & Service, Inc. v. County of Manatee*,²⁰⁷ the petitioners sought certiorari review in the circuit court of the disapproval by a board of county commissioners of a construction proposal.²⁰⁸ The petition was accompanied with a motion to supplement the record as more documents became available.²⁰⁹ Shortly thereafter, the petitioner filed an amended petition with a more thorough, but not yet completed, appendix.²¹⁰ The circuit court never ruled on the motion to supplement and denied the amended petition without ordering a response on the merits, finding that the petitioners failed to make a prima facie showing for relief.²¹¹ The petitioners moved for rehearing, seeking, among other things, guidance detailing the insufficiency of the petition and an opportunity to amend once again.²¹²

Reviewing the order of denial, the second district recognized that “[b]ecause certiorari petitions must be filed within thirty days from the date of rendition of the subject order, it is sometimes impossible to compile and contemporaneously file the entire record as an appendix to the petition.”²¹³ The court also stated that although “[s]everal elements are embraced in the notion of procedural due process, none [are] more important than the right to

203. *Id.* at 158 (footnote omitted).

204. *Id.*

205. 362 So. 2d 56 (Fla. 2d Dist. Ct. App. 1978).

206. *Bared*, 670 So. 2d at 158.

207. 661 So. 2d 907 (Fla. 2d Dist. Ct. App. 1995).

208. *Id.* at 908.

209. *Id.*

210. *Id.*

211. *Id.*

212. *DSA*, 661 So. 2d at 908.

213. *Id.* at 909.

be heard.”²¹⁴ Under the circumstances of this case, the court found that the summary denial of the petition deprived the petitioner of procedural due process.²¹⁵

C. Order to Show Cause

In *City of Kissimmee v. Grice*,²¹⁶ a police officer whose employment was terminated filed a petition for certiorari in the circuit court, which ordered the City to show cause why relief should not be granted.²¹⁷ The City moved to dismiss, asserting that the circuit court lacked subject matter jurisdiction.²¹⁸ Although the motion was denied,²¹⁹ the City failed to file a response to the order to show cause.²²⁰ The circuit court granted the writ,²²¹ but “merely stated conclusions of law without indicating how the city departed from the essential requirements of law”²²² in terminating the officer.

On appeal, the fifth district found that the lack of response to an order to show cause “is not tantamount to a default which automatically entitles the petitioner to his requested relief.”²²³ The court indicated that although the failure to respond “does limit the court’s consideration to the information contained in the record and the allegations contained in the petition[,] . . . [s]till the court must determine if the petition is meritorious and whether the requested relief should be granted.”²²⁴

The district court quashed the circuit court’s order, characterizing it as “in essence, a ‘Per Curiam Reversal,’”²²⁵ and stated, “[a]lthough a decision under review may be affirmed without opinion, indicating that the presumption of correctness accorded the lower tribunal had not been rebutted, an appellate court has the responsibility to write opinions in all reversals.”²²⁶

214. *Id.*

215. *Id.*

216. 669 So. 2d 307 (Fla. 5th Dist. Ct. App. 1996).

217. *Id.* at 308.

218. *Id.* at 309.

219. *Id.*

220. *Id.* at 308.

221. *Grice*, 669 So. 2d at 309.

222. *Id.* at 309 n.1.

223. *Id.* at 308.

224. *Id.* (citation omitted).

225. *Id.* at 309 (footnote omitted).

226. *Grice*, 669 So. 2d at 309.

XII. AMICUS CURIAE

In *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*,²²⁷ the fourth district offered guidance as to the role an amicus curiae should play in an appeal. The court noted that a brief from an amicus curiae is “generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues.”²²⁸ The court also stated that “[a]lthough ‘by the nature of things an amicus is not normally impartial,’ amicus briefs should not argue the facts in issue.”²²⁹

Applying these principles, the court denied one of two requests for leave to file an amicus brief, because the brief appeared “to be nothing more than an attempt to present a fact specific argument”²³⁰ of the same type as was contained in the appellants’ fifty page brief, a brief of the maximum allowable length under the appellate rules.²³¹ The court pointed out that “[s]ince the parties are limited as to the number and length of briefs, amicus briefs should not be used to simply give one side more exposure than the rules contemplate.”²³²

The court expressed some further thoughts on the subject, indicating that “it would be helpful to the court if [multiple] amicus would attempt to join together in one brief and cooperate with the parties so as not to be repetitious of the parties’ briefs.”²³³ Further, the court said that “[i]n the interest of brevity, amicus briefs should not contain a statement of the case or facts, but rather should get right to the *additional* information which the amicus believes will assist the court.”²³⁴ The court concluded its discussion by noting that “although Florida Rule of Appellate Procedure 9.370 does not require a motion for leave to file an amicus brief to state whether the parties have consented, it would be appropriate for the motion to contain that information.”²³⁵

227. 21 Fla. L. Weekly D1562 (4th Dist. Ct. App. July 3, 1996).

228. *Id.* at D1562 (citing *Alexander v. Hall*, 64 F.R.D. 152 (D.C.S.C. 1974)).

229. *Id.* (citing *Strasser v. Doorley*, 432 F.2d 567 (1st Cir. 1970)).

230. *Id.*

231. FLA. R. APP. P. 9.210(a)(5).

232. *Ciba-Geigy*, 21 Fla. L. Weekly at D1562.

233. *Id.*

234. *Id.*

235. *Id.* (citation omitted).

XIII. PROHIBITION

In *Brooks v. Lockett*,²³⁶ plaintiffs and prospective plaintiffs in a putative class action suit in Orange County sought a writ of prohibition against a circuit judge in Lake County, where a similar class action against the same defendant was pending, who had entered an order abating the Orange County proceeding,²³⁷ as well as other cases against the defendant.²³⁸ The fifth district found that the Lake County judge “was not empowered to issue an order staying a pending action in another jurisdiction.”²³⁹ It recognized that “prohibition generally is not available to revoke an order already entered,”²⁴⁰ but granted the writ nonetheless,²⁴¹ because “the order in the instant case attempts to exert an ongoing effect on pending class-action litigation involving [the defendant] throughout the State of Florida.”²⁴²

XIV. THE EFFECT ON APPEALS OF PRIOR DENIALS OF PROHIBITION

In *Barwick v. State*,²⁴³ the defendant raised on appeal to the supreme court from his convictions and sentences a claim that the trial court erred in denying his motion for disqualification. This same issue had been the basis for a pretrial petition for a writ of prohibition that the supreme court had denied²⁴⁴ in an order which did not indicate the grounds for denial.²⁴⁵

The State argued that the denial of prohibition should be deemed a ruling on the merits of the issue.²⁴⁶ In support of this position, the State relied on the third district’s opinion in *Obanion v. State*,²⁴⁷ which was advocated by (then Judge and present Supreme Court of Florida) Justice Anstead’s specially concurring opinion in the fourth district’s decision in

236. 658 So. 2d 1205 (Fla. 5th Dist. Ct. App. 1995).

237. Lake County is located in the fifth circuit, while Orange County is located in the ninth circuit. *Id.* at 1207.

238. *Brooks*, 658 So. 2d at 1206.

239. *Id.* at 1207.

240. *Id.*

241. *Id.* at 1208.

242. *Id.* at 1207–08.

243. 660 So. 2d 685 (Fla. 1995).

244. *Id.* at 690.

245. *Id.* at 691.

246. *Id.* at 690–91.

247. 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986), *review denied*, 504 So. 2d 768 (Fla. 1987).

DeGennaro v. Janie Dean Chevrolet, Inc.,²⁴⁸ cases that the supreme court categorized as “recogniz[ing] that a denial of a petition for writ of prohibition in those districts should henceforth constitute a ruling on the merits unless otherwise indicated.”²⁴⁹

The supreme court “approve[d] of the procedure adopted by the Third District in *Obanion* and advocated by Justice Anstead’s concurring opinion in *DeGennaro* as to the effect of the denial of a petition for writ of prohibition in those district courts,”²⁵⁰ but did not agree that its denial of the petition in *Barwick* was a decision on the merits.²⁵¹ Noting that its order did not indicate the grounds for the denial²⁵² and the fact that the court had not “clearly expressed an intention to have a denial of a petition for writ of prohibition, without more, serve as a ruling on the merits,”²⁵³ the court “recognize[d] a need to clarify the effect of this Court’s denial of a prohibition petition.”²⁵⁴

Satisfying the need that it had identified, the court stated:

248. 600 So. 2d 44 (Fla. 4th Dist. Ct. App. 1992) (Anstead, J., concurring specially).

249. *Barwick*, 660 So. 2d at 691. While *Obanion* certainly established this principle in the third district, the impact of *DeGennaro* in the fourth district is less clear. Justice Anstead’s sentiments in that decision cannot be reconciled with those expressed by Judge Farmer in his dissenting opinion in *Thomason v. State*, 594 So. 2d 310 (Fla. 4th Dist. Ct. App. 1992) (Farmer, J., dissenting), *quashed on other grounds*, 620 So. 2d 1234 (Fla. 1993). In *Thomason*, the defendant, who was appealing from an order withholding adjudication and placing him on probation, raised a double jeopardy claim that he had previously asserted in a petition for prohibition that had been denied without opinion. The court affirmed without opinion, but Judge Farmer, who wrote primarily to dissent on the merits, discussed the question of whether consideration of the double jeopardy claim was proper in light of the prior petition. He noted that such consideration was appropriate because “prohibition is an extraordinarily *prerogative* writ . . . that is sometimes denied for good reasons having nothing to do with the underlying merits of a petitioner’s position.” *Id.* at 312 n.2. He recognized that his view was contrary to *Obanion*, but stated that the fourth district had never adopted the *Obanion* approach and that he hoped it never would, “at least as long as prohibition is deemed a matter of mere grace.” *Id.* Although disagreeing with Judge Farmer on the merits of the case, it appears that the other members of the panel agreed with him on the jurisdictional issue because the case was affirmed, rather than dismissed, because Judge Stone wrote a specially concurring opinion that set forth the reasons why he felt the case should be affirmed on the merits, and because the court, on rehearing, certified a question that dealt only with the merits of the case. *Id.* at 318.

250. *Barwick*, 660 So. 2d at 691.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

We hold that from this time forward, if an order from this Court denying a petition for a writ of prohibition based upon an unsuccessful motion for disqualification is to constitute a decision on the merits and, thereby, foreclose further review of the disqualification issue on direct appeal, the order will state that it is “with prejudice.”²⁵⁵

The court’s decision to use qualifying language that refers only to a petition “based upon an unsuccessful motion for disqualification”²⁵⁶ leaves open the question of whether the court means to apply this same rationale when a petition is based on some other ground, such as the double jeopardy issue in *Thomason* or the speedy trial claim in *Obanion*.

The court’s specific approval of the *Obanion* procedure for the third district and the procedure advocated by Justice Anstead in *DeGennaro* for the fourth district,²⁵⁷ while it adopted a different procedure for itself, at least with regard to petitions raising disqualification issues, seems to indicate that each district court will be allowed to adopt the approach it deems best.

XV. MOOTNESS

In *J. M. v. State*,²⁵⁸ the third district reversed an adjudication of delinquency based on its conclusion that the trial court’s stated reasons for its departure from the recommendation made by the Department of Health and Rehabilitative Services (“HRS”) as to the appropriate level of restrictiveness were not supported by the record.²⁵⁹ The district court remanded for a new disposition hearing, finding that the issue was not moot even though the juvenile had served his residential sentence and had been released by HRS.²⁶⁰ The court stated:

Depending upon the evidence, if any, presented at the new disposition hearing on remand, the trial court, in its finding of delinquency, may conceivably decide to withhold adjudication, impose a less restrictive sentence and give the juvenile credit for the origi-

255. *Barwick*, 660 So. 2d at 691.

256. *Id.*

257. *See supra* note 249. This footnote addresses the reasons why the court’s approval of this procedure for the fourth district may not mean a great deal, since the fourth district itself may prefer a different approach.

258. 677 So. 2d 890 (Fla. 3d Dist. Ct. App. 1996).

259. *Id.* at 892.

260. *Id.* at 893.

nal sentence served or suspend entry of sentence altogether. As stated by this court in *R.A.B. v. State*, 399 So.2d 16, (Fla 3d DCA 1981): "The very fact of adjudication, apart from disposition, has potential collateral effects which are not harmless." *Id.* at 18. Indeed, a withhold of adjudication as opposed to an adjudication for this offense would certainly be relevant to future dispositions if this juvenile is ever rearrested or if he decided to enter a profession which required him to disclose any juvenile record. *See* § 39.045, Fla. Stat. (1993).²⁶¹

XVI. HARMLESS ERROR

In *Heuss v. State*,²⁶² the fourth district found that the trial court erred by failing to make findings sufficient to support the admission of certain statements.²⁶³ The court concluded that the error was harmless,²⁶⁴ however, and affirmed the convictions and sentences under review.²⁶⁵ In a motion for rehearing, the defendant pointed out that the state had not made a harmless error argument and contended that the court lacked authority to sua sponte apply the harmless error doctrine.²⁶⁶

Noting that section 59.041 of the *Florida Statutes* requires the court to consider whether any error is harmless,²⁶⁷ the court rejected the defendant's contention. The court stated that it could "discern no public policy supporting a conclusion that a review court must reverse an otherwise valid conviction for an error that is deemed harmless simply because harmless error was not argued in the state's brief."²⁶⁸

XVII. SANCTIONS

In several cases, orders were entered imposing sanctions on pro se litigants. One particularly active litigant received sanctions from three

261. *Id.* (footnote omitted). *See also* FLA. STAT. § 39.045 (1993).

262. 660 So. 2d 1052 (Fla. 4th Dist. Ct. App. 1995).

263. *Id.* at 1057.

264. *Id.*

265. *Id.* at 1058.

266. *Id.*

267. A similar requirement is set forth in section 924.33 of the *Florida Statutes*.

268. *Heuss*, 660 So. 2d at 1059.

district courts. In *Attwood v. Eighth Circuit Court*,²⁶⁹ *Attwood v. Singletary*,²⁷⁰ and *Attwood v. State ex rel. Florida Department of Corrections*,²⁷¹ the first, second, and fourth districts, respectively, decided to take action against an individual who had instituted an extraordinary number of cases, virtually all of which challenged prison conditions.²⁷²

Attwood had filed seventeen appeals or petitions in the first district in the period of just over ten months preceding the court's order,²⁷³ seventeen cases in the second district in the six-month period ending June 1, 1995,²⁷⁴ and thirty-one appeals or petitions in the fourth district in the first half of 1995.²⁷⁵ The fourth district also noted that Attwood had eighteen cases, one of which had 200 defendants, pending in the circuit court for Martin County,²⁷⁶ and that as of the date of a hearing held in October, 1993, in the United States District Court for the Northern District of Florida, Attwood had filed more than forty cases in that court.²⁷⁷ The fourth district additionally pointed out that at the federal hearing, Attwood admitted that he had also filed "several thousand"²⁷⁸ internal grievances in the Florida system.²⁷⁹

The first district indicated that its clerk's office received mail from Attwood "on almost a daily basis."²⁸⁰ The fourth district noted that at the federal hearing, Attwood "admitted mailing 'pounds of mail a week' to the courts."²⁸¹

In addition to commenting on the quantity of Attwood's efforts, the district courts made it clear that they were unimpressed with the quality of those efforts. The fourth district referred to Attwood's "frivolous claims,"²⁸² the second district to his "baseless appeals, petitions, and related unauthorized motions,"²⁸³ and the first district to his "simply incomprehensible"²⁸⁴

269. 667 So. 2d 356 (Fla. 1st Dist. Ct. App. 1995).

270. 659 So. 2d 1127 (Fla. 2d Dist. Ct. App. 1995).

271. 660 So. 2d 358 (Fla. 4th Dist. Ct. App. 1995).

272. See *Attwood*, 667 So. 2d at 357 n.4; *Singletary*, 659 So. 2d at 1128; *Department of Corrections*, 660 So. 2d at 358.

273. *Attwood*, 667 So. 2d at 356.

274. *Singletary*, 659 So. 2d at 1128.

275. *Department of Corrections*, 660 So. 2d at 358.

276. *Id.*

277. *Id.*

278. *Id.* at 359.

279. *Id.*

280. *Attwood*, 667 So. 2d at 357.

281. *Department of Corrections*, 660 So. 2d at 359.

282. *Id.* at 360.

283. *Singletary*, 659 So. 2d at 1128.

pleadings. Attwood's pleadings were also apparently quite repetitive. The first district indicated that he filed "numerous copies of the same pleading in different cases."²⁸⁵ The fourth added that he often "makes copies of what he has already filed, signs the copied version, and handwrites an additional allegation, which must be treated as a new petition or appeal."²⁸⁶

The fourth district also expressed concern over the fact that Attwood, claiming indigency, had paid no filing fees in any of his cases²⁸⁷ despite evidence adduced at the federal hearing to the effect that he was the sole owner of a rental income-generating apartment building with an estimated value of \$57,000 to \$69,000²⁸⁸ and that he had a bank account about which he refused to testify.²⁸⁹

The first district prohibited Attwood from filing any document on his own behalf in the case under review or in any other case, as either appellant or petitioner,²⁹⁰ directed its clerk to "refuse any document filed by Attwood unless signed by a member of The Florida Bar"²⁹¹ and, in Attwood's pending cases that were not yet mature, afforded Attwood thirty days within which to file and serve a notice of appearance of counsel,²⁹² noting that it would dismiss any case in which such a notice is not timely filed.²⁹³

The second district directed its clerk to reject the filing of all future notices of appeal and petitions for extraordinary relief in civil matters sent by or on behalf of Attwood unless submitted and signed by a member of The Florida Bar.²⁹⁴ The court stated that any papers filed in violation of its order would be "automatically placed in an inactive file,"²⁹⁵ and that any notices of appeal received from circuit courts would be "summarily stricken."²⁹⁶ The court noted that its order would not apply to any criminal appeal filed by Attwood which directly concerns a judgment and sentence.²⁹⁷

284. *Attwood*, 667 So. 2d at 356.

285. *Id.* at 357.

286. *Department of Corrections*, 660 So. 2d at 360.

287. *Id.* at 358.

288. *Id.* at 359.

289. *Id.*

290. *Attwood*, 667 So. 2d at 357.

291. *Id.*

292. *Id.*

293. *Id.*

294. *Singletary*, 659 So. 2d at 1128.

295. *Id.*

296. *Id.*

297. *Id.*

The fourth district ordered that Attwood “be denied indigent status for the filing of appeals or petitions for extraordinary relief”²⁹⁸ and directed its clerk “to refuse any such notice of appeal or petition for filing unless accompanied by the proper filing fee or submitted and assigned by a member of the Florida Bar.”²⁹⁹ Like the second district, the court indicated that its order would not apply to “any criminal appeal filed by Robert Attwood which directly concerns a judgment and sentence.”³⁰⁰

The fifth district, apparently unaffected by Attwood’s output, determined that sanctions were appropriate for another litigant. In *Holmes v. State*,³⁰¹ the court entertained a defendant’s fifth petition for writ of habeas corpus and his eleventh post-conviction proceeding,³⁰² all unsuccessful challenges to a 1989 conviction and sentence.³⁰³

Finding the defendant “has disrupted the fair allocation of judicial resources of this court,”³⁰⁴ and “this activity now rises to the level of being an abuse of process,”³⁰⁵ the court prohibited the defendant from filing “any further *pro se* pleadings regarding his 1989 conviction and sentence.”³⁰⁶

XVIII. REHEARING

In *Thompson v. Singletary*,³⁰⁷ the fourth district entered an initial opinion ordering a new trial for a criminal defendant.³⁰⁸ No motion for rehearing was filed within the fifteen days allowed by Rule 9.330(a) of the *Florida Rules of Appellate Procedure*,³⁰⁹ and mandate therefore issued.³¹⁰

The state subsequently filed an untimely motion for rehearing, a motion to accept the motion for rehearing as timely filed and a motion to recall the mandate.³¹¹ Attached to the motion for rehearing were portions of the trial transcript not previously furnished to the court that demonstrated that the

298. *Department of Corrections*, 660 So. 2d at 360.

299. *Id.*

300. *Id.*

301. 669 So. 2d 360 (Fla. 5th Dist. Ct. App. 1996).

302. *Id.* at 360.

303. *Id.* at 360 n.1.

304. *Id.* at 361.

305. *Id.*

306. *Holmes*, 669 So. 2d at 361.

307. 659 So. 2d 435 (Fla. 4th Dist. Ct. App. 1995).

308. *Id.* at 435–36.

309. *Id.* at 436.

310. *Id.*

311. *Id.*

defendant was not in fact entitled to a new trial.³¹² Eleven days after the state's motions were filed, and before the court ruled on them, the term of court ended.³¹³

The court found that the untimeliness of the motion for rehearing presented no impediment to its consideration, because the fifteen-day time limit of the rule is not jurisdictional³¹⁴ and the motion was filed in the same term of court.³¹⁵ The fact that the term of court ended after the issuance of the mandate, however, was a matter of greater concern.

The court began its analysis by focusing on the Supreme Court of Florida's decision in *State Farm Mutual Automobile Insurance Co. v. Judges of District Court of Appeal, Fifth District*.³¹⁶ There, the district court affirmed a case without opinion.³¹⁷ When the appellant filed a motion for rehearing four months later during the next term of court, the district court denied the motion as untimely, but sua sponte decided to reconsider the case en banc because it conflicted with an opinion in another case that was written in the interim.³¹⁸ The party opposing the rehearing then obtained a writ of mandamus from the supreme court, which held that an appellate court is without jurisdiction to recall its mandate beyond the term of court during which the mandate was issued.³¹⁹

After its discussion of *State Farm*, the fourth district pointed out that if the state had called its attention to the impending expiration of the court's term of court by designating its motion to recall mandate as an emergency motion, the court would have recalled mandate before the end of the term.³²⁰ The court noted that in the absence of such a designation, it had followed its normal procedure with motions for rehearing, which is to hold them in the clerk's office until a response is filed or the time for a response expires.³²¹ By the time that process was completed, so was the term of the court.³²²

312. *Thompson*, 659 So. 2d at 436.

313. *Id.*

314. *Id.*

315. *Id.* at 437.

316. 405 So. 2d 980 (Fla. 1981).

317. *Thompson*, 659 So. 2d at 436.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Thompson*, 659 So. 2d at 436.

The court next turned its attention to *Washington v. State*,³²³ a case in which the supreme court stated that “[t]he prevailing rule is that an appellate court is without power to recall a mandate regularly issued without inadvertence and resume jurisdiction of the cause after the expiration of the term at which its judgment was rendered and the mandate issued.”³²⁴ The supreme court in *Washington* also recognized “the power . . . to recall a mandate sent down by inadvertence.”³²⁵

Seizing on the references in *Washington* to “inadvertence,” the fourth district concluded that its failure to grant the State’s motion to recall the mandate during the eleven day period between its filing and the expiration of the term of court was “inadvertent under *Washington*.”³²⁶ Repeating its previous pronouncement that it would have recalled mandate prior to the end of the term had the State called its attention to the need to do so,³²⁷ the court concluded that “[u]nder these facts, which we believe make this case distinguishable from *State Farm*, . . . we have not lost jurisdiction.”³²⁸ The court therefore granted the State’s motions, withdrew its original opinion,³²⁹ and denied relief on the merits.³³⁰

XIX. APPELLATE ATTORNEYS’ FEES

A. Offer of Judgment on Appeal

In *Deleuw, Cather & Co. v. Grogis*,³³¹ when the fourth district upheld a trial court’s judgment taxing costs, the appellee moved for appellate attorney’s fees and costs on the basis of an offer of judgment served during the pendency of the appeal.³³² The court struck the motion and the offer of judgment based on its conclusion that section 768.79 of the *Florida Statutes* under which the offer was made, “does not contain any language which would indicate that the legislature contemplated its use during appeals.”³³³

323. 110 So. 259 (Fla. 1926).

324. *Id.* at 260–61 (citations omitted).

325. *Id.* at 261.

326. *Thompson*, 659 So. 2d at 437.

327. *Id.*

328. *Id.*

329. The original opinion was published in the advance sheets at 655 So. 2d 1282. It was not included in the bound volume, however, in light of the fact that it was withdrawn.

330. *Thompson*, 659 So. 2d at 437.

331. 664 So. 2d 989 (Fla. 4th Dist. Ct. App. 1995).

332. *Id.* at 989.

333. *Id.*

Additionally, the court found the statute inapplicable to the case under review because the statute applies only to damages³³⁴ and the proceeding dealt only with the correctness of the amount of costs,³³⁵ which are not considered a part of a claim which forms the basis of a suit.³³⁶

B. *Violations of the Government in the Sunshine Law*

In *School Board of Alachua County v. Rhea*,³³⁷ the first district rejected a claim that because section 286.011(4) of the *Florida Statutes* provides that “the court shall assess a reasonable attorney’s fee” against agencies determined to have violated the Government in the Sunshine Law, there is no requirement for a party seeking appellate attorney’s fees in such a case to file a motion in the appellate court.³³⁸ The court found that the statute’s mandatory language “does not supersede the requirements of Florida Rule of Appellate Procedure 9.400(b),”³³⁹ which dictates that such motions must be filed in the appellate court, “nor does it authorize the trial court to make an initial award of appellate attorney’s fees.”³⁴⁰

XX. MANDATE

The supreme court, in *State v. Roberts*,³⁴¹ clarified the procedure for obtaining a stay or recall of a district court’s mandate when discretionary review is sought. The issue came before the court after the first district’s denial of a motion to recall mandate.³⁴² The motion had been filed four days after the party seeking the recall had filed a notice invoking the supreme court’s discretionary jurisdiction. In its denial, the district court relied on the supreme court’s opinion in *State v. McKinnon*³⁴³ for the proposition that a party desiring a stay of mandate during the pendency of a petition for review must apply to the supreme court for the stay.³⁴⁴

334. *Id.*

335. *Id.*

336. *Deleuw*, 664 So. 2d at 989.

337. 661 So. 2d 331 (Fla. 1st Dist. Ct. App. 1995).

338. *Id.* at 332.

339. *Id.*

340. *Id.*

341. 661 So. 2d 821 (Fla. 1995).

342. *Id.* at 821.

343. 540 So. 2d 111 (Fla. 1989).

344. *Roberts*, 661 So. 2d at 821.

The supreme court recognized that *McKinnon* “contained language”³⁴⁵ supporting such a conclusion, but pointed out that “the issue in that case was not where the motion for stay should be filed.”³⁴⁶ Rather, the court stated, the holding of *McKinnon* was that the pendency of a petition for review “did not deprive the trial court of jurisdiction to resentence a defendant pursuant to the district court’s mandate which had reversed and remanded the case for resentencing.”³⁴⁷ Ending any confusion as to the effect of *McKinnon*, the court stated that “[w]hile a motion for stay and to recall a mandate may be filed in this Court, it may also be filed in the district court of appeal.”³⁴⁸ Relying on Rule 9.130(a) of the *Florida Rules of Appellate Procedure*, which indicates that lower tribunals “have continuing jurisdiction”³⁴⁹ to consider motions for stay pending review, the court said, “[t]he fact that a notice to invoke the discretionary jurisdiction of this court has already been filed does not deprive the district court of appeal of jurisdiction to rule upon the motion.”³⁵⁰ In fact, the court went on to indicate that “[g]enerally speaking, the Court prefers that motion for stay be filed in the district court of appeal because at that stage of the case the district court ordinarily will be better informed concerning the case and thereby better able to predict the likelihood of this Court’s accepting jurisdiction.”³⁵¹ The court therefore receded from *McKinnon* “to the extent that it suggests that the filing of a notice to invoke discretionary jurisdiction precludes the district court of appeal from entertaining a motion to stay or withdraw its mandate.”³⁵²

XXI. APPEALS IN CRIMINAL CASES

A. *Death of Defendant*

In *State v. Clements*,³⁵³ the supreme court dealt with the effect of defendants’ deaths during the pendency of direct appeals from judgments and sentences. Despite the fact that each of the district courts of appeal had

345. *Id.*

346. *Id.*

347. *Id.* at 821–22.

348. *Id.* at 822.

349. *Roberts*, 661 So. 2d at 822.

350. *Id.*

351. *Id.*

352. *Id.*

353. 668 So. 2d 980 (Fla. 1996).

found abatement ab initio to be proper under such circumstances,³⁵⁴ the supreme court concluded that “the appeal of a conviction may be dismissed but is not to be abated ab initio.”³⁵⁵ The court pointed out that the theory upon which abatement ab initio had been applied was the fact that it left in effect upon a defendant’s death the legal presumption of innocence.³⁵⁶ The court found such reasoning inapplicable in light of the fact that “the presumption of innocence ceases ‘upon the adjudication of guilt and the entry of sentence,’”³⁵⁷ and the fact that “a judgment of conviction comes for review with a presumption in favor of its regularity or correctness.”³⁵⁸

The court went on to indicate, however, that even dismissal is not mandated. Finding that “monetary fines or penalties continue to be enforceable against assets which comprise a defendant’s estate,”³⁵⁹ the court stated that in such situations, “the estate maintains the same right to appeal that the defendant would have had if living”³⁶⁰ and that the state may also “have an interest in seeing the appeal completed.”³⁶¹ Thus, the court concluded that “when a defendant dies after judgment but during an appeal, the appellate court may, upon a showing of good cause by the State or a representative of the defendant, determine that the appeal should proceed.”³⁶²

B. *Belated Appeals*

The fourth district grudgingly reversed a defendant’s sentence in *Gilbert v. State*³⁶³ by applying, to a belated appeal, the general rule that appellate courts decide cases in accordance with the law in effect at the time of the appellate decision.³⁶⁴ The court felt that it was bound by supreme court precedent³⁶⁵ to apply this general rule despite “question[ing] its

354. See, e.g., *Williams v. State*, 648 So. 2d 313 (Fla. 1st Dist. Ct. App. 1995); *Carstens v. State*, 638 So. 2d 630 (Fla. 4th Dist. Ct. App. 1994); *Jackson v. State*, 559 So. 2d 320 (Fla. 3d Dist. Ct. App. 1990); *Kearns v. State*, 536 So. 2d 1187 (Fla. 5th Dist. Ct. App. 1989); *Cruz v. State*, 137 So. 2d 254 (Fla. 2d Dist. Ct. App. 1962).

355. *Clements*, 668 So. 2d at 981.

356. *Id.*

357. *Id.* (quoting *Vaccaro v. State*, 11 So. 2d 186, 187 (Fla. 1942)).

358. *Clements*, 668 So. 2d at 981 (citing *Vaccaro*, 11 So. 2d at 188; *Hitchcock v. State*, 413 So. 2d 741 (Fla. 1982)), *cert. denied*, 459 U.S. 960 (1982).

359. *Clements*, 668 So. 2d at 982.

360. *Id.*

361. *Id.*

362. *Id.*

363. 667 So. 2d 969 (Fla. 4th Dist. Ct. App. 1996).

364. *Id.* at 971.

365. *Florida Patient’s Compensation Fund v. Von Stetina*, 474 So. 2d 783 (Fla. 1985).

propriety in cases of a belated appeal, especially one [such as the case under review] which is not brought until after the favorable case law change has been announced.”³⁶⁶

The court expressed its belief that “a defendant should not be allowed to sit back and await a favorable change in the law before claiming a right to appeal, as the appellant did here.”³⁶⁷ Indicating that it did not believe it should “take two years to discover and bring to the court’s attention”³⁶⁸ a trial counsel’s dereliction of the duty to file a notice of appeal when requested to do so, the court suggested “that the time for bringing a claim for ineffectiveness based on trial counsel’s failure to appeal should be even more limited than a routine motion for ineffectiveness pursuant to *Florida Rule of Criminal Procedure* 3.850,”³⁶⁹ a rule which presently requires such motions to be filed within two years of conviction,³⁷⁰ one year in capital cases.³⁷¹

Judge Glickstein wrote a specially concurring opinion in which he agreed with the majority on the merits of the case, but “abstain[ed] from their expressed concerns as to the policy matters beyond the issues.”³⁷²

C. Appeals by the State

1. Appeals Taken After the Jury is Sworn

In *State v. Livingston*,³⁷³ a motion to suppress, filed prior to jury selection, was heard after the jury was sworn but before opening statements.³⁷⁴ The trial court granted the motion and subsequently granted a mistrial.³⁷⁵

The State appealed from the order granting the motion to suppress and the defendant contended that the order was not appealable because the jury had been sworn prior to the suppression hearing.³⁷⁶ The second district

366. *Gilbert*, 667 So. 2d at 971.

367. *Id.*

368. *Id.*

369. *Id.*

370. FLA. R. CRIM. P. 3.850(b).

371. *Id.*

372. *Gilbert*, 667 So. 2d at 971 (Glickstein, J., concurring specially).

373. 21 Fla. L. Weekly D1237 (2d Dist. Ct. App. May 22, 1996).

374. *Id.* at D1237–38.

375. *Id.* It is not clear from the opinion which party requested the mistrial, whether the mistrial had any relation to the motion to suppress or whether the mistrial was granted before opening statements or at some point thereafter.

376. *Livingston*, 21 Fla. L. Weekly at D1238.

disagreed, concluding that “the granting of a motion to suppress followed by a mistrial results in an order appealable under *Florida Rule of Appellate Procedure* 9.140(c)(1)(B).”³⁷⁷

2. Effect of Nolle Prose

The State sought certiorari review of two pretrial evidentiary rulings in *State v. Spence*.³⁷⁸ After the trial court entered the orders in question, the State nolle prossed the case.³⁷⁹ Some three weeks later, the State refiled an information alleging the same crime.³⁸⁰ The State then filed its timely petitions for certiorari.³⁸¹

Relying on the supreme court’s decision in *State v. Vazquez*,³⁸² the court found that the evidentiary rulings had “no carryover effect upon the new information.”³⁸³ Given this fact, the court called the attempt to obtain review of the rulings a “request for a futile act”³⁸⁴ and denied the State’s petitions.³⁸⁵ “Even though the new case may constitute an identical allegation,”³⁸⁶ the court stated, “it nonetheless constitutes a separate case and we cannot reach back and rule and determine the validity of orders entered in a previous case that is no longer in existence.”³⁸⁷

The court warned that the filing of a nolle prose “may have awesome consequences which should be contemplated before such action is taken,”³⁸⁸ and indicated that it “prepared this opinion to point out the pitfall in the course of action taken by the state in the instant case.”³⁸⁹

3. Pretrial Orders Declaring a Sentencing Statute Unconstitutional

In *State v. Peloquin*,³⁹⁰ the second district dealt with consolidated appeals by the State from orders declaring the DUI vehicle impoundment

377. *Id.*

378. 658 So. 2d 660 (Fla. 3d Dist. Ct. App. 1995).

379. *Id.* at 661.

380. *Id.*

381. *Id.*

382. 450 So. 2d 203 (Fla. 1984).

383. *Spence*, 658 So. 2d at 661.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Spence*, 658 So. 2d at 661.

389. *Id.*

390. 20 Fla. L. Weekly D2744 (2d Dist. Ct. App. Dec. 15, 1995).

law³⁹¹ unconstitutional.³⁹² The court noted that the defendants in the cases under review had not yet gone to trial or pleaded to the charges³⁹³ and that the issue of vehicle impoundment does not arise until after conviction.³⁹⁴ Under these circumstances, the court dismissed the appeals,³⁹⁵ stating that “[a] pretrial order declaring a statute or ordinance unconstitutional, and doing nothing more regarding the underlying case, is not appealable,”³⁹⁶ and that since “these orders relate to sentencing, and do not impact the trial of the cases, they do not meet the standard for review by certiorari.”³⁹⁷

D. *Motions for Post Conviction Relief*

1. Summary Denial

In *Davis v. State*,³⁹⁸ the fourth district discussed the procedure it follows in reviewing summary denials of motions for postconviction relief.³⁹⁹ The court noted that appeals in such cases are governed by Rule 9.140(g) of the *Florida Rules of Appellate Procedure*,⁴⁰⁰ which requires the court to review “the arguments made therein together with the order of denial and the attachments thereto,”⁴⁰¹ and which states, “[u]nless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing.”⁴⁰² The court went on to note that if its review “shows a preliminary basis for reversing the trial court’s order,”⁴⁰³ the court will order a response from the state and will then “allow the appellant to reply.”⁴⁰⁴ If the record does not show such a basis, the court continued, “neither the appellant nor the state are required to file briefs.”⁴⁰⁵

391. FLA. STAT. § 316.193(6)(d) (1993).

392. *Peloquin*, 20 Fla. L. Weekly at D2744.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.* (citation omitted).

397. *Peloquin*, 20 Fla. L. Weekly at D2744.

398. 660 So. 2d 1161 (Fla. 4th Dist. Ct. App. 1995).

399. *Id.* at 1162.

400. *Id.*

401. *Id.*

402. FLA. R. APP. P. 9.140(g).

403. *Davis*, 660 So. 2d at 1162.

404. *Id.*

405. *Id.*

The court took the opportunity to explain its process because “we have noted of late many pro se appellants filing briefs on orders denying postconviction relief without a hearing.”⁴⁰⁶ Stating that it “would have already disposed of this case as an affirmance but for the fact”⁴⁰⁷ that the appellant filed a brief,⁴⁰⁸ the court opined that such briefs “may in fact slow the process of our review”⁴⁰⁹ and “[g]enerally . . . are not considered, because either the arguments were made in the postconviction relief motion, or they improperly raise additional issues not contained in”⁴¹⁰ the motion.

2. Orders Granting in Part and Denying in Part

In *Cooper v. State*,⁴¹¹ the second district found to be appealable an order granting in part and denying in part a motion for postconviction relief filed under Rule 3.850 of the *Florida Rules of Criminal Procedure*.⁴¹² Such an order, the court concluded, “marks the end of the judicial labor which is to be expended on the motion, and the order is final for appellate purposes.”⁴¹³ The court drew a distinction between such an order and one that denies a claim in a postconviction motion but grants an evidentiary hearing on a different claim in the same motion.⁴¹⁴ In such circumstances, the court stated, the order is “not appealable until all issues raised have been ruled upon by the court,”⁴¹⁵ because “[j]udicial economy . . . forbids piecemeal appeals until all pending matters raised in a single motion have been resolved and . . . can then be efficiently reviewed in one appellate proceeding.”⁴¹⁶

E. Cross-Appeals

In *Page v. State*,⁴¹⁷ a criminal defendant appealed from a conviction and the state cross-appealed, asserting that the trial court erroneously suppressed

406. *Id.*

407. *Id.*

408. *Davis*, 660 So. 2d at 1162.

409. *Id.*

410. *Id.*

411. 667 So. 2d 932 (Fla. 2d Dist. Ct. App. 1996).

412. *Id.* at 933.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Cooper*, 667 So. 2d at 933.

417. 677 So. 2d 55 (Fla. 1st Dist. Ct. App. 1996).

a statement.⁴¹⁸ The first district affirmed the conviction and, in light of that resolution, declined to address the issue raised on cross-appeal.⁴¹⁹

The court recognized section 924.07(1)(d) of the *Florida Statutes*, which states, in pertinent part: "Once the state's cross-appeal is instituted, the appellate court shall review and rule upon the question raised by the state regardless of the disposition of the defendant's appeal."⁴²⁰ Concluding, however, that compliance with that provision in a case such as the one under review would "be rendering what amounted to nothing more than an advisory opinion,"⁴²¹ the court found that "to the extent the statute purports to dictate to the courts what issues must be addressed, regardless of necessity, it constitutes a violation of the separation of powers."⁴²² The court certified the following question to the supreme court as one of great public importance:

IS SECTION 924.07(1)(d), FLORIDA STATUTES (1995), AN UNCONSTITUTIONAL VIOLATION OF THE PRINCIPAL [SIC] OF SEPARATION OF POWERS TO THE EXTENT THAT IT PURPORTS TO MANDATE THAT AN APPELLATE COURT MUST RULE UPON ISSUES RAISED BY THE STATE IN A CROSS-APPEAL, REGARDLESS OF THE DISPOSITION OF THE DEFENDANT'S APPEAL?⁴²³

F. Disqualification of Counsel

In *Colton v. State*,⁴²⁴ a criminal defendant appealing his conviction, who was represented by the Public Defender's Office, moved to disqualify counsel for the State.⁴²⁵ The motion was based on the fact that at the time of the filing of the notice of appeal, counsel for the state had been employed as a trial attorney by the Public Defender's Office representing the defendant.⁴²⁶

418. *Id.* at 55.

419. *Id.* at 56.

420. FLA. STAT. 924.07(1)(d) (1995).

421. *Id.*

422. *Page*, 677 So. 2d at 56.

423. *Id.*

424. 667 So. 2d 341 (Fla. 1st Dist. Ct. App. 1995).

425. *Id.* at 342.

426. *Id.*

Resolving all factual disputes in favor of the defendant,⁴²⁷ the first district denied the motion. The court found a number of facts to be of significance, including the fact that: 1) the attorney did not represent the defendant at trial or on any previous matter;⁴²⁸ 2) the defendant did not assert that the attorney had received any confidential information, but only that it was possible that he could have been exposed to such information;⁴²⁹ and 3) the attorney filed an affidavit in which he stated that he was not privy or exposed to any information regarding appellate cases, including the defendant's appeal.⁴³⁰

The court noted that there is no rule of Professional Conduct that specifically addresses successive government to government employment when those interests are adverse⁴³¹ and rejected the defendant's effort to extend to the facts of the case the dictates of Rule 2.060(c) of the *Florida Rules of Judicial Administration*, which "prohibits former judicial research aides from participating in any manner in any proceeding that was docketed in the court during the term of service or prior thereto."⁴³²

The court therefore addressed the issue in terms of whether the representation resulted in an appearance of impropriety, noting first that such an evaluation must be done on a case-by-case basis.⁴³³ In finding no appearance of impropriety to exist, the court pointed out that "arguments made at trial and on appeal are distinct and involve differing strategies,"⁴³⁴ that appellate courts are "bound by the record and arguments made at the trial court level,"⁴³⁵ matters with which the attorney in the case under review was not involved,⁴³⁶ and that any "anonymous information"⁴³⁷ the attorney might have overheard while with the Public Defender's Office would be viewed by the court as "of little value in the appellate process."⁴³⁸

427. The court noted that if the case had turned on the factual disputes, it would have appointed a special master to make factual findings. *Id.*

428. *Id.* at 343.

429. *Colton*, 667 So. 2d at 343.

430. *Id.* at 342.

431. *Id.* at 342-43.

432. *Id.* at 343.

433. *Id.*

434. *Colton*, 667 So. 2d at 343.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

G. *Out-of-Time Rehearing*

In *Spaziano v. State*,⁴³⁹ a criminal defendant with a pending death warrant filed two out-of-time motions for rehearing. One motion was directed to the affirmance, thirteen years earlier on direct appeal, of the judgment and sentence of death and the other was directed to the affirmance, nine years earlier, of the denial of a motion for post-conviction relief.⁴⁴⁰

The court noted that the motions were “clearly not authorized.”⁴⁴¹ It went on, however, consistent with its “constitutional responsibility to refrain from dismissing a cause solely because an improper remedy has been sought,”⁴⁴² to consider the contents of the motions and a supporting affidavit “to determine whether they have any basis for relief under our jurisdiction.”⁴⁴³ Such consideration led to the conclusion that one issue raised by the defendant, relating to newly discovered evidence of the recantation of the testimony of a significant witness, was a proper subject for a successive motion for post-conviction relief under Rules 3.850 and 3.851 of the *Florida Rules of Criminal Procedure*.⁴⁴⁴ The supreme court therefore remanded the matter to the trial court for consideration of that issue.⁴⁴⁵

XXII. APPEALS IN TERMINATION OF PARENTAL RIGHTS CASES

A. *Final Orders*

The question of what constitutes a final order for purposes of appeal, when parental rights are terminated was dealt with by the fifth district in *Moore v. Department of Health and Rehabilitative Services*.⁴⁴⁶ Uncertainty existed on this point because the statutory scheme applicable to such cases contemplates the entry of two written orders.⁴⁴⁷ The first order, pursuant to section 39.467 of the *Florida Statutes*, is to be entered after the adjudicatory hearing and is to set forth “the findings of fact and conclusions of law.”⁴⁴⁸ The second, pursuant to section 39.469(3), is a subsequent order of disposi-

439. 660 So. 2d 1363 (Fla. 1995).

440. *Id.* at 1364.

441. *Id.* at 1365.

442. *Id.*

443. *Id.*

444. *Spaziano*, 660 So. 2d at 1365–66.

445. *Id.* at 1366.

446. 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995).

447. *Id.* at 1139.

448. FLA. STAT. § 39.467(5) (1995).

tion “briefly stating the facts upon which [the court’s] decision to terminate the parental rights is made.”⁴⁴⁹

The district court held that “it is the second or dispositional order which is the final order for purposes of appeal.”⁴⁵⁰ Although the notice of appeal in the case under review was directed to the initial adjudicatory order, the court reached the merits of the appellant’s claims, concluding that “a notice of appeal directed to an adjudicatory order should simply be treated as a premature notice which is held in abeyance until entry of the dispositional order.”⁴⁵¹

B. *Lack of Issue of Arguable Merit*

In *Ostrum v. Department of Health and Rehabilitative Services*,⁴⁵² an appeal was taken from a final order terminating parental rights. The appellant’s court-appointed counsel moved to withdraw and filed a brief pursuant to the dictates of *Anders v. California*.⁴⁵³

In *Anders*, the United States Supreme Court established the procedure to be employed by court-appointed counsel in criminal appeals when they find no issues of arguable merit. As capsulized in *Ostrum*, such attorneys are to file a brief “detailing the proceedings below with a discussion of where error might be suggested and why none actually appears.”⁴⁵⁴

The fourth district granted the motion to withdraw, but also took the opportunity to establish the proper procedure to be employed when court-appointed counsel finds no issues of arguable merit in appeals from orders terminating parental rights.⁴⁵⁵

The court concluded that “the full panoply of *Anders* procedures”⁴⁵⁶ do not apply in such situations. The court relied in part on the fact that the Sixth Amendment right to counsel does not apply to termination of parental rights cases because they are purely civil in nature,⁴⁵⁷ and the conclusion that

449. *Id.* § 39.469(3) (1995).

450. *Moore*, 664 So. 2d at 1139.

451. *Id.*

452. 663 So. 2d 1359 (Fla. 4th Dist. Ct. App. 1995).

453. 386 U.S. 738 (1967).

454. *Ostrum*, 663 So. 2d at 1361.

455. *Id.*

456. *Id.*

457. The court recognized that the right to counsel in termination of parental rights cases is compelled by both the *Florida Constitution* and the *United States Constitution*, albeit on a due process theory. See *In re D.B.*, 385 So. 2d 83, 90–91 (Fla. 1980).

“the interest of the children in quitting the uncertainties surrounding their future should be put to rest as soon as it can fairly be done.”⁴⁵⁸

“More importantly, however,”⁴⁵⁹ the court stated, “*Anders* represents a radical departure from the traditional role of appellate judges as neutral decision makers without bias or prejudice for or against any party,”⁴⁶⁰ turning the judges instead “into advocates for the party whose counsel seeks to withdraw.”⁴⁶¹

“Whatever may be the rationale for requiring that departure from neutrality in criminal cases,”⁴⁶² the court continued, “we are quite unwilling to allow it in purely civil matters. To do so is to favor one class of litigants over the other. That circumstance will understandably be seen by other parties as a classic denial of equal protection of the law.”⁴⁶³

Accordingly, the court concluded that in cases of this nature, counsel should simply move to withdraw.⁴⁶⁴ The court then set forth the procedure that it will follow with such motions. As in other civil appeals, the court will give the party a period of time within which to argue the case without an attorney.⁴⁶⁵ If the party fails to file a brief, the court will dismiss the appeal for failure to prosecute.⁴⁶⁶ If the party does file a brief and it fails to present a preliminary basis for reversal, the court will summarily affirm under Rule 9.315 of the *Florida Rules of Appellate Procedure*.⁴⁶⁷ If the brief does present a preliminary basis for reversal, the case will proceed as an ordinary appeal.⁴⁶⁸

In *Jiminez v. Department of Health and Rehabilitative Services*,⁴⁶⁹ the third district applied the *Ostrum* reasoning to similar facts, noting additionally one point not specifically addressed by, but presumably implicit in, *Ostrum*. The *Jiminez* court stated that in cases in which a party’s brief does show a preliminary basis for reversal, the “court will retain discretion to

458. *Ostrum*, 663 So. 2d at 1361.

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Ostrum*, 663 So. 2d at 1361.

464. *Id.*

465. *Id.*

466. *Id.*

467. *Id.*

468. *Ostrum*, 663 So. 2d at 1361.

469. 669 So. 2d 340 (Fla. 3d Dist. Ct. App. 1996).

deny the motion to withdraw and direct that appointed counsel proceed with the appeal."⁴⁷⁰

XXIII. APPEALS IN WORKERS' COMPENSATION CASES

In *Millinger v. Broward County Mental Health Division*,⁴⁷¹ the appellant's notice of appeal from an order denying a claim for compensation was mailed to the district court two days before the expiration of the thirty-day period for filing such notices,⁴⁷² but was not received until after that period had expired.⁴⁷³

The appellant filed a "Motion for Extension or in the Alternative Motion for Remand,"⁴⁷⁴ requesting that the appeal be accepted as timely or that the case be remanded to the judge of compensation claims ("JJC") to determine whether excusable neglect existed so as to allow the JJC to vacate and reenter the already final order.⁴⁷⁵ The motion was accompanied by an affidavit of appellant's counsel's secretary stating that she had called the clerk's office of the district court and was given erroneous information that the notice of appeal would be timely if it was postmarked within the thirty-day period.⁴⁷⁶ The district court denied the motion and dismissed the appeal.⁴⁷⁷

The appellant then filed with the JJC a motion for rehearing and motion to vacate based on the same grounds as the motion in the district court.⁴⁷⁸ At the hearing on the motion, appellant's counsel testified that he was aware of the fact that the notice had to actually be filed within thirty days,⁴⁷⁹ that he had instructed his staff on the point,⁴⁸⁰ and that his secretary had acted on her own in contacting the clerk's office.⁴⁸¹ The JJC vacated the original order and reentered an identical order to allow the appellant an opportunity to appeal.⁴⁸²

470. *Id.* at 342 (footnote omitted).

471. 672 So. 2d 24 (Fla. 1996).

472. FLA. R. WORK. COMP. P. 4.165(a).

473. *Millinger*, 672 So. 2d at 25.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.*

478. *Millinger*, 672 So. 2d at 25.

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.*

The appellant instituted a timely appeal from the second order and the appellee cross-appealed, challenging the vacation of the original order.⁴⁸³ The district court agreed with the appellee, holding that the JJC was without jurisdiction to vacate and reenter the judgment.⁴⁸⁴

The supreme court approved the district court's decision⁴⁸⁵ and found it to be inapplicable to the case relied upon by the appellant, *New Washington Heights Community Development Conference v. Department of Community Affairs*.⁴⁸⁶

In *New Washington Heights*, the appellant's counsel's secretary telephoned the clerk of an administrative agency and was erroneously told that the agency would consider an appeal from one of its orders to be filed as of the postmark date, if sent by certified mail.⁴⁸⁷ The third district dismissed the appeal, but did so "without prejudice to the appellant to apply to the Department to vacate and re-enter the operative order."⁴⁸⁸ The court stated that "[i]f the Department acts favorably upon such application, the appellant may timely appeal the re-entered order and thereby challenge the merits of the original adverse agency action."⁴⁸⁹ The court's decision was based on the principle that "where state action deprives a party of the ability to file a timely notice of appeal, the appellate court, although deprived of jurisdiction over the appeal, will provide the thus-rejected appellant with an alternative avenue of review."⁴⁹⁰

The supreme court found that the reasoning of *New Washington Heights* was "not dispositive"⁴⁹¹ in *Millinger* "for at least two reasons."⁴⁹² First, the court stated, the untimely notice in *Millinger* "was not the *direct* result of misrepresentations of a state official."⁴⁹³ Second, the court continued, not only was it "both inappropriate and unnecessary for counsel's secretary to call the court clerk for legal advice"⁴⁹⁴ in *Millinger* because "[i]t is a settled rule of law that mailing, as opposed to filing, a notice within the thirty-day

483. *Millinger*, 672 So. 2d at 25.

484. *Millinger v. Broward County Mental Health Div.*, 655 So. 2d 104 (Fla. 1st Dist. Ct. App. 1994).

485. *Millinger*, 672 So. 2d at 25.

486. 515 So. 2d 328 (Fla. 3d Dist. Ct. App. 1987).

487. *Id.* at 329.

488. *Id.* at 330.

489. *Id.*

490. *Id.* at 329-30.

491. *Millinger*, 672 So. 2d at 26.

492. *Id.*

493. *Id.*

494. *Id.*

filing period is insufficient to preserve appellate rights,”⁴⁹⁵ but the appellant’s “counsel admitted that he knew the notice had to be filed in the district court within the thirty-day filing period.”⁴⁹⁶ Under these facts, the court found that “[i]t was counsel’s responsibility to adequately supervise and instruct his staff to ensure”⁴⁹⁷ that the notice was timely filed. The court also “disapprove[d] *New Washington Heights* to the extent that it is inconsistent with our holding here.”⁴⁹⁸

The supreme court additionally rejected a claim that because a JJC “may . . . do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office,”⁴⁹⁹ the JJC had the “inherent authority to vacate and reenter his final order.”⁵⁰⁰ The appellant’s argument in this regard was based on the decision in *Morgan Yacht Corp. v. Edwards*,⁵⁰¹ which interpreted section 440.331(1) “as giving a JJC the authority to rescind his approval of a settlement upon discovering that the settlement was based on the claimant’s ‘flagrant fraud and misrepresentations.’”⁵⁰²

The supreme court distinguished *Morgan Yacht* on the basis that counsel in *Millinger* did not miss the deadline “due to fraud or deliberate deception,”⁵⁰³ but because he “failed to manage his office professionally.”⁵⁰⁴

XXIV. APPEALS IN JUVENILE CASES

A. Final Orders

In *A.N. v. State*,⁵⁰⁵ an appeal was taken by a juvenile from an adjudication of delinquency.⁵⁰⁶ The State moved to dismiss, asserting that the order of adjudication was a nonappealable, nonfinal order.⁵⁰⁷

495. *Id.* (citations omitted).

496. *Millinger*, 672 So. 2d at 26.

497. *Id.*

498. *Id.* at 27.

499. FLA. STAT. § 440.33(1) (1993).

500. *Millinger*, 672 So. 2d at 27.

501. 386 So. 2d 883 (Fla. 1st Dist. Ct. App. 1980).

502. *Millinger*, 672 So. 2d at 27 (quoting *Morgan Yacht*, 386 So. 2d at 884).

503. *Id.*

504. *Id.* (footnote omitted).

505. 666 So. 2d 928 (Fla. 3d Dist. Ct. App. 1995).

506. *Id.* at 929.

507. *Id.*

The third district pointed out that under the *Florida Constitution*, the right to appeal interlocutory orders exists only “to the extent provided by rules adopted by the supreme court”⁵⁰⁸ and that the supreme court has not adopted a rule that permits interlocutory appeals in juvenile delinquency cases.⁵⁰⁹ The court recognized the fact that the legislature “created the right to appeal a final order in a delinquency case by enacting paragraph 39.069(1)(a), Florida Statutes (1993).”⁵¹⁰ The court noted, however, that the statute “does not itself define what is a final order in a juvenile delinquency proceeding.”⁵¹¹

Agreeing with the first district’s decisions in *C.L.S. v. State*⁵¹² and *T.L.W. v. Soud*,⁵¹³ which found that the final order in a delinquency case is the order of disposition because that order marks the end of the judicial labor in the case,⁵¹⁴ the third district concluded that since no disposition order had been entered,⁵¹⁵ there existed no appealable order⁵¹⁶ and dismissal was appropriate.⁵¹⁷

B. Evidence Sufficient to Prove Only Lesser Included Offense

In *I.T. v. State*,⁵¹⁸ the second district found the evidence insufficient to support adjudications of delinquency based on the offense of grand theft auto.⁵¹⁹ The court concluded, however, that the evidence did support a finding of trespass in a conveyance.⁵²⁰

Citing to the supreme court’s decision in *Gould v. State*,⁵²¹ the second district recognized that when an appellate court finds the evidence insufficient in a criminal case to support the offense for which a defendant was convicted, but sufficient to prove a lesser included offense, the appellate

508. FLA. CONST., art. V, § 4(b)(1).

509. *A.N.*, 666 So. 2d at 930.

510. *Id.*

511. *Id.*

512. 586 So. 2d 1173 (Fla. 1st Dist. Ct. App. 1991).

513. 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994), *review dismissed*, 650 So. 2d 992 (Fla. 1995).

514. *A.N.*, 666 So. 2d at 930.

515. *Id.*

516. *Id.*

517. *Id.*

518. 657 So. 2d 1241 (Fla. 2d Dist. Ct. App. 1995).

519. FLA. STAT. § 812.014(2)(c) (1993).

520. *Id.* § 810.08(1) (1993).

521. 577 So. 2d 1302 (Fla. 1991).

court can order the trial court to enter a conviction for the lesser crime only when that crime is a necessarily lesser included offense.⁵²²

The court pointed out, however, that in *G.C. v. State*,⁵²³ the third district concluded that “an appellate court may affirm a juvenile adjudication on an alternative ground that is not a necessary lesser included offense,”⁵²⁴ and that the supreme court, in its review of the third district’s decision,⁵²⁵ “approved this procedure.”⁵²⁶

The court acknowledged that in *N.C. v. State*,⁵²⁷ the fourth district followed a different procedure, reversing an adjudication for grand theft auto and discharging the juvenile defendant based on *Gould*.⁵²⁸ Concluding, however, that *Gould* is limited to adult criminal cases,⁵²⁹ and that the supreme court did not intend in *Gould* to overrule *G.C.*,⁵³⁰ the court affirmed the adjudications in *I.T.* with directions to modify them to reflect trespass in a conveyance as their basis.⁵³¹ The court also certified conflict with *N.C.*⁵³²

C. Sentencing

In *J.M. v. State*,⁵³³ the third district concluded that a trial court’s departure from the recommendations set forth by HRS in a delinquency disposition proceeding is appealable.⁵³⁴ The court relied on section 39.052(3)(e)3 of the *Florida Statutes*, which states: “The court shall commit the child to the department at the restrictiveness level identified [by HRS] or may order placement at a different restrictiveness level. . . . Any party may appeal the court’s findings resulting in a modified level of restrictiveness pursuant to this subparagraph.”⁵³⁵

522. *I.T.*, 657 So. 2d at 1242.

523. 560 So. 2d 1186 (Fla. 3d Dist. Ct. App. 1990).

524. *I.T.*, 657 So. 2d at 1242.

525. *State v. G.C.*, 572 So. 2d 1380 (Fla. 1991).

526. *I.T.*, 657 So. 2d at 1242.

527. 581 So. 2d 647 (Fla. 4th Dist. Ct. App. 1991).

528. *I.T.*, 657 So. 2d at 1242.

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.*

533. 677 So. 2d 890 (Fla. 3d Dist. Ct. App. 1996).

534. *Id.* at 891.

535. FLA. STAT. § 39.052(3)(e)3 (1993).

Judge Cope dissented, believing that the court is not permitted to review a trial court's discretionary sentencing decision⁵³⁶ because of section 39.052(3)(k) of the *Florida Statutes*.⁵³⁷ That provision states:

It is the intent of the Legislature that the criteria set forth in paragraph (d) are general guidelines to be followed at the discretion of the court and not mandatory requirements of procedure. It is not the intent of the Legislature to provide for the appeal of the disposition made pursuant to this subsection.⁵³⁸

The majority, however, interpreted the second sentence of section 39.052(3)(k) to refer to the first sentence of the provision.⁵³⁹ "That is to say,"⁵⁴⁰ the court indicated, "we believe the legislature did not intend to create an appealable issue out of the fact that the trial court considered only certain of the criteria listed in paragraph (d) and not other listed criteria."⁵⁴¹

The majority also found what it considered to be "a second, more fundamental reason for why this statutory provision cannot be construed to preclude appellate review."⁵⁴² Noting that "[t]he commitment of a child to HRS is a deprivation of liberty which triggers significant due process protection,"⁵⁴³ the court stated that it "simply cannot agree with an interpretation of any statutory language which permits such a fundamental liberty interest to rest solely on the unbridled discretion of the trial judge."⁵⁴⁴

The court went on to note that in *A.S. v. State*,⁵⁴⁵ it had found that the trial court violated a juvenile's constitutional rights by imposing a harsher sentence than that recommended by HRS because the juvenile had exercised his constitutional right to assert his innocence, even after adjudication as a delinquent.⁵⁴⁶ The court stated that if there was no right for juveniles to appeal their dispositions, the juvenile in *A.S.* would have had to "serve a

536. Judge Cope indicated that the question was not whether there existed an appealable order, but whether the trial court's departure from the recommendation made by HRS was an appealable issue. *Id.* at 894-95 (Cope J., dissenting).

537. *Id.* at 896 (Cope, J., dissenting).

538. FLA. STAT. § 39.052(3)(k) (1993).

539. *J. M.*, 677 So. 2d at 891-92.

540. *Id.* at 892.

541. *Id.*

542. *Id.*

543. *Id.*

544. *J.M.*, 677 So. 2d at 892.

545. 667 So. 2d 994 (Fla. 3d Dist. Ct. App. 1996).

546. *J. M.*, 677 So. 2d at 892.

significantly enhanced sentence as a result of his exercise of a fundamental constitutional right.”⁵⁴⁷ The court indicated that in its view, such a result was “unfathomable.”⁵⁴⁸

D. *Juvenile Restitution*

In *State v. C.W.*,⁵⁴⁹ the fourth district dismissed an appeal by the state from a final order denying restitution in a juvenile proceeding.⁵⁵⁰ The court recognized that such orders can be appealed in criminal cases under section 924.07(1)(k) of the *Florida Statutes*,⁵⁵¹ but pointed out that there is no comparable provision in sections 39.069(1)(b) and 39.0711,⁵⁵² which list the types of orders from which the state may appeal in juvenile proceedings.

XXV. APPEALS IN BOND VALIDATION CASES

In *Rowe v. St. Johns County*,⁵⁵³ an appeal from a decision declaring a proposed bond issue valid,⁵⁵⁴ the named appellant filed a notice of appeal, but did not submit the initial brief.⁵⁵⁵ Rather, the appellants were “three citizens who did not intervene in the bond validation proceeding below.”⁵⁵⁶ The supreme court found that “as citizens and taxpayers”⁵⁵⁷ of the county that authorized the issuance of the bonds, the three appellants “were proper parties to that proceeding and thus may properly appear for the first time on appeal.”⁵⁵⁸

XXVI. A LOOK TO THE FUTURE

In the upcoming year, the supreme court, pursuant to Rule 2.130 of the *Florida Rules of Judicial Administration*, will adopt its four-year cycle amendments to the *Florida Rules of Appellate Procedure*. It is likely that

547. *Id.*

548. *Id.*

549. 662 So. 2d 768 (Fla. 4th Dist. Ct. App. 1995).

550. *Id.* at 769.

551. *Id.*

552. *Id.*

553. 668 So. 2d 196 (Fla. 1996).

554. *Id.* at 197.

555. *Id.*

556. *Id.*

557. *Id.* at 197–98.

558. *Rowe*, 668 So. 2d at 198.

these amendments will significantly impact the appellate process in Florida. Of course, the supreme court and the courts of appeal will also provide answers to many of the questions raised by the cases discussed in this article. The answers, as they usually do, will likely generate new questions. Those questions, and others, will continue to provide the large number of court decisions that shape the field of appellate practice.

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1. The reference to "community associations" means any mandatory membership corporation tied to the ownership of real property, which corporation has a right of lien for the collection of assessments. See FLA. STAT. § 468.431(1) (1995). The most common forms of community associations are condominium associations, cooperative associations, and homeowners' associations. This survey covers legislation and cases from July 1, 1995 to June 30, 1996.

I. LEGISLATION

A. *Condominiums and Cooperatives*

The first half of the 1990s might be described as the zenith of legislative micromanagement for Florida's condominium and cooperative communities. Various perceived abuses of power by boards of directors led to significant "reform" legislation in 1991,² the sweeping nature of which resulted in public outcry and a resultant deferral of implementation of that law until 1992.³ Since that time, most legislative efforts appear to have focused on removal of "glitches" created by the 1991-92 "reforms" to the law.

The year of 1996 saw little in terms of significant policy shifts in the condominium and cooperative statutes. Perhaps most indicative of the laissez-faire legislative philosophy of 1996 were the pre-filed bills that were not sent to the floor for vote. For example, legislation was introduced,⁴ and subsequently withdrawn, which would have overruled the 1995 amendment to the statutes⁵ which permitted the right to "opt out" of the statutory election procedures, including the ability of an association⁶ to use proxies in the election of directors.

The main operational change to the statutes involves whether meetings of "committees" are subject to the "sunshine" requirements of the statutes, which generally require posting of meeting notices, right of attendance by unit owners, and the right of unit owners to speak to designated agenda items.⁷ The 1992 amendments to chapters 718 and 719⁸ of the *Florida Statutes* defined a "committee" as "a group of board members, unit owners, or board members and unit owners appointed by the board or a member of the board to make recommendations to the board regarding the association budget or take action on behalf of the board."⁹

Notwithstanding the apparently clear intent of this language, the Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division")

2. See 1991 Fla. Laws ch. 91-103.

3. 1991 Fla. Laws ch. 91-426.

4. Representative Geller introduced the relevant bill. See Fla. HB 263 (1996).

5. 1995 Fla. Laws ch. 95-274 (codified at FLA. STAT. §§ 718.112(2)(d), 719.106(1)(d) (1995)).

6. All references in this article to a particular association will be referred to as "Association."

7. FLA. STAT. §§ 718.112(2)(c), 719.106(1)(c) (1995).

8. See 1991 Fla. Laws chs. 91-103, -426.

9. FLA. STAT. §§ 718.103(6), 719.103(5) (1995).

advanced a restrictive interpretation, basically finding that all “committees” are subject to the “sunshine” provision of the statutes.¹⁰ In response to this position, several different bills were drafted which were specifically intended to reverse the Division’s restrictive interpretation, and to promote a more liberal application of the statutes, i.e., that a “committee” was only subject to “sunshine” requirements if it could take *final* action on behalf of the board of administration, or alternatively, make recommendations to the board regarding the association budget.

The final language approved on the floors of both chambers of the legislature introduced an additional element of compromise. Specifically, although the more liberal provision was emplaced in the statute, the governing documents must permit closure of “committee” meetings. The operative language is found in sections 2¹¹ and 7¹² of chapter 96-396 of the *Laws of Florida*, which became law without the Governor’s approval on June 2, 1996.¹³ Section 2 provides:

Meetings of a committee to take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to the provisions of this paragraph. Meetings of a committee that does not take final action on behalf of the board or make recommendations to the board regarding the association budget are subject to the provisions of this section, unless those meetings are exempted from this section by the bylaws of the association.¹⁴

The other noteworthy operational change to the condominium and cooperative statutes addresses delivery of notice of the annual budget meeting of the association. Through apparent oversight in the legislative drafting process, both the condominium and cooperative statutes previously permitted notices of all types of meetings (except the budget meeting, the notice of which could only be served by United States mail) to be hand delivered, upon

10. See Memorandum of Division of Florida Land Sales, Condominiums and Mobile Homes Lead Attorney, Karl Scheuerman dated April 19, 1995, ref. Legal Case 94N-0144.

11. See ch. 96-396, § 2, 1996 Fla. Laws 2462, 2462 (amending FLA. STAT. § 718.112(2)(c) (1995)).

12. See *id.* § 7, 1996 Fla. Laws at 2465 (amending FLA. STAT. § 719.106(1)(c) (1995)). Section 7 of Chapter 96-396, amending the Cooperative Act, contains neutral language.

13. Chapter 96-396 may be cited as the “Isabelle Greenwald Memorial Condominium Act of 1996,” and honors the deceased condominium activist from the Sunrise Lakes condominium community in Broward County. See *id.* § 1, 1996 Fla. Laws at 2462.

14. *Id.* § 2, 1996 Fla. Laws at 2462 (amending FLA. STAT. § 718.112(2)(c)).

obtaining a written waiver of notice, or in some cases, evidenced by affidavit. Sections 2 and 7 of chapter 96-396 amended sections 718.112(2) and 719.106(1)(e) of the *Florida Statutes*, respectively, to remove this inconsistency.¹⁵

Under the new law, notice of budget meetings may be hand delivered to unit owners. Evidence of hand delivery is perfected through the execution of an affidavit of compliance, executed by an officer of the association, the manager, or other person who delivered the notice.¹⁶

The other notable aspect of the amendments regarding notice of the budget meeting was an amendment that made the Cooperative Act¹⁷ parallel to the Condominium Act.¹⁸ Although section 718.112(2)(c) was amended in 1984 to change the minimum period required to give notice of the budget meeting from thirty days to fourteen days, a parallel amendment was never adopted for the Cooperative Act. The 1996 amendment to section 719.106(1)(e) of the Cooperative Act now makes the two statutes contain the same procedural requirements.¹⁹

However, it must be noted that more restrictive provisions of the bylaws of the association (condominium or cooperative) will still control.²⁰ Therefore, it is especially important in pre-1984 condominiums, and all cooperatives, to examine the association's bylaws regarding notice requirements, since many such bylaws were written to incorporate then-existing provisions of the applicable statute.

In 1996, the Florida Legislature also attempted to refine the allocation of common expenses in "mixed-use condominiums." The concept of "mixed-use condominiums" was created in the 1995 legislative session through the enactment of section 718.404 of the Condominium Act.²¹ The apparent intent of the 1995 legislation was to prevent the owners of non-residential units in "mixed-use condominiums" from receiving preferential treatment in the declaration of condominium relative to voting rights and sharing in the common expenses of the association.

The 1995 version of the statute prohibited the owners of residential units from paying more than fifty percent of the common expenses when the non-

15. *See id.* §§ 2, 7, 1996 Fla. Laws at 2462, 2465 (amending FLA. STAT. §§ 718.112(2), 719.106(1)(e)).

16. *See id.* § 2, 1996 Fla. Laws at 2462 (amending FLA. STAT. § 718.112(2)(c)).

17. *See* FLA. STAT. §§ 719.101-.622 (1995).

18. *See id.*

19. Ch. 96-396, § 7, 1996 Fla. Laws at 2465 (amending FLA. STAT. § 719.106(e)).

20. *See id.*

21. *See* ch. 95-274, § 38, 1995 Fla. Laws 2462, 2531 (amending FLA. STAT. § 718.404).

residential units comprised less than fifty percent of all units.²² Read literally, the creation of a small percentage of “commercial” units, such as retail shops, would require those units to shoulder at least fifty percent of the common expense burden.

Sections 3²³ and 4²⁴ of chapter 96-396 provide that for “mixed-use condominiums” created on or after January 1, 1996,²⁵ the ownership share of common elements and the concomitant sharing of common expenses and common surplus must be based either “on the total square footage of each unit in uniform relationship to the total square footage of each other unit in the condominium or on an equal fractional basis.”²⁶ This change appears to be a common sense solution to the previous anomaly in the statutes.

The “Roth Act” section of the Condominium Act,²⁷ governing the conversion of existing improvements to condominium, was also amended by chapter 96-396 of the *Laws of Florida*. In 1995, section 718.616(4) was added to the Condominium Act to provide that when a conversion occurred in a municipality, the chief administrative official for the municipality was obligated to sign a letter verifying that the proposed condominium complied with the municipality’s code, zoning ordinances, and all other local legislation.²⁸ Due to the apparent recalcitrance of local officials to execute such letters, section 718.616(4) of the Condominium Act was relaxed by the 1996 legislation to provide that the municipality need only verify that it has been notified of the proposed conversion to condominium.²⁹

Section 719.1055 of the Cooperative Act was amended by the 1996 Legislature.³⁰ Subsection (3)(a) of that section now provides that the association may materially alter, convert, lease or modify common elements by a seventy-five percent vote unless otherwise provided in the cooperative documents.³¹ This language appears to only apply to mobile home cooperatives. In contrast to the Condominium Act,³² a cooperative association may also change

22. FLA. STAT. § 718.404(3) (1995).

23. See ch. 96-396, § 3, 1996 Fla. Laws 2462, 2464 (amending FLA. STAT. § 718.115(2)).

24. See *id.* § 4, 1996 Fla. Laws at 2464 (amending FLA. STAT. § 718.404(3)).

25. The January 1, 1996 “grandfathering” date is curious since the legislation took effect on June 2, 1996. See *id.* §§ 3–4, 1996 Fla. Laws at 2464 (amending §§ 718.115(2), .404(3)).

26. See *id.*

27. See FLA. STAT. §§ 718.604–.622 (1995).

28. See ch. 95-274, §40, 1995 Fla. Laws 2462, 2532.

29. *Id.*

30. See *id.* § 6, 1996 Fla. Laws at 2465 (amending FLA. STAT. § 719.1055(3)).

31. See *id.*

32. See FLA. STAT. § 718.110(4) (1995).

the configuration or size of a unit if the action is approved by seventy-five percent of the total voting interests of the cooperative.

B. Homeowners' Associations

A particular deed restriction (declaration of covenants and restrictions) for an influential subdivision in the Tampa area was set to expire by its own terms in 1996. Since the declaration contained no amendatory procedure, Florida common law would dictate that unanimous approval would be needed to extend the restrictions.³³

The residents in this community were able to influence the legislature to enact new legislation.³⁴ Section 617.306(1)(b) of Florida's "Homeowners' Association" statute now provides that "unless otherwise provided in the governing documents or by law," any "governing document" may be amended by the affirmative vote of two-thirds of the voting interests of the association.³⁵ The definition of "governing documents" includes the declaration of covenants, the articles of incorporation, and the bylaws of the association.³⁶

One exception is that amendments pursuant to this statute may not impair "vested rights" without unanimous approval of association members and lienors. The creation of a statutory concept of "vested rights" will certainly create fodder for future litigation, as that term has no apparent significance in Florida's community association common law. Perhaps the legislature would have been better advised to incorporate the concept of "appurtenances," as governed by section 718.110(4) of the Condominium Act, since at least one court has already applied that concept to homeowners' associations.³⁷ The amendments to section 617.306 became law without Governor Chiles' signature on June 1, 1996.³⁸

C. Not-For-Profit Corporations

In addition to the fairly significant amendment to section 617.306, discussed above, the 1996 Florida Legislature also enacted various "housekeeping" amendments to chapter 617, commonly cited as the "Florida

33. See, e.g., *Harwick v. Indian Creek Country Club*, 142 So. 2d 128, 129 (Fla. 3d Dist. Ct. App. 1962).

34. See ch. 96-343, § 4, 1996 Fla. Laws 1967, 1968 (amending FLA. STAT. § 617.306(1)).

35. See *id.* § 4, Fla. Laws at 1968 (creating FLA. STAT. § 617.306(1)(b)).

36. FLA. STAT. § 617.301(6) (1995).

37. See *Roth v. Springlake II Homeowners Ass'n*, 533 So. 2d 819 (Fla. 4th Dist. Ct. App. 1988).

38. See 1996 Fla. Laws ch. 96-343.

Not For Profit Corporation Act.”³⁹ Chapter 617 not only applies to most community associations (some pre-1977 condominium associations are unincorporated and mobile home park cooperatives are sometimes structured as for profit corporations), it also governs every not for profit corporation incorporated under the laws of Florida.

In 1996, the Florida Legislature also amended section 617.0505(1) to permit not for profit corporations to authorize distribution of corporate assets and income upon “partial liquidation” of the corporation, but only if provided in the articles of incorporation.⁴⁰

Chapter 96-212 of the *Laws of Florida* also amended certain provisions of chapter 617.⁴¹ These changes became law without Governor Chiles’ signature on May 25, 1996.⁴² Subsections (3) and (5) of section 617.0502 of the *Florida Statutes* were amended.⁴³ The amendments concern the procedures for a registered agent changing its address and authorizing an administrative fee in connection with notification of the same to the Department of State.⁴⁴

D. *Fair Housing Act—Housing for Older Persons*

The federal Fair Housing Amendments Act of 1988⁴⁵ prohibited, among other things, housing discrimination based on “familial status.” Familial status was defined by the federal legislation to mean having custody of minor children or being pregnant. This statute essentially outlawed “adults only” housing, which was prevalent in Florida’s development landscape. Florida followed suit through the enactment of chapter 760 of the *Florida Statutes*, entitled the “Fair Housing Act,” which largely mirrors the federal statute.⁴⁶

One exception to both the state and federal statutes was the so-called “55 and over” provision. This exemption allowed housing providers, including community associations, to prohibit occupancy by families with children if the housing facility met all three of the following tests:

- (i) at least eighty percent of the dwelling units were occupied by at least one person age fifty-five or older; and

39. FLA. STAT. §§ 617.01011–.312 (1995).

40. See ch. 96-343, § 2, 1996 Fla. Laws 1967, 1967 (amending FLA. STAT. § 617.0505(1)).

41. See ch. 96-212, § 8, 1996 Fla. Laws 791, 795 (amending FLA. STAT. § 617.0502).

42. See *id.* at 572.

43. *Id.*

44. *Id.*

45. 42 U.S.C. §§ 3601–3619 (1994).

46. See FLA. STAT. §§ 760.20–.37 (1995).

- (ii) the housing provider promulgated policies and procedures demonstrating an intent to provide housing for older persons; and
- (iii) the housing provider provided “significant facilities and services” specifically designed to meet the physical or social needs of older persons, or demonstrated that providing such facilities and services was not practicable.⁴⁷

Many of Florida’s “adults only” complexes met the eighty percent threshold. Most community associations initiated “policies and procedures” through amendment of restrictions such as declaration of condominium, cooperative owners’ agreements, and declarations of covenants.

The most problematic aspect of compliance was the proof of “significant facilities and services.” The United States Department of Housing and Urban Development promulgated several sets of proposed and/or enacted administrative regulations which were intended to flesh out this concept.

Ultimately, all of the proposed and/or enacted regulations proved unsatisfactory to “seniors” communities. The federal resolution was the adoption of the “Housing for Older Persons Act of 1995,”⁴⁸ which became law on December 18, 1995. This law deleted the “significant facilities and services” requirement as a prerequisite to compliance with the “55 and over” exemption.⁴⁹

However, the federal law provided no relief to Florida communities, since chapter 760 of the *Florida Statutes* and various county or municipal ordinances still outlawed “adults only” housing. In fact, some county ordinances⁵⁰ did not even contemplate the availability of the “55 and over” exemption, even if “significant facilities and services” were provided.⁵¹ Section 760.29(4)(b)3a of the *Florida Statutes* retained the “significant facilities and services” requirements.⁵²

In order to place state and local law on par with the federal statute, the 1996 Legislature adopted chapter 96-191 of the *Laws of Florida*, signed into law by Governor Chiles on May 21, 1996. Essentially, the language of the state statute provides that a community association (or other housing provider) can provide “housing for older persons” if it complies with the federal stan-

47. See *id.* § 760.29(4)(b)3.

48. Housing for Older Persons Act of 1995, Pub. L. No. 104-76, 109 Stat. 787 (codified at 42 U.S.C. § 3607(b)(2)(c)(1994)).

49. See *id.*

50. See, e.g., Broward County Human Rights Ordinance.

51. See FLA. STAT. § 760.29(4)(b)3a.

52. See *id.*

dards.⁵³ Additionally, the statute prohibits counties or municipalities from contravening the state statute⁵⁴ and also mirrors the federal statute by insulating individuals from monetary liability if they reasonably relied in good faith on the application of the exemption.⁵⁵

E. *Regulatory Council of Community Association Managers*

In 1987, section 468.432 of the *Florida Statutes* was created to regulate the licensure, education, and discipline of community association managers.⁵⁶ These functions were delegated by this statute to the Division of Florida Land Sales, Condominiums, and Mobile Homes ("Division").⁵⁷

Through the late 1980s and early 1990s, community association managers ("CAMs") grew increasingly disenchanted with the Division's oversight. The Division was apparently equally disenchanted with its charge, resulting in a call by the Division Director to abolish CAM regulation in 1994.

The result was the formation of a grass roots organization known as the Coalition of CAM Organizations ("COCO"), which consisted of delegates from nearly every community association trade organization in Florida. In the face of overwhelming odds, when "rightsizing" (cutting) government was the order of the day in Tallahassee, COCO was successful in obtaining the enactment of chapter 96-291 of the *Laws of Florida*, which became law without Governor Chiles' signature on May 30, 1996.⁵⁸

Chapter 96-291 creates the "Regulatory Council of Community Association Managers."⁵⁹ The Council displaces the Division as the body with oversight responsibility for the licensure and education of CAMs.⁶⁰ Discipline of CAMs was transferred to the Division of Professions.⁶¹

The Council is to consist of seven members, all appointed by the Governor.⁶² Five members must be licensed CAMs, one of whom must be affiliated

53. See ch. 96-191, § 1, 1996 Fla. Laws 508, 509 (amending FLA. STAT. § 760.29(4)).

54. See *id.* § 1, 1996 Fla. Laws at 509 (amending FLA. STAT. § 760.29(4)).

55. See *id.* § 1, 1996 Fla. Laws at 510 (amending FLA. STAT. § 760.29(4)(d)).

56. 1987 Fla. Laws ch. 87-343 (codified at FLA. STAT. § 468.432).

57. See *id.* § 4, Fla. Laws at 2180.

58. See ch. 96-291, § 12, 1996 Fla. Laws 1257.

59. See *id.* § 3, 1996 Fla. Laws 1253 (renumbering and amending FLA. STAT. § 468.434 as § 468.4315).

60. See *id.* § 12, 1996 Fla. Laws 1257.

61. *Id.*

62. See *id.* § 3, 1996 Fla. Laws 1253 (renumbering and amending FLA. STAT. § 468.434 as § 468.4315).

with the timeshare industry.⁶³ Members are appointed for a term of four years.⁶⁴

F. Insurance

The "insurance crisis" in Florida, which was caused in large part by Hurricane Andrew, has hit community associations particularly hard. For those lucky enough to find good coverage with a reputable carrier, rates have skyrocketed while deductibles have been raised substantially.

After considering the positions of both insureds and insurers, the legislature adopted the "Hurricane Insurance Affordability and Availability Act," which was signed into law by the Governor on May 21, 1996.⁶⁵

Of most importance to community associations is the extension of the policy cancellation moratorium for three additional years, for the period of June 1, 1996 to May 30, 1999. The extension includes condominium associations. Insurers can cancel up to ten percent of their policies in each county and up to five percent statewide each year.

G. Telecommunications Act of 1996

The effect of this federal legislation,⁶⁶ signed into law by President Clinton on February 8, 1996, may be that "[t]he right to channel surf could surpass a community's right to preserve aesthetics"⁶⁷ Section 207 of the Telecommunications Act of 1996 provides:

Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming service through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.⁶⁸

On August 6, 1996, the Federal Communications Commission ("FCC") released a proposed rule which prohibits community associations from enforcing restrictions which unreasonably restrict or impair an owner's right to

63. *See id.*

64. *Id.*

65. Ch. 96-194, § 1, 1996 Fla. Laws 574, 574.

66. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

67. P. Michael Nagle, *Channel Surfing*, COMMON GROUND, May-June 1996, at 31.

68. Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 56.

install satellite dishes of one meter or less.⁶⁹ This rule still permits some reasonable restrictions, such as location designation, or a requirement for screening, as long as signal quality is not impaired, or costs unreasonably increased. This rule only applies to situations where the owner actually owns the area where the satellite dish will be installed, such as single family subdivisions. Rules for commonly maintained property, such as condominium buildings, still have not been promulgated.

II. CASE LAW

A. *Condominiums*

The bulk of condominium case law from July 1, 1995, to June 30, 1996, the period which is the subject of this survey, involves collection of assessments. Since this period is not considered to be one of economic downturn, it may be that one goal of the mandatory non-binding arbitration program, reduction of judicial adjudication of condominium disputes,⁷⁰ is being met.

*Scudder v. Greenbrier C Condominium Ass'n*⁷¹ involved the propriety of transportation expenses as a common expense. In *Rothenberg v. Plymouth #5 Condominium Ass'n*,⁷² the Fourth District Court of Appeal held that bus service was not a proper common expense for a condominium association. In 1988, section 718.115(1) was amended by chapter 88-148 of the *Laws of Florida* to provide that common expenses could include reasonable transportation services if the services had been provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or if provision was made in the "condominium documents" (a term not defined in the statute) or bylaws.⁷³

The unit owner/complainants in *Scudder* challenged the propriety of the association's provision of bus service, advancing several points in court. The Fourth District Court of Appeal, rendering its second decision in this litigation,⁷⁴ issued a nine-page opinion.

69. 61 Fed. Reg. 46,557, 561 (1996) (adding 47 C.F.R. § 1.4000).

70. See FLA. STAT. § 718.1255(3)(b) (1995).

71. 663 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1995).

72. 511 So. 2d 651 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1277 (Fla. 1987).

73. See 1988 Fla. Laws ch. 88-148.

74. See also *Scudder v. Greenbrier C Condominium Ass'n*, 566 So. 2d 359 (Fla. 4th Dist. Ct. App. 1990).

The first issue confronted by the court was the relevance of whether the Association was the provider of the transportation services.⁷⁵ The appellate court recited the trial court's findings of fact and intimated that the transportation services were provided through various umbrella organizations within the Century Village Community.⁷⁶ The fourth district held that a "condominium association" must have been the provider of services to be validly charged to unit owners.⁷⁷ Although the appellate court found the evidence at trial to be contradictory, it upheld the trial court's factual finding that the "Association" provided the transportation services.⁷⁸

The next issue adjudicated on this appeal was whether, prior to 1988, the transportation system had actually incurred the costs to be assessed as a common expense. Upon close reading of the 1988 amendment to section 718.115 of the Condominium Act, the fourth district concluded that the transportation services, if *continuously* provided since transition of control, did not have to be assessed as a common expense during the same time.⁷⁹

The fourth district also refused to find the 1988 amendment to be unconstitutionally vague. Interpreting the "ordinary meaning" of the words used in the statute, the court found that people of common understanding and average intelligence had fair warning that transportation expenses could be assessed as a common expense so long as the association was continuously providing such services since transition of control.⁸⁰

In a victory for the unit owners, the court held that the Association's "one-rider rule" unlawfully discriminated against multiple-resident units.⁸¹ The court also found that the "second rider surcharge" violated section 718.115(2) of the Condominium Act, which provides that unit owners share common expenses in the same proportion as their ownership share of the common elements.⁸² The court also found the "one-rider rule" was unreasonable.⁸³

Finally, the court found the Association to be the "prevailing party," which entitled it to an award of its costs and attorney's fees, even though the

75. *Scudder*, 663 So. 2d at 1365.

76. *Id.*

77. *Id.* at 1366.

78. *Id.*

79. *Id.* at 1367.

80. *Scudder*, 663 So. 2d at 1368.

81. *Id.* at 1369.

82. *Id.*

83. *Id.* at 1368-69.

association did not prevail on the “one-rider rule” issue.⁸⁴ The fourth district ultimately remanded the case to the trial court for re-evaluation of the attorney’s fees issue in light of its opinion.⁸⁵

This decision is thorough and well reasoned. The fourth district gave due deference to the intent of the 1988 Legislature, which overruled *Rothenberg*. Associations wishing to provide off-site transportation services are well advised to carefully review this decision. Although the outcome was ultimately favorable to the Association, the “continuity” of the provision of services appears to have been the dispositive factor. Associations which cannot show this continuity are best advised to amend the condominium documents to legitimize the provision of off-site transportation services.

*Griffin v. Berkley South Condominium Ass’n*⁸⁶ was another assessment case involving the definition of “prevailing party.” The Association filed a lien foreclosure action against Griffin. After realizing that it had been improperly charging late fees due to lack of documentary authority,⁸⁷ and had also improperly sought electricity charges, the Association voluntarily dismissed its lien foreclosure action.

Griffin moved for an award of attorneys’ fees pursuant to section 718.303 of the *Florida Statutes*.⁸⁸ On the authority of *Stuart Plaza, Ltd. v. Atlantic Coast Development Corp. of Martin County*,⁸⁹ the fourth district found the unit owner to be the prevailing party, and thus entitled to an award of his attorney’s fees.

One interesting aspect of this case is the incorporation of section 718.303 of the Condominium Act. Although this is the general “prevailing party fees clause” of the statute, it is unclear why the provisions of section 718.116, which govern the foreclosure of liens, was not cited as the operative statutory provision. Section 718.303 only deals with actions for “injunctions” and “money damages,” neither of which directly pertains to an action to foreclose a claim of lien. The lesson to be learned by associations is that once legal process is initiated to collect assessments, the association cannot “bail out” of the case, even if brought in error, without exposure to an award of the unit owner’s fees.

84. *Id.* at 1369.

85. *Scudder*, 663 So. 2d at 1370.

86. 661 So. 2d 135 (Fla. 4th Dist. Ct. App. 1995).

87. *See* FLA. STAT. § 718.116(3) (1995).

88. *See id.* §718.303(1) (1993).

89. 493 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1986).

Maya Marca Condominium Apartments, Inc. v. O'Rourke,⁹⁰ involves the use of deficiency judgments in condominium assessment collection. In a common scenario, the Association obtained a foreclosure judgment against the unit owner in the amount of \$13,748.00. The Association was the highest bidder at the foreclosure sale.

Subsequently, the unit owner's mortgagee foreclosed the Association's interest in the property. The Association ended up with nothing. The Association then moved for the entry of a personal judgment against the unit owner, which the trial court refused to grant. The Association appealed.

The Fourth District Court of Appeal reversed the trial court and held that the Association was entitled to entry of a money judgment.⁹¹ The Association argued that the trial court abused its discretion in refusing to grant a deficiency judgment.

Perhaps giving the Association more than it asked for, the appellate court held that the common law of deficiency judgments has no application in the condominium foreclosure setting.⁹² Rather, the court reasoned, section 718.116(1) of the Condominium Act provides that a unit owner is personally liable for all assessments that came due while he is the owner of a unit.⁹³

This case should provide a significant advantage to associations confronted with the foreclosure of superior mortgage liens. Rather than facing the sometimes excruciating choice of electing remedies, or the vagaries of trial courts in granting deficiency judgments, it appears that the association "can have its cake and eat it too." Association collection practitioners should consider the application of this case when advising clients of the benefits of foreclosure versus money judgments.

In *Oakland East Manors Condominium Ass'n v. La Roza*,⁹⁴ the facts of the assessment dispute are not set forth in the court's opinion in adequate detail to facilitate a complete understanding of the court's disposition of the legal issues. Apparently, the Association obtained a judgment for unpaid assessments against the unit owner. The unit owner subsequently paid the docketed judgment amount.

The Fourth District Court of Appeal upheld the trial court's denial of the Association's claim of foreclosure.⁹⁵ It is unclear, procedurally, why the

90. 669 So. 2d 1089 (Fla. 4th Dist. Ct. App. 1996).

91. *Id.*

92. *Id.*

93. *Id.*

94. 669 So. 2d 1138 (Fla. 4th Dist. Ct. App. 1996).

95. *Id.* at 1139.

judgment of foreclosure was not entered in conjunction with liquidation of the amounts owed. In any event, citing the “acceptance of benefits doctrine,” the appellate court held that the Association could not accept the benefits of the judgment, and then seek to have it reversed on appeal.⁹⁶

The appellate court did, however, reverse the trial court on the issues of prejudgment interest and attorneys’ fees.⁹⁷ The Association’s bylaws provided for interest of “the highest rate of interest . . . permissible under the usury laws of the State of Florida.”⁹⁸ Since Florida’s usury statute⁹⁹ permits interest at eighteen percent per annum, the appellate court held that the trial judge had no discretion in the award of interest.¹⁰⁰ The court also held that the trial court erred in not awarding the Association’s attorney’s fees, in light of the language permitting recovery of the same in the Association’s bylaws.¹⁰¹ Interestingly, the court also cited section 718.303 of the Condominium Act, without embellishment.¹⁰²

The final “assessment” case involves the law of “phantom units.” *Winkelman v. Toll*¹⁰³ is a complex appellate decision founded upon a quiet title action. The issue was whether certain “declared” but “unbuilt” condominium “units” were subjected to the terms of a declaration of condominium by virtue of certain “phase amendments.”¹⁰⁴ The trial court held that they were not. The Fourth District Court of Appeal reversed.¹⁰⁵

In 1980, the declaration of condominium for Mission Lakes Condominium was recorded in the Broward County Public Records. The declaration contained provisions for adding phases which provided that the developer could add phases by amending the declaration. The same language also obligated the developer to attach surveyors’ certificates of completion¹⁰⁶ to the amendments adding the phases. Certain “phases” were “submitted” to the terms of the declaration, although no construction was undertaken, and no surveyor’s certificates were ever filed.

96. *See id.* (citing *Dance v. Tatum*, 629 So. 2d 127, 129 (Fla. 1993)).

97. *Id.*

98. *Id.* at 1139–40.

99. *See* FLA. STAT. § 687.02 (1993).

100. *Oakland East*, 669 So. 2d at 1140.

101. *Id.*

102. *See* discussion *supra* p. 81 (discussing *Griffin v. Berkeley South Condominium Ass’n*, 661 So. 2d 135 (Fla. 4th Dist. Ct. App. 1995), and its relation to the application of section 718.303 of the *Florida Statutes* to lien foreclosure actions).

103. 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).

104. *Id.*

105. *Id.* at 107.

106. *See* FLA. STAT. § 718.104(4)(e) (1979).

Relying on the operative version of the Condominium Act in effect when the condominium was created, the court held that failure to record a surveyor's certificate of completion does not nullify the effect of an amendment adding the phases and the "units" therein to the term of the declaration.¹⁰⁷ The court relied upon an amicus brief filed by the Division of Florida Land Sales, Condominiums, and Mobile Homes as justification for its interpretation of the 1979 version of the Condominium Act.¹⁰⁸ The court also found that 1984 amendments to section 718.403(1) of the Condominium Act clarified the legislature's intent.¹⁰⁹

Predictably, the party seeking avoidance of submission to the declaration cited the fourth district's decision in *Welleby Condominium Ass'n v. William Lyon Co.*¹¹⁰ In its only footnote, the court carefully distinguished *Welleby* and it appears to have specifically limited that case in the fourth district to the peculiar language in the *Welleby* declaration of condominium.¹¹¹

Winkelman appears to signal the fourth district's inclination to follow the lead of the second district in finding that "phantom units" are generally created upon the filing of the declaration or phase amendment, regardless of whether actually constructed.

In addition to the five condominium "assessment" cases discussed above, 1995-96 saw a couple of other "association versus unit owner" cases litigated in the appellate courts. These cases involve behavior oriented disputes. An example of the bizarre extremes of the condominium experience is seen in, *Kittel-Glass v. Oceans Four Condominium Ass'n*,¹¹² which involved a unit owner accused of seventy-nine violations of the condominium documents, including indecent exposure, reckless display of a firearm, public intoxication, and assault and battery.

Pursuant to section 718.303(3) of the Condominium Act, the unit owner was fined \$50.00 for each of seventy-nine alleged violations. However, the

107. *Winkelman*, 661 So. 2d at 105.

108. *Id.* at 106.

109. *Id.*

110. 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987), *review denied*, 531 So. 2d 169 (Fla. 1988).

111. *Winkelman*, 661 So. 2d at 107 n.1. *Welleby* is considered by many commentators to be in conflict with the decisions of the Second District Court of Appeal in *Hyde Park Condominium Ass'n v. Estero Island Realty*, 486 So. 2d 1 (Fla. 2d Dist. Ct. App. 1986) and *Estencia Condominium Ass'n v. Sunfield Homes, Inc.*, 619 So. 2d 1008 (Fla. 2d Dist. Ct. App. 1993). It should also be noted that *Welleby* was legislatively overruled by 1990 amendments to section 718.104(2) of the *Florida Statutes*.

112. 648 So. 2d 827 (Fla. 5th Dist. Ct. App. 1995).

notice of the fining hearing issued by the Association listed only fourteen incidents. The trial court upheld the fines as levied by the Association and also entered an injunction, punishable by contempt, barring the unit owner from the condominium.¹¹³

On appeal, the fifth district reduced the fine to the fourteen specified violations.¹¹⁴ More importantly, the court held that the injunction amounted to a judicially forced sale of the condominium unit, in violation of the owner's right to just compensation for the taking of her property.¹¹⁵ The appellate court reasoned that the trial court could enjoin the violations, and punish noncompliance through fines or incarceration.¹¹⁶

This decision, while based on sound legal reasoning, is detrimental to the rights of unit owners to live peaceably in their community, free from threats of irrational persons. While the law cannot cure all societal ills, it is submitted that this case justifies the view that some statutory provision for "forced buy-out" (at fair market value) should be available to associations in controlling the composition of their community.

*Woodlake Redevelopment Corp. v. Woodlake Condominium Ass'n of Marco Shores*¹¹⁷ also involves internal "disputes" and the use of that term of art regarding the necessity of the use of mandatory, nonbinding arbitration.¹¹⁸ A group of unit owners sued the Association and its individual directors, alleging five counts. The trial court dismissed all five counts, finding that the subject matter of all counts were arbitrable "disputes," as defined in the statute.¹¹⁹ The unit owners appealed. The Second District Court of Appeal reversed the trial court.¹²⁰

The reported decision does not detail the basis of Counts I, II, or III.¹²¹ Apparently, they pertain to disagreements involving maintenance of the common elements. Count IV was an action for breach of fiduciary duty against the individual directors.¹²² Count V was an action for an accounting against the condominium association.¹²³

113. *Id.* at 828.

114. *Id.* at 829.

115. *Id.*

116. *Id.*

117. 671 So. 2d 253 (Fla. 2d Dist. Ct. App. 1996).

118. See FLA. STAT. § 718.1255.

119. *Woodlake*, 671 So. 2d 254.

120. *Id.* at 255.

121. *Id.*

122. *Id.* at 254.

123. *Id.*

The court concluded that two counts of the complaint (breach of fiduciary duty against the directors and the accounting action against the association) are subject to arbitration, while three counts (those involving disagreement over maintenance of the common elements) were not subject to arbitration.¹²⁴

Finding that the Association arbitration rules provided no guidance, the court turned to the *Florida Arbitration Code*¹²⁵ and held that Counts IV and V should be stayed in the main action, while Counts I, II, and III should proceed in the trial court.¹²⁶

Clearly, the court correctly found that Counts I, II, and III, to the extent they involve disagreement over maintenance of common elements by the Association, are not “disputes” as defined in Section 718.1255(1)(a)2 of the *Florida Statutes*, unless the “dispute” involved the authority of the board to alter or add to the common elements.¹²⁷ However, without discussion, the court found Counts IV (breach of fiduciary duty) and V (accounting) to be “arbitrable” disputes.¹²⁸ Unfortunately, there is no support in the statute for the court’s conclusion.

Section 718.1255(1)(b) deals with those alleged actions of the association which are arbitrable “disputes.”¹²⁹ The same includes the failure to: 1) properly conduct elections; 2) give adequate notice of meetings or other actions; 3) properly conduct meetings; or 4) allow inspection of books and records.¹³⁰

An action against individual directors (not the association) for breach of fiduciary duty and an action for an accounting against the association do not fall within any of these categories. The court’s invocation of the *Arbitration Code* is also disturbing. Arbitration is typically the result of contractual selection of that forum for dispute resolution. In the condominium context, the statutorily mandated arbitration is “nonbinding,” in apparent recognition of the parties’ constitutional right of access to the courts. Limitation on those rights should be applied sparingly. This decision is not predicated on a reasoned analysis of the intention of the Condominium Act regarding the use of alternative dispute resolution.

124. *Woodlake*, 671 So. 2d at 55.

125. FLA. STAT. § 682.03(3) (1995).

126. *Woodlake*, 671 So. 2d at 255.

127. *Id.* at 254.

128. *Id.* at 255.

129. *See* FLA. STAT. § 718.1255(2)(b).

130. *Id.*

The final series of condominium cases involve unit owner and/or association disputes with third parties, including developers, recreational facilities lessors, and an insurance company. *Island Breakers—a Condominium, Inc. v. Highlands Underwriters Insurance Co.*¹³¹ reversed a summary judgment entered in favor of the insurance company. At issue was whether a commercial “all risk” insurance policy provided coverage for building “collapse” caused by “hidden decay.”¹³² In its per curiam opinion, the Third District Court of Appeal found that issues such as the nature, extent, and cause of damage to the condominium building’s balconies, as well as when the problems were discovered by the association, could only be resolved by the trier of fact, not at summary judgment.¹³³

Judge Cope, in his concurring opinion, fleshes out the nature of the dispute in more detail, including the relevant policy language and the nature of the problem at the condominium (the common scenario of cracked concrete, and rusting of steel reinforcing bars).¹³⁴ To Judge Cope, the issue was whether there was a “collapse,” which does not require the balcony to fall off the building.¹³⁵ Judge Cope also discussed the issue of “hidden decay” and whether the existence of the balcony cracks placed the association on notice of the decay.¹³⁶

This case does not plow new legal ground with respect to the propriety of summary judgment in resolving factual disputes. However, the case does send community association practitioners an important message in advising their clients regarding the often-encountered “spalling” cases. Simply stated, counsel should advise their client to review current and historical insurance policies to ascertain whether there is “collapse” coverage. These cases usually involve substantial sums of money, which may justify the extra effort in ascertaining the existence of potential insurance coverage.

Another association “pleading” case, this one involving a motion to dismiss, is *Moorings at Aberdeen Homeowners’ Ass’n v. UDC Homes, Inc.*¹³⁷ Various entities served as the developer of a planned development known as Aberdeen.¹³⁸ The developers created a master association.¹³⁹ Count IV of the

131. 665 So. 2d 1084 (Fla. 3d Dist. Ct. App. 1995).

132. *Id.*

133. *Id.* at 1085.

134. *Id.* (Cope, J., concurring).

135. *Id.*

136. *Island Breakers*, 665 So. 2d at 1086.

137. 673 So. 2d 981 (Fla. 4th Dist. Ct. App. 1996).

138. *Id.* at 982.

139. *Id.*

complaint alleged that UDC Homes, through control of its subsidiary, caused master association expenses to be improperly shifted to plaintiffs (three homeowners' associations and one condominium association, all "sub-associations" under the Aberdeen master declaration).¹⁴⁰

The trial court dismissed the claim against UDC Homes as insufficient to "pierce the corporate veil."¹⁴¹ Applying *Steinhardt v. Banks*,¹⁴² the fourth district held that the subassociations' allegations that UDC Homes (the subsidiary) was a "mere device to engage in improper conduct of managing Sunbelt and the Master Association [Aberdeen POA] in a manner contrary to the Declaration in order to obtain a financial benefit for Sunbelt and UDC Homes" were sufficient to survive a motion to dismiss.¹⁴³

Although this case is not remarkable from a common law pleading standpoint, it serves as a reminder to association practitioners and developer counsel that "corporate shell games" in the development of real estate projects are subject to attack if corporate formalities are not adhered to.

Brickell Biscayne Corp. v. WPL Associates,¹⁴⁴ involves common law indemnity and equitable subrogation in the condominium setting. As part of its settlement with a condominium association which had sued for construction defects, Brickell Biscayne Corporation (the condominium's developer) obtained an assignment of all of the Association's rights.¹⁴⁵

The developer subsequently sued several parties, some of which were not parties to the original action.¹⁴⁶ Having reached a fifth amended complaint, the trial court dismissed the developer's action for common law indemnity and subrogation, which was filed against subconsultants which were not parties to the original action.¹⁴⁷ In affirming the dismissal of common law indemnity claims, the appellate court reasoned that since the association had not sued the subconsultants, and since the developer had no relationship with the subconsultants, the developer had no indemnity rights.¹⁴⁸ Additionally, since the association assigned only rights arising out of the main action, there were no rights to assign regarding parties who were not subject to that action.¹⁴⁹

140. *Id.*

141. *Id.*

142. 511 So. 2d 336 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1273 (Fla. 1987).

143. *Moorings*, 673 So. 2d at 983.

144. 671 So. 2d 247 (Fla. 3d Dist. Ct. App. 1996).

145. *Id.* at 248.

146. *Id.*

147. *Id.* at 249.

148. *Id.*

149. *Brickell*, 671 So. 2d at 249.

The third district likewise affirmed dismissal of the developer's claim for equitable subrogation.¹⁵⁰ Since the subconsultants were not parties to the main action, the court ruled that the policy of equitable subrogation, to avoid unjust enrichment of the party at fault, would not apply.¹⁵¹ The court distinguished *Kala Investments v. Sklar*,¹⁵² where the party against whom equitable subrogation was sought was a co-defendant in the main action.¹⁵³

For practitioners of complex construction litigation, the lesson from this case appears to be that the right of recovery from a third party under indemnity or subrogation theories is dependent upon that party's privity of contract with the indemnitee and/or the party being named in the main action.

*Gomez-Ortega v. Dorten, Inc.*¹⁵⁴ involved a class action suit brought by, and on behalf of, "secondary purchasers" of condominium units subject to a recreation lease which contained an escalation clause. The validity of the recreation lease had been resolved in favor of the lessors in previous litigation.¹⁵⁵

The plaintiffs in this case argued that the lease was not enforceable against them since they were not parties to it.¹⁵⁶ The case was dismissed on the basis of *res judicata*.¹⁵⁷ In affirming the trial court's dismissal, the Third District Court of Appeal reasoned that the "secondary purchasers" were in privity with the condominium Association, which had previously (and unsuccessfully) challenged the escalation clause in the lease.¹⁵⁸ The court found that the privity between the "secondary purchasers" and the Association invoked the requisite identity of parties to permit application of the doctrine of *res judicata*.¹⁵⁹ Furthermore, the court found the requisite identity of issues, since there were also "secondary purchasers" when the Association brought the previous action, and that such claims could have been properly raised in the previous action, although they were not.¹⁶⁰

To the extent the doctrine of *res judicata* is designed to avoid multiplicity of actions by the same parties involving the same matter, the court's decision is

150. *Id.*

151. *Id.*

152. 538 So. 2d 909 (Fla. 3d Dist. Ct. App.), *review denied*, 551 So. 2d 460 (Fla. 1989).

153. *Brickell*, 671 So. 2d at 249.

154. 670 So. 2d 1107 (Fla. 3d Dist. Ct. App. 1996).

155. *Maison Grande Condominium Ass'n v. Dorten, Inc.*, 600 So. 2d 463 (Fla. 1992).

156. *Gomez-Ortega*, 670 So. 2d at 1108.

157. *Id.*

158. *Id.* at 1108-09.

159. *Id.* at 1109.

160. *Id.*

demonstrative of sound judicial policy. This is especially true since the “secondary purchasers” could have (or should have) discovered the existence of the lease, its escalation clause, and previous appellate decisions with respect thereto.

B. Cooperatives

In *Moonlit Waters Apartments, Inc. v. Cauley*,¹⁶¹ the Supreme Court of Florida answered the following question certified from the Fourth District Court of Appeal¹⁶² as one of great public importance:

WHETHER SECTION 719.401(1)(f)1 APPLIES TO AN EXISTING LONG TERM GROUND LEASE ENTERED INTO AT ARM'S LENGTH UPON WHICH ALL IMPROVEMENTS OF A COOPERATIVE APARTMENT COMPLEX HAVE BEEN CONSTRUCTED.¹⁶³

The supreme court answered in the negative and affirmed the holding of the fourth district.¹⁶⁴ *Moonlit Waters Apartments, Inc.* was the governing Association of a twenty-unit cooperative apartment building with a pool, a dock, and parking areas, all on three subdivision lots.¹⁶⁵ *Moonlit Waters* had a 99-year ground lease, which commenced in 1965, providing for annual rental payments adjusted at ten-year intervals based upon changes in the consumer price index.¹⁶⁶ Joseph J. Cauley was the lessor. In 1991, *Moonlit Waters* informed Cauley that it wished to purchase the entire property, pursuant to section 719.401(1)(f)1 of the *Florida Statutes*, which requires a lease of recreational or other commonly used facilities, entered into before the unit owners received control of the association, to include an option to purchase.¹⁶⁷ Cauley refused to enter into negotiations with *Moonlit Waters* to sell the property.¹⁶⁸

161. 666 So. 2d 898 (Fla. 1996).

162. *Moonlit Waters Apartments, Inc. v. Cauley*, 651 So. 2d 1269 (Fla. 4th Dist. Ct. App.), *decision approved*, 666 So. 2d 898 (Fla. 1996).

163. *Moonlit Waters*, 666 So. 2d at 899.

164. *Id.* at 900.

165. *Id.* at 899.

166. *Id.*

167. *Id.*

168. *Moonlit Waters*, 666 So. 2d at 899.

Moonlit Waters filed a motion to appoint an arbitrator to decide upon a sales price for the property pursuant to section 719.401(1)(f)1.¹⁶⁹ The circuit court denied the motion, finding that the statute violated both the *United States Constitution* and the *Florida Constitution*.¹⁷⁰ The court reasoned that appointing an arbitrator would violate Cauley's due process rights by denying him the opportunity to retain property in which he had a vested right.¹⁷¹ The Fourth District Court of Appeal declined to reach the constitutional issue, finding that the statute applies only to a lease of recreational or other commonly used facilities, and does not apply to an all-encompassing underlying land lease.¹⁷²

In affirming the fourth district, the supreme court applied the "plain meaning rule" of statutory construction.¹⁷³ The court found the statute to be unambiguous in its application to leases of "recreational or other commonly used facilities" and not "land leases."¹⁷⁴ The court also considered the language of section 719.4015(1) of the *Florida Statutes*, which prohibits escalation clauses in "land leases" and leases of "recreational facilities land, or other commonly used facilities."¹⁷⁵ Applying another maxim of statutory construction, *expressio unius est exclusio alterius*,¹⁷⁶ the court found a specific legislative intent to exclude land leases from the operative provisions of the subject statute.¹⁷⁷

*Downey v. Surf Club Apartments*¹⁷⁸ was a cooperative case involving unique facts. In 1977, the cooperative Association's board approved a resolution authorizing the Association to lease certain rooms in the building to shareholders.¹⁷⁹ However, no formal documentation was ever executed.¹⁸⁰

Downey subsequently sold his cooperative unit, but claimed a residual right to continue leasing the "extra room."¹⁸¹ The Association notified Downey by letter prior to his sale that he would retain no residual rights with

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 899.

173. *Moonlit Waters*, 666 So. 2d at 900 (citing *Lamont v. State*, 610 So. 2d 435 (Fla. 1992)).

174. *Id.*

175. *Id.* (quoting FLA. STAT. § 719.4015(1) (1993)).

176. *Id.* (citing *Bergh v. Stephens*, 175 So. 2d 787 (Fla. 1st Dist. Ct. App. 1965)).

177. *Id.*

178. 667 So. 2d 414 (Fla. 3d Dist. Ct. App. 1996).

179. *Id.* at 415.

180. *Id.*

181. *Id.*

respect to the "extra room."¹⁸² Downey subsequently sold his unit. The Association sued Downey for declaratory relief. Downey counterclaimed for wrongful eviction. The trial court ruled in favor of the Association.¹⁸³

In affirming the trial court's decision, the Third District Court of Appeal held that Downey divested himself of all ownership rights in the Association, and consequently, all real property interest he might claim in the apartment cooperative complex.¹⁸⁴ The court further held that upon Downey's sale of his unit, the "extra room" reverted to the Association.¹⁸⁵

The rationale for the court's holding was that a person can have no interest in a cooperative apartment aside from his ownership of stock in the corporation.¹⁸⁶ The court further held that since Downey never received stock "which carried with it the right to lease the subject room," he had no real property interest in the room.¹⁸⁷

Although the result appears appropriate, the logic used by the court is not easy to understand. What if the Association *had* issued Downey stock that entitled him to lease the room? Would that right be severable from the stock? Would it be an "appurtenance?"¹⁸⁸ If the end justifies the means, the court's opinion can be defended.

C. Homeowners' Associations, Common Law Covenant Enforcement, Miscellaneous

In contrast to the paucity of case law involving internal condominium disputes, 1995-96 produced its fair share of non-condominium, community association case law. Perhaps the most significant case for homeowners' associations is the decision of the Supreme Court of Florida in *Holly Lakes Ass'n v. Federal National Mortgage Ass'n*.¹⁸⁹ The issue decided relates to a mortgagee's lien priority, an issue that is statutorily regulated in the condominium context.¹⁹⁰

Holly Lakes is a mobile home park with a declaration of covenants recorded in 1974.¹⁹¹ The declaration required a monthly assessment payment

182. *Id.*

183. *Downey*, 667 So. 2d at 415.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See* FLA. STAT. § 719.105 (1995).

189. 660 So. 2d 266 (Fla. 1995).

190. FLA. STAT. § 718.116(1) (1995).

191. *Holly Lakes*, 660 So. 2d at 267.

for maintenance and provided that if the monthly charge was not paid when due, that the Holly Lakes Association had the right to place a lien against the lot and the improvements.¹⁹² The McKessens purchased a mobile home site at Holly Lakes and gave a mortgage for the purchase price to the Federal National Mortgage Association ("FNMA").¹⁹³ The mortgage was recorded in 1983.¹⁹⁴ FNMA brought a foreclosure action against the McKessens in 1992. The Association alleged that it had superior lien rights to FNMA's mortgage rights against the property because its lien related back to the 1974 declaration of covenants.¹⁹⁵

The trial court ruled in favor of the Association.¹⁹⁶ The Fourth District Court of Appeal reversed the trial court, but certified the question to the supreme court as being one of great public importance.¹⁹⁷ The supreme court affirmed the ruling of the district court, answering the certified question in the negative.¹⁹⁸ The supreme court held that the language of the declaration of covenants did not create an ongoing automatic lien, but rather created a right to a lien in the event the maintenance assessment was not paid when due.¹⁹⁹ Because the mortgage was recorded in 1983, prior to the Association's lien (which was recorded in 1991), the court held that FNMA's lien had priority.²⁰⁰

The court distinguished the case of *Bessemer v. Gersten*,²⁰¹ which dealt with a conflict between a creditor's lien and the owner's homestead right.²⁰² The supreme court held that the declaration of covenants of Holly Lakes failed to put FNMA on notice that the Association claimed a continuing, automatic lien on the property securing the monthly maintenance assessments, and that FNMA could not be charged with constructive notice of the existence of the Association's lien.²⁰³ The court intimated, in dicta, that in order for an association's claim of lien to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Holly Lakes*, 660 So. 2d at 268.

197. *Federal Nat'l Mortgage Ass'n v. McKesson*, 639 So. 2d 78, 80 (Fla. 4th Dist. Ct. App. 1994), *decision approved*, 660 So. 2d 266 (Fla. 1995).

198. *Holly Lakes*, 660 So. 2d at 269.

199. *Id.* at 268.

200. *Id.*

201. 381 So. 2d 1344 (Fla. 1980).

202. *Holly Lakes*, 660 So. 2d at 268.

203. *Id.*

association's lien relates back to the date of the filing of the declaration, or that it otherwise takes priority over intervening mortgages.²⁰⁴

Although the court's ruling leaves association practitioners with the right to create (or in some cases amend) non-condominium covenants with "super-lien" rights, caution should be exercised before advising a client to do so. Specifically, the client needs to be aware that such "super-lien" status runs afoul of secondary mortgage market guidelines, and may deter lenders who would not accept mortgages with lower priority than an assessment lien.

*Jakobi v. Kings Creek Village Townhouse Ass'n*²⁰⁵ is another significant (and troubling) homeowners' association case. *Jakobi* involves the application of section 57.105(2) of the *Florida Statutes*. *Jakobi*, a townhouse owner, filed a suit against the Association after his request for permission to install a screened enclosure was denied.²⁰⁶ Ultimately, the parties executed a stipulation whereby the Association agreed to allow *Jakobi* to construct the enclosure.²⁰⁷ The Association had previously approved similar installations.

Subsequently, *Jakobi* moved for an award of attorney's fees pursuant to section 57.105(2), reasoning that the Association's bylaws contained a provision allowing the Association to recover fees incurred in litigation with an owner.²⁰⁸ The trial court held that the bylaws did not constitute a contract within the meaning of the statute.²⁰⁹ The Third District Court of Appeal reversed the trial court, holding that the bylaws were a contract within the meaning of the statute.²¹⁰ The premise for the court's decision was that since *Jakobi* had to file suit to prevent the Association from arbitrarily refusing to approve his installation, this was an action "with respect to the contract" as contemplated by section 57.105(2) of the *Florida Statutes*.²¹¹

The court rejected the Association's argument that the bylaws (initially adopted before 1988) predated the October 1, 1988 "grandfathering" date referenced in the statute.²¹² The court reasoned that the 1992 deed transferring title to the owner created a "novation."²¹³ Because the owner took title with record notice of the bylaw provisions, the court held that he assumed a new

204. *Id.*

205. 665 So. 2d 325 (Fla. 3d Dist. Ct. App. 1995).

206. *Id.* at 326.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Jakobi*, 665 So. 2d at 327.

211. *Id.*

212. *Id.*

213. *Id.*

personal contractual obligation with the Association for compliance with its restrictions, and for payment of fees, which formed the basis for the contractual undertaking required by the statute.²¹⁴ This, the court held, gave rise to a new contract which, by law, had the attorney's fees clause of the bylaws incorporated within its terms.²¹⁵

This logic, if not result-oriented, is certainly problematic. Taking the court's position to its logical conclusion, an association's legal relationship with its members will depend on the date that the owner purchased, and on the law in effect at that time. This is certainly the "morass of legal entanglement" that the courts have sought to avoid in the condominium setting.²¹⁶

As a practical matter, the enactment of section 617.305(a) of the *Florida Statutes* should minimize the impact of this decision. The referenced statute now provides for the recovery of prevailing party attorney's fees in homeowners' association disputes.

*Kay v. Via Verde Homeowners Ass'n*²¹⁷ is a homeowners' association collection case. The trial court granted the Association's claim to foreclose its lien for unpaid assessments and dismissed the owner's counterclaim for breach of contract, fraud and breach of fiduciary duty.²¹⁸ The trial court ruled that the counterclaims did not state a cause of action.²¹⁹

The Fourth District Court of Appeal affirmed the dismissal of the counterclaim, except for dismissal of the owner's cause of action for breach of contract.²²⁰ In her counterclaim, the owner had alleged that the Association had agreed to repair and maintain certain sub-surface air conditioning pipes in the common property, that the Association failed to do so, and that the owner was damaged by the Association's failure to perform.²²¹

The appellate court, accepting these allegations as true, found the same sufficient to state a cause of action for breach of contract.²²² The court does not discuss whether the alleged contract was oral or written, nor does it discuss whether the governing documents for the community required the Association to maintain these particular pipes.²²³ Had that issue been litigated in the case,

214. *Id.*

215. *Jakobi*, 665 So. 2d at 327.

216. *See, e.g., Rothfleisch v. Cantor*, 534 So. 2d 823, 825 (Fla. 4th Dist. Ct. App. 1988).

217. 677 So. 2d 337 (Fla. 4th Dist. Ct. App. 1996).

218. *Id.* at 338.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Kay*, 677 So. 2d at 338.

223. *Id.*

it would have been interesting to see whether the court would still have dismissed the breach of fiduciary duty counterclaim.

*Carmelitas Holding Co. v. Paradise Beach Resorts St. Augustine, Inc.*²²⁴ is a homeowners' association case involving enforcement of judgments against a homeowners' association and its successor in interest. The Association apparently took out a loan with Barnett Bank and defaulted. Although the opinion does not contain great detail about the apparently unusual transfer of all of a homeowners' association's rights and assets to a successor entity, the trial court essentially treated the Association and its successor as one party.

The successor to Barnett Bank attempted to impose a creditor's bill against the Association's right to assess its members. The trial court held that the Association could only levy assessments for specified purposes, and that payment of judgments was not one of such purposes.²²⁵ Thus, the trial court refused to grant a creditor's bill against the Association's right of assessment.

The appellate court initially noted that the articles of incorporation for the Association authorized the Association to levy assessments to pay all lawful obligations incurred in connection with the affairs of the Association.²²⁶ The court also found it noteworthy that the articles of incorporation authorized the Association to borrow money.²²⁷

Having concluded that the Association had the authority to borrow money and that the declaration authorized assessments for general expenses of the Association, the court held that "[t]he law simply does not allow an association to borrow money and then absolve itself from repayment through its declarations or bylaws."²²⁸

There are two points from this case which merit discussion. First, the court appears to implicitly accept that the Association's authority to borrow money is predicated solely on enabling authority in the governing documents. The court does not consider (perhaps it was not raised by the parties) the provisions of section 617.0302(7) of the *Florida Statutes*, which permit all not-for-profit corporations to borrow money, unless otherwise specified in the articles of incorporation.

A second related point is the court's consideration of the governing documents without regard to the complementary or supplementary nature of the governing statute. This is, somewhat curiously, the opposite of the

224. 675 So. 2d 660 (Fla. 5th Dist. Ct. App. 1996).

225. *Id.*

226. *Id.* at 661.

227. *Id.*

228. *Id.*

philosophy often exhibited by the courts in condominium issues where the language of the statute is found to control, without regard to the language in the governing documents.²²⁹

*Americas Homes, Inc. v. Esler*²³⁰ involves free speech with regard to a dissatisfied homeowner's "picketing" in a residential development. The Eslers bought a home from an affiliate of Americas Homes, Inc. ("Americas"). The property was classified as being in flood zone "C," a zone which the court said is not normally prone to flooding.²³¹ The Eslers lived in the home for two years without a flooding incident, and apparently decided to sell their home. Right after the Eslers listed their property for sale, a flooding condition occurred in the vicinity of the Eslers' property.

According to the opinion, a broker advised the Eslers that they would not be able to sell their home without disclosing the flooding condition.²³² The Eslers complied with their broker's request by posting a sign in their yard which read: "DUE TO LOCAL FLOODING THIS PROPERTY IS FOR SALE."²³³ The sign also posted photographs of the area during flooding. The sign did not disparage Americas in any fashion, or even mention that Americas had sold Eslers the property.

Americas sued Eslers, seeking a temporary injunction requiring removal of the sign. The trial court refused to grant the injunction and Americas appealed. In affirming the denial of the temporary injunction, the court found *Zimmerman v. D.C.A. at Welleby, Inc.*²³⁴ to be dispositive. *Zimmerman* involved unhappy condominium owners picketing a developer's sales office.²³⁵ The *Zimmerman* court allowed the owners to picket and peacefully protest because it was protected speech under the First Amendment and not subject to prior restraint (although the *Zimmerman* court held that the conduct could be tortious and actionable in damages).²³⁶

The appellate court in *Esler* affirmed that freedom of speech is a fundamental personal right and liberty which is constitutionally protected under both the *United States Constitution* and the *Florida Constitution*.²³⁷ The court held that the Eslers, by placing a sign on their property in compliance with the

229. See, e.g., *Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985).

230. 668 So. 2d 239 (Fla. 5th Dist. Ct. App. 1996).

231. *Id.*

232. *Id.* at 240.

233. *Id.*

234. 505 So. 2d 1371 (Fla. 4th Dist. Ct. App. 1987).

235. *Id.* at 1372.

236. *Id.* at 1374.

237. *Americas Homes*, 668 So. 2d at 240.

instructions from their broker, were exercising their right of free speech.²³⁸ Accordingly, the Fifth District Court of Appeal affirmed the trial court's denial of the temporary injunction.²³⁹

This case affirms the proclivity of the courts to treat free speech as sacrosanct, even though "commercial speech" may be involved. In *Esler*, the developer did not seek damages at the trial court (and in fact alleged that it had no remedy at law). However, counsel is wise to re-read *Zimmerman* when considering the availability of picketing or other protest as a means of influencing dispute resolution. Although the *Zimmerman* court also declined prior restraint of the picketing, it was clear that the court held open the possibility of a damages award (which in such cases could obviously be significant) if the conduct was found to be tortious. In other words, although this type of "speech" may be insulated from prior restraint through injunction, it is not absolutely privileged in terms of tort liability.

A year of community association case law would not be complete without a "dog case." Although these cases are usually considered one of the least glamorous aspects of practicing community association law, *Barrwood Homeowners Ass'n v. Maser*²⁴⁰ reinforces the sometimes serious aspect of animal control in common interest communities.

Alexander Maser, a minor, was bitten by a dog. Apparently, the bite occurred on the common areas owned by the Association. Although not specifically set forth in the facts of the opinion, it appears that the dog belonged to one of the owners in the community.

Maser's parents sued the Association, but not the dog's owner. A jury verdict was rendered against that Association for negligence. The trial court also ruled during the trial that the dog's owner should be put on the verdict form and that the minor's damages would be reduced by the dog owner's percentage of fault.²⁴¹ Maser appealed this aspect of the case.

The Fourth District Court of Appeal affirmed the trial court's verdict form, which permitted apportionment of liability to the dog's owner, even though he was not a party to the case.²⁴² The Fourth District Court of Appeal also upheld the jury's verdict against the Association.²⁴³ Citing *Vasques v.*

238. *Id.*

239. *Id.*

240. 675 So. 2d 983 (Fla. 4th Dist. Ct. App. 1996).

241. *Id.* at 984.

242. *Id.*

243. *Id.*

Lopez,²⁴⁴ the court concluded that a land owner could be held liable for damages caused by a dog on its property if the landlord had knowledge of the dog's vicious propensities.²⁴⁵

Although many associations are wont to become involved in internal disputes between community residents, this case demonstrates the need for an association to pay serious attention to complaints regarding potentially threatening animal behavior.

*Robins v. Walter*²⁴⁶ is a decision of the Third District Court of Appeal involving the application of subdivision covenants. Mr. and Mrs. Robins purchased a lot in Highlands, a platted subdivision, in Walton County.²⁴⁷ The Robins obtained a building permit which allowed them to construct a residential home with attached garage and a "mother-in-law apartment" above the garage.²⁴⁸ According to the plans, the Robins built a five-bedroom main home and a "carriage house" above the garage.²⁴⁹ Each bedroom in the main home had a separate entrance to the outside.²⁵⁰

The Robins then advertised the facility as a "bed and breakfast."²⁵¹ Other lot owners in the subdivision sued the Robins, resulting in an order after nonjury trial which enjoined the Robins from renting out the "carriage house," or operating the main structure as a bed and breakfast.²⁵² The order also precluded the Robins from selling food from their property, whether charged separately or included as part of a rental.²⁵³

The three covenants in question were articles 2, 3, and 6 of the declaration of covenants.²⁵⁴ The appellate court held that while not a model of clarity, the

244. 509 So. 2d 1241 (Fla. 4th Dist. Ct. App. 1987).

245. *Barrwood Homeowners*, 675 So. 2d at 984.

246. 670 So. 2d 971 (Fla. 1st Dist. Ct. App. 1995).

247. *Id.* at 973.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Robins*, 670 So. 2d at 973.

252. *Id.* at 974.

253. *Id.*

254. The three covenants provided:

2. No structure shall be erected, altered, placed, or permitted to remain on any residential building lot other than one detached single family dwelling unit with attached or detached garage, with quarters for domestics attached to the garage.

3. No structure of any said lot shall be used for business or commercial purposes provided, however, the renting of the premises in whole or in part shall not be construed to be a business or commercial operation. . . .

....

intention of the covenants was to allow parties to lease or rent their premises for residential purposes, but not to allow an ongoing commercial enterprise to take place on lots which are designated for noncommercial purposes.²⁵⁵

The Robins also argued that article 2 of the covenants, while limiting original construction, does not limit the use of the structure once it is built.²⁵⁶ Although the appellate court recognized case law from other jurisdictions which stands for this proposition, the court read article 2 in conjunction with articles 3 and 6.²⁵⁷ After reading the covenants as a whole, the court found that a “bed and breakfast inn” is an ongoing business or commercial use of the property in violation of the intent of the covenant.²⁵⁸ The court then went on the find that a “bed and breakfast inn” is essentially the same thing as a “motel” which have been precluded by the courts in other Florida decisions involving similar covenant language.²⁵⁹

The court also distinguished *Moss v. Inverness Highlands South and West Civic Corp.*²⁶⁰ on the basis that an adult congregate living facility (at issue in *Moss*) is entirely different than a transient motel.²⁶¹ Finally, the court held that in light of the language in the restrictions which exempts rentals from being designated commercial (meaning that rentals can be “residential”), the trial court’s ruling on the “carriage house” rental was “overly broad” and stricken.²⁶² The apparent intent of the appellate court’s pronouncement on this issue was that the lot owners could rent out the “carriage house” as a residential apartment.

Although courts tend to strictly construe covenants, the court in *Robins* gave a fair meaning to the covenants as a whole and reached a just result in this case. The court’s ruling on the “carriage house” may have been an attempt to “split the baby” since article 2 of the covenants specifically contemplates that quarters detached from the main residences are for “domestics,” which would typically be considered an adjunct of a “single family” usage, as clearly contemplated by article 2 of the covenants.

6. No business shall be permitted or maintained on any lot or lots except lot 16-A, 17, 18, 19 and 20 in Block B, lots 1, 2, 14 and 15 in Block D, and lots 1, 2 and 3 in Block F.

Robins, 670 So. 2d at 973.

255. *Id.* at 974.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Robins*, 670 So. 2d at 974.

260. 521 So. 2d 359 (Fla. 5th Dist. Ct. App.), *review denied*, 531 So. 2d 1353 (Fla. 1988).

261. *Robins*, 670 So. 2d at 975.

262. *Id.*

Criminal Law: 1996 Survey of Florida Law

Mark M. Dobson*

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I. INTRODUCTION

Florida courts continue to decide numerous cases in the area of substantive criminal law. Keeping up with the recent pronouncements of Florida's courts in this area obviously presents a challenge to the busy practitioner. This article discusses Supreme Court of Florida decisions in the area of substantive criminal law handed down between July 1, 1995 and

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July 1, 1996.¹ As with past survey articles on criminal law, this one does not discuss issues regarding the death penalty or other sentencing issues. Both these topics have become so specialized that they deserve separate, special treatment. Even after cases mainly involving the death penalty and other sentencing issues² are eliminated, the survey does not discuss every Supreme Court of Florida case. Cases which merely discuss the application of settled or fairly standard fact situations to a well-settled rule of law have also been eliminated.³ When a particular area of substantive criminal law is discussed in the text of this article, cases from the Florida district courts of appeal discussing the same area are mentioned in the footnotes accompanying that section to help supplement the textual discussion. Otherwise, Florida district court opinions are not the subject of this article. Similarly, new legislation is mentioned only when it relates to the continuing importance of a discussed case.

This article is divided into two main parts. The first part discusses the Supreme Court of Florida cases concerning major questions of substantive criminal law that do not involve constitutional issues. The second part discusses Supreme Court of Florida cases involving constitutional challenges to substantive criminal law statutes in Florida.

II. NON-CONSTITUTIONAL DECISIONS

A. *Kidnapping*

This past year the Supreme Court of Florida decided an important case clarifying once again what constitutes the offense of kidnapping in Florida. Section 787.01(1)(a) of the *Florida Statutes* defines the basic

1. The author has chosen as a cut-off point decisions reported up to, and including 673 So. 2d. Thus, as in last year's article, some major Supreme Court of Florida cases decided before July 1, 1996 may not be included in this article. Major Supreme Court of Florida cases decided before July 1, 1995, but not included in last year's survey, are discussed in this year's article.

2. Indeed, cases discussing sentencing guidelines and related topics were a major focus of a significant number of Supreme Court of Florida cases this last survey year. Readers interested in these areas should consult the recent supreme court decisions referenced in APPENDIX A to this article.

3. Thus, a number of Supreme Court of Florida decisions involving homicide offenses are not discussed in this article. Readers interested in supreme court cases discussing whether the state has proven a particular homicide offense may wish to consult the opinions in APPENDIX B to this article.

offense of kidnapping.⁴ This section provides that either “confining, abducting, or imprisoning another person against his will and without lawful authority”⁵ by any of three specified means is kidnapping when the act was done to further or to accomplish a specific purpose. The three specified means are “forcibly, secretly, or by threat.”⁶

Kidnapping is a specific intent crime.⁷ There are four different specific purposes for kidnapping under section 787.01(a):⁸ 1) kidnapping for ransom, reward, or as a shield or hostage;⁹ 2) kidnapping in connection with

4. The remaining two subsections of section 787.01 set forth the sentencing provisions and establish an additional offense when a young child (under 13) is kidnapped with aggravating circumstances.

5. *See* FLA. STAT. § 787.01(1)(a) (1995). One recent Supreme Court of Florida opinion implies that the confinement, abduction, or imprisonment must be at least partially successful for there to be a kidnapping. *See* *Rogers v. State*, 660 So. 2d 237 (Fla. 1995) (reversing the kidnapping conviction of a driver whom the defendant ordered at gunpoint to drive in a certain direction). In *Rogers*, the court held that since the driver refused and drove in a different direction, there was insufficient evidence to support a kidnapping conviction. *Id.* at 241. As kidnapping is a specific intent crime, one would think that attempted kidnapping would be a possible lesser included offense here. However, for reasons not stated, the court’s opinion does not discuss this.

6. *Id.* Chapter 787 provides no definition of these specified means. Arguably, the term “forcibly” means by actual use of physical force, while the term “by threat” means by threatened use of either physical force or some other harm. Otherwise, the terms would be redundant.

“Secretly” has been defined as “intended . . . to isolate or insulate the intended victim from meaningful contact or communication with the public.” *See* *Robinson v. State*, 462 So. 2d 471, 476 (Fla. 1st Dist. Ct. App. 1984), *review denied*, 471 So. 2d 44 (Fla. 1985) (citing *Miller v. State*, 233 So. 2d 448 (Fla. 1st Dist. Ct. App. 1970)). *See also* *McCarter v. State*, 463 So. 2d 546 (Fla. 5th Dist. Ct. App.), *review denied*, 472 So. 2d 1181 (Fla. 1985). For example, the *Robinson* court found that the defendant’s act of asking a sexual assault victim whether she needed a ride and then driving to a secluded area without the victim being aware of what was happening or where she was being taken constituted a secret abduction.

7. *See* *Heddleson v. State*, 512 So. 2d 957 (Fla. 4th Dist. Ct. App. 1987); *State v. Graham*, 468 So. 2d 270 (Fla. 2d Dist. Ct. App. 1985); *Mills v. State*, 407 So. 2d 218 (Fla. 3d Dist. Ct. App. 1981).

8. *See* *Justus v. State*, 438 So. 2d 358, 367 (Fla. 1983), *cert. denied*, 465 U.S. 1052 (1984) (declaring that “the four clauses pertaining to criminal intent [are] set out [in the] disjunctiv[e], so that there are four alternative means by which one can form the intent to commit kidnapping.”).

9. FLA. STAT. § 787.01(1)(a)1. This section was discussed in a recent important case decided during this survey period. In *Lafleur v. State*, 661 So. 2d 346 (Fla. 3d Dist. Ct. App. 1995), the defendant appealed a conviction for the armed kidnapping of his infant son. *Lafleur* claimed that as he was the boy’s father; therefore, he could not be legally convicted of kidnapping his own child. The district court disagreed for two reasons. First, the court noted that another district court opinion, *Johnson v. State*, 637 So. 2d 3, 4 (Fla. 3d Dist. Ct. App.

another felony;¹⁰ 3) kidnapping to inflict bodily harm or to terrorize;¹¹ and 4) kidnapping to interfere with a governmental or political function.¹² The most frequently encountered factual scenario involves allegations that the act constituting the kidnapping was done with the intent to satisfy the second of these four possible purposes, i.e., to “[c]ommit or facilitate commission of any felony.”¹³ Florida courts recognize that there are problems with applying this subsection too literally to other felonies, the elements of which involve some confinement or movement of another person. Indeed, the Supreme Court of Florida, in its first case discussing section 787.01(1)(a)2 after its passage, noted that “[i]f construed literally this subsection would apply to any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery.”¹⁴ Thus, any confinement for purposes of these crimes would automatically make the offender liable for kidnapping as well.

States have adopted three basic approaches to deal with this issue: 1) the “any movement or confinement” approach, making *any* movement or confinement of another except those absolutely necessary to commit the other felony kidnapping;¹⁵ 2) the “incidental” approach making only those

1994), *review denied*, 649 So. 2d 235 (Fla. 1994) which announced “[t]he general rule . . . that a parent cannot be found guilty of kidnapping . . . for taking his child from the other parent” was inapplicable because in *Johnson* there was no court order awarding custody to the parent from whom the child was taken, whereas in *Lafleur* such an order had been made. *Lafleur*, 661 So. 2d at 348. Second, *Johnson* does not control when the child is taken for an ulterior purpose, as opposed to exercising the taking parent’s parental rights. *Id.* *Lafleur*, during the abduction, had initially refused to give the boy up as the boy was “his ‘ace in the hole.’” Also, the boy was taken to force his mother to return to *Lafleur*. This second reason, if taken literally, will become the primary focus of inquiry whenever a parent is accused of kidnapping his or her child. Regardless of whether a custody order exists or not, taking one’s child for an unlawful purpose should not be condoned. However, applying this reasoning too literally may result in turning domestic disputes into kidnapping offenses. Where a child is forcibly taken at gunpoint by one parent from another parent, no one will probably feel any qualms in having the parent who used potentially deadly force convicted of kidnapping. But in other scenarios, applying *Lafleur*’s language literally may lead to unwarranted extensions of the kidnapping offense.

10. FLA. STAT. § 787.01(1)(a)2.

11. *Id.* § 787.01(1)(a)3.

12. *Id.* § 787.01(1)(a)4.

13. *Id.* § 787.01(1)(a)2. This subsection has by far the most reported cases discussing kidnapping and seems to be the most common intent charged for kidnapping in Florida.

14. *See Mobley v. State*, 409 So. 2d 1031, 1034 (Fla. 1982).

15. This approach would appear to produce a larger number of convictions than the other two. For a list of cases illustrating this approach, see Comment, *Criminal Law: Lowering the Threshold for Kidnapping to Facilitate a Felony*, 35 U. FLA. L. REV. 528, 529 nn.15–16 (1983).

acts of victim movement or confinement that are materially different from the other felony kidnapping; and 3) the *Model Penal Code* approach making only “[movement] from [the victim’s] place of residence or business, or a substantial distance from the vicinity where [the victim] is found”¹⁶ or “unlawfully confin[ing the victim] for a substantial period in a place of isolation”¹⁷ kidnapping.¹⁸

The Supreme Court of Florida in *Faison v. State*¹⁹ selected the second of these three approaches. *Faison* required that a three-part test be satisfied before an accused could be convicted of kidnapping under section 787.0(1)(a)2. Under this test, the movement or confinement:

- (a) Must not be slight, inconsequential and merely incidental to the other crime;
- (b) Must not be of the kind inherent in the nature of the other crime; and
- (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.²⁰

Proof of each factor is necessary for a kidnapping conviction under section 787.01(1)2.²¹

Unfortunately, this test has been easier to state than to apply. Once again during this survey year, the Supreme Court of Florida, in *Berry v. State*,²² reconciled a split between two district courts of appeal as to whether certain facts support a conviction under section 787.01(1)(a)2 for kidnapping. *Berry* and some accomplices entered an apartment and robbed two victims at gunpoint. One victim was immediately bound and left in the same

16. MODEL PENAL CODE § 212.1.

17. *Id.*

18. In *Faison*, Justice Boyd forcefully argued for a fourth approach which would make victim movement or confinement during another felony kidnapping only when such acts “expose the victim to a risk of physical or mental harm substantially greater than the risk of harm ordinarily encountered by the victim of the forcible felony being committed” *Faison*, 426 So. 2d at 968 (Boyd, J., concurring in part and dissenting in part). For a discussion praising this approach and urging its adoption, see Matthew J. King, Note, *Kidnapping in Florida: Don’t Move or You’ve Done It*, 13 STETSON L. REV. 197, 205–08; 211–14 (1985).

19. 426 So. 2d 963 (Fla. 1983).

20. *Id.* at 965.

21. *Kirtsey v. State*, 511 So. 2d 744, 745 (Fla. 5th Dist. Ct. App. 1987) (discussing FLA. STAT. § 787.01(1)2).

22. 668 So. 2d 967 (Fla. 1996).

room where he was when the robbers entered. The robbers forced the other victim to accompany them to each room and show them where any valuables may be located. Afterwards, this victim was tied hand and foot before the robbers left. Unfortunately for the robbers, he freed himself shortly after their departure and called the police. At trial, Berry was convicted of both armed robbery and kidnapping. The Fourth District Court of Appeal affirmed his kidnapping conviction finding that the act of tying up a victim by itself could support a kidnapping under *Faison*.²³ The supreme court granted review to resolve an apparent conflict between this decision and the first district's opinion in another case.²⁴

The supreme court first noted that tying someone up clearly constituted a "confinement" under section 787.01(1) and that under the facts, such confinement was also clearly not willful.²⁵ Likewise, the court noted that the defendant's actions constituting the alleged kidnapping were done to commit or facilitate commission of a felony, in this case robbery.²⁶ Therefore, taken literally, the elements of section 787.01(1)(a) had all been proven. However, because of the purpose for which the alleged acts of kidnapping were taken, the *Faison* test needed to be applied to see if Berry could be found guilty of this offense.

Applying *Faison*, the supreme court easily concluded that tying up the victims satisfied the first *Faison* requirement that the confinement²⁷ "not be slight, inconsequential and merely incidental to the other crime."²⁸ The court noted that if the victims had been held at gunpoint until the robbery was completed, this would be a confinement, but that the court would have found it incidental to the robbery's commission. Likewise, if the robbers had made the victims go from room to room and later merely left them in a room with orders to stay there until the robbers had left, this would also be incidental. The court noted that "[i]n both hypotheticals, any confinement accompanying the robbery would cease naturally with the robbery."²⁹ Here,

23. *Berry v. State*, 652 So. 2d 836, 839 (Fla. 4th Dist. Ct. App. 1994).

24. *See Brinson v. State*, 483 So. 2d 13 (Fla. 1st Dist. Ct. App.), *review denied*, 492 So. 2d 1335 (1986).

25. *Berry*, 668 So. 2d at 969.

26. *Id.*

27. In *Berry*, the court noted that the *Faison* test should be read in the disjunctive as applying to either confinement or movement. Here, the supreme court focused on the defendant's actions in tying up the victims and thus only discussed "confinement." *Berry*, 652 So. 2d at 838.

28. *Faison*, 426 So. 2d at 965.

29. *Berry*, 668 So. 2d at 969.

however, the robbers clearly intended the confinement to continue after the robbery was over.³⁰

Faison's second requirement that the confinement "not be of the kind inherent in the nature of the other crime"³¹ was also easily satisfied. Tying someone up is not needed to commit a robbery. Indeed, the victims could have been left untied and a robbery would have still occurred.

Finally, *Berry* concluded that *Faison's* third requirement was also met. The court concluded that tying the victims up "was a confinement with independent significance from the underlying felony in that it substantially reduced the risk of detection."³² Indeed, the court could find no other purpose for leaving the victims bound other than to limit the risk of being caught. The fact that one victim shortly afterwards untied himself and frustrated this purpose made no difference as attainment of the confinement's objectives was irrelevant; what mattered was the intended purpose behind them.³³

Berry demonstrates that questions about the proper application of *Faison* will continue to arise in the Florida courts. The court attributes some of the difficulty in applying *Faison* to both the failure to distinguish between "confinement" and "movement" and the failure to recognize *Faison* used these terms disjunctively rather than conjunctively. However, *Berry* can-

30. Despite the robbers' goal in tying up the victims, one of them was able to free himself almost immediately and call the police. The supreme court discusses this fact with reference to *Faison's* third requirement but not with the first requirement. *Id.* at 970.

The court's language could bring about very different results depending on the words the robbers use. Under the court's test, if the robbers put victims in a room and tell them not to come out until the robbers leave, the confinement would be inconsequential. But what if the robbers tell the victims not to leave until ten or twenty minutes have passed? The victims would still not be bound as in the first scenario but they would be confined longer than needed for the robbery to be completed if they comply with the robbers' commands. Under this second scenario, would the robbers additionally be guilty of kidnapping?

This question, and others that could be posed about differences in the court's examples, show that under *Faison*, as with probably any test designed to be applied to a myriad of fact situations, questions about the test's proper application will continue to persist.

31. *Faison*, 426 So. 2d at 965.

32. *Berry*, 668 So. 2d at 970.

33. See *supra* note 30 and accompanying text. The *Berry* opinion does not discuss what possible effect on the first *Faison* requirement one victim's being able to free himself quickly had. The court's discussion of the first *Faison* requirement speaks in terms of actual continued confinement beyond a robbery's completion. If this is really what the court intends is needed to satisfy this requirement then why didn't the escape of one victim frustrate that here? Was the state perhaps lucky in that there was a second victim who was not freed until later? Does that mean *Berry* actually committed only one kidnapping and not two?

didly acknowledges that “the diverse factual situations to which [*Faison*] must be applied”³⁴ means that the complete elimination of questions under this test is not likely to occur.³⁵ In *Berry*, the supreme court discussed how *Faison* should be applied to a particular situation. The trial and district courts now have one more useful opinion to serve as guidance in applying the law of kidnapping in Florida.

B. *Felon in Possession of Weapons*

Under section 790.23(1) of the *Florida Statutes*, persons convicted of a felony under the law of any state or country are prohibited from possessing or controlling firearms or other electric weapons including tear gas guns and chemical weapons.³⁶ Violation of this section is a second degree felony.³⁷

The status of the accused as a convicted felon must be proven as an element of this charge.³⁸ The Florida district courts of appeal have been split as to whether the pendency of an appeal renders one a “convicted” felon within the meaning of section 790.23. During this last survey year, the Supreme Court of Florida handed down two short, but important, opinions dealing with this question.

The first case, *State v. Snyder*,³⁹ directly addressed the split between the appellate districts over when someone should be considered a “convicted” felon for purposes of section 790.23.⁴⁰ Snyder had been convicted and sentenced for grand theft.⁴¹ During the pendency of his appeal from this

34. *Berry*, 668 So. 2d at 970.

35. See *supra* notes 30 & 33 (providing further questions which the author believes *Berry* leaves unanswered).

36. This includes juveniles adjudicated for an offense that would be considered a felony if the juvenile was an adult. FLA. STAT. § 790.23(1)(c) (1995). Proof of the possession element needed to sustain a conviction under this section may be based on the uncontroverted testimony of a single witness. See *Cordero v. State*, 669 So. 2d 1075 (Fla. 3d Dist. Ct. App.), review denied, 678 So. 2d 337 (Fla. 1996).

37. FLA. STAT. § 790.23(3).

38. See *Killingsworth v. State*, 584 So. 2d 647 (Fla. 1st Dist. Ct. App. 1991).

39. 673 So. 2d 9 (Fla. 1996).

40. *Snyder* dealt with former section 790.23. See FLA. STAT. § 790.23 (1991). Since Snyder’s conviction the legislature has amended this section. Unlike present section 790.23(1), the former version of this statute did not apply to juveniles adjudicated of what would have been felonies had the proceedings taken place in an adult court.

41. Snyder was a minor but was convicted and sentenced as an adult. At the time of his later charge, if Snyder had merely been adjudicated a delinquent, section 790.23(1) could not have been used to support a felon in possession of a firearm charge. See *J.B.M. v. State*, 560 So. 2d 347 (Fla. 5th Dist. Ct. App. 1990). Section 790.23 has been amended to include juvenile adjudications as predicate offenses. See FLA. STAT. § 790.23(1)(a).

conviction, he was arrested for firing a rifle in his backyard. Shortly after his arrest, the second district affirmed his treatment as an adult for the grand theft conviction, but remanded due to other errors in sentencing.⁴² Subsequently, Snyder was tried and convicted of possession of a firearm by a convicted felon. Snyder appealed claiming that he had not been “convicted” for purposes of section 790.23 at the time he had possessed the rifle since his appeal was still pending.

The second district reluctantly agreed but noted the direct conflict with cases from other districts. The supreme court framed the issue before it as “whether a defendant is ‘convicted’ for purposes of section 790.23 . . . when adjudicated guilty in the trial court, notwithstanding [the existence of an appeal or other procedure to challenge the conviction].”⁴³ The court noted that the one district court⁴⁴ which answered this question affirmatively did so for two distinct reasons: the presumption of the correctness of verdicts and the irrelevancy of a pending appeal or other post conviction procedures to the legislative policy behind section 790.23. The supreme court in *Snyder* focused on the second of these reasons to uphold the conviction in this case.

The court found that this criminal offense provision was “intended to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities.”⁴⁵ Whether an appeal or other procedure challenging a felon’s conviction is pending was found irrelevant to this legislative policy.⁴⁶ An adjudication of guilt, even if later found to be incorrect for whatever reason, thus serves as a kind of prima facie indication of dangerousness, indicating the person adjudicated is presumptively unfit as a matter of law to carry dangerous items.⁴⁷ Thus, the

42. *Snyder v. State*, 597 So. 2d 384 (Fla. 2d Dist. Ct. App. 1992).

43. *Snyder*, 673 So. 2d at 10 (footnote omitted).

44. *Burkett v. State*, 518 So. 2d 1363 (Fla. 1st Dist. Ct. App. 1988).

45. *Snyder*, 673 So. 2d at 10 (citing *Nelson v. State*, 195 So. 2d 853, 855 & n.8 (Fla. 1967)).

46. Indeed, *Snyder* declared that “[t]he legislature never intended for convicted felons to possess firearms during the pendency of their appeals.” *Id.* at 11.

47. This presumption or assumption behind section 790.23 is obviously not universally true in fact for all cases. Clearly the commission of all kinds of felonies are not in actuality a true indication of dangerousness. A person who commits a grand theft by stealthy means is certainly a lot less dangerous than one who commits a robbery or an aggravated battery. The latter two kinds of felonies involve some element of violence or intimidation while the former does not. Indeed, if grand theft is accomplished by force against a person, it should become a robbery.

court held that “a defendant is ‘convicted,’ for purposes of [section 790.23,] when he is adjudicated guilty in the trial court, notwithstanding the fact that he has the right to contest the validity of the conviction by appeal or by other procedures.”⁴⁸

Snyder’s holding is clearly correct for several reasons. One, it certainly seems to help promote the legislative policy behind section 790.23. Appeals and other challenges to the validity of convictions take at least months, if not years, to exhaust. Should a convicted felon be allowed to possess a firearm during this time? If the conviction is affirmed, the defendant has received an undeserved grace period during which firearm possession would be allowed. Second, a contrary decision in *Snyder* would only raise additional questions about when a person should be considered a “convicted” felon under section 790.23. For example, what if the conviction is affirmed by a district court but the defendant tries either successfully or unsuccessfully to convince the supreme court to review it? How about the time when habeas corpus or other post-conviction relief challenges can still be filed, could a defendant still possess firearms during this time? In this situation, line-drawing is inevitable. Thus, the most logical place to draw the line would be where it most effectuates legislative and other policies. This is clearly at the trial court level. After *Snyder*, all persons who are accused and adjudicated as felons have clear notice they cannot possess, at least until something happens to officially undermine the validity of their convictions, the items specified in section 790.23.⁴⁹ Finally, although the supreme court did not

However, section 790.23 makes no distinctions between the kinds of felonies or how they were factually committed. Anyone convicted of a felony, no matter how non-dangerous that person may actually be, is considered *legally* too dangerous to possess the kinds of items noted in section 790.23.

48. *Burkett*, 518 So. 2d at 1366 (footnote omitted).

49. Notice is clearly an important concept in the criminal law. However, all persons are presumed to know the law and conduct themselves so as not to violate it. Therefore, a convicted felon should not be able to plead ignorance of the law as a defense, nor should convicted felons be able to plead ignorance of their predicate felonies as a defense. See *Burkett v. State*, 518 So. 2d 1363, 1364 (Fla. 1st Dist. Ct. App. 1988).

However, at least one decision from another state has allowed an accused’s ignorance of his underlying felony to serve as a defense to this type of charge. In *People v. Bray*, 124 Cal. Rptr. 913 (Cal. Ct. App. 1975), the accused had made multiple attempts to ascertain if his out-of-state conviction was a felony. Even the prosecuting attorney admitted to having had difficulty in finding out this fact. The appellate court under these circumstances found that *Bray’s* conviction should be reversed. To this writer, *Bray* is an example of where the sound exercise of prosecutorial judgment in not filing charges to begin with should have been followed.

discuss this as a reason behind its decision, the holding in *Snyder* promotes the principle of verdict finality. Even though a result may later be overturned on appeal, we should treat a verdict as final unless or until it is otherwise unreasonable to do so.⁵⁰

Snyder also addressed the issue of what should happen to a defendant convicted under section 790.23 during the pendency of an appeal from the conviction of a predicate felony which is subsequently reversed. If the court chose to strictly follow the public policy behind section 790.23, one result would be to say that the subsequent reversal has no effect on the conviction under section 790.23. However, this result also appears inherently unfair. What if the appellate reversal came one day after the adjudication of guilt under section 790.23, should the conviction still stand? The supreme court in *Snyder* decided that "fairness requires that [a defendant] be permitted to attack a conviction for possession of a firearm when the predicate felony conviction is subsequently reversed on appeal."⁵¹ Thus, the court held that "such a defendant is entitled to relief through a Florida Rule of Criminal Procedure 3.850 motion to vacate judgment."⁵²

In its second decision discussing section 790.23 during this survey period, the Supreme Court of Florida in *State v. Johnson*⁵³ followed *Snyder's* reasoning to approve a lower court decision vacating the defendant's conviction for felony possession of a firearm under section 790.23. Johnson had first been convicted of a felony battery and had appealed this conviction. During the appeal's pendency, he was arrested for possession of a firearm and charged under section 790.23. Johnson plead nolo contendere to this charge but moved to set it aside when the appellate court later reversed his battery conviction. The trial court denied the motion. However, the district

Ironically in *Snyder*, the notion that people should know the law worked to the defendant's benefit. Since the controlling law in the second district would have allowed Snyder to continue legally possessing firearms at the time he fired the rifle, the supreme court found that he was entitled to rely on it. Thus, applying the supreme court's decision to his case to uphold his conviction would be analogous to convicting him under an ex post facto law. The supreme court therefore approved the reversal of Snyder's conviction although it disapproved the second district's reasoning for it.

50. *Snyder's* holding is consistent with the principle of verdict finality found in other substantive law areas. For example, under section 90.610(2) of the *Florida Statutes*, the pendency of an appeal does not make an otherwise admissible conviction inadmissible for impeachment purposes.

51. *Snyder*, 673 So. 2d at 11.

52. *Id.* See also FLA. R. CRIM. P. 3.850(a) (providing the appropriate method for filing such a motion).

53. 668 So. 2d 194 (Fla. 1996). *Johnson* and *Snyder* were actually decided on the same day.

court of appeals found Johnson was entitled to post-conviction relief based on the same reasoning the supreme court used in *Snyder*.⁵⁴ The Supreme Court of Florida affirmed the granting of such relief and the vacating of Johnson's conviction for possessing a firearm while a convicted felon.

Snyder and *Johnson* will most likely somewhat increase the number of convictions being vacated on post-conviction relief, as well as possibly increasing the number of rule 3.850 motions filed. However, the combined result of the decisions in these two cases help bring certainty and fairness to the law.

C. Tampering With Evidence

Under section 918.13 of the *Florida Statutes*, it is a third degree felony⁵⁵ to tamper with or fabricate physical evidence under certain situations. There are several elements which must be proven before a conviction under this section appears possible. First, a "criminal trial or proceeding or an investigation"⁵⁶ must be in existence or about to be initiated. Second, this must have been begun by a lawful authority.⁵⁷ Third, the accused must know about the existence of the first two elements. Fourth, the accused must "[a]lter, destroy, conceal or remove"⁵⁸ some physical object. Finally, this must be done "with the purpose to impair its . . . [use] in [the particular] proceeding or investigation."⁵⁹

The Supreme Court of Florida in *State v. Jennings*⁶⁰ recently discussed how this statute can be violated. In this case, the defense filed a motion to dismiss to the State's charge that Jennings tampered with physical evidence. The defense alleged that police officers approached Jennings after seeing him holding what they believed was marijuana. As one officer approached Jennings, the officer also believed Jennings was holding cocaine rocks in his hand. This officer shouted "police" and Jennings either simultaneously or immediately afterwards tossed the suspected cocaine into his mouth. The officers grabbed Jennings and eventually arrested him. However, Jennings had swallowed the objects tossed into his mouth, and these were never

54. *Johnson v. State*, 664 So. 2d 986, 987–88 (Fla. 4th Dist. Ct. App. 1995).

55. FLA. STAT. § 918.13(2) (1995).

56. *Id.* § 918.13(1).

57. The specific authorities listed in section 918.13(1) are a "prosecuting authority, law enforcement agency, grand jury or [state] legislative committee." *Id.*

58. *Id.* § 918.13(1)(a).

59. *Id.*

60. 666 So. 2d 131 (Fla. 1995).

recovered. Since the State did not file a traverse, the alleged facts were assumed to be true for purposes of ruling on the motion.

The trial court granted the motion finding as a matter of law, that swallowing the suspected cocaine rocks could not constitute the needed act of “conceal[ment], remov[al], [destruction or alteration].”⁶¹ The third district affirmed, but on a different basis.⁶² That court concluded that Jennings could not be guilty of the charged offense since he “was neither under arrest nor did he know that a law enforcement officer was about to instigate an investigation.”⁶³ The supreme court granted review to resolve a certified conflict split between this district courts on this issue.⁶⁴

The supreme court first addressed the trial court’s ruling that, as a matter of law, swallowing an object⁶⁵ could not constitute the needed destruction or concealment for a conviction. The trial court had relied on *Boice v. State*⁶⁶ for this conclusion. In *Boice*, undercover police sold the defendant a bag of cocaine. Immediately after this, uniformed officers surrounded Boice’s car. Boice threw the bag out of his car, but officers retrieved it from the roadway. The bag and cocaine had not been altered in any way. The second district found that since the bag had been tossed into the open roadway and not otherwise concealed in any manner, there had been no alteration or concealment under the statute. Rather, the district

61. FLA. STAT. § 918.13(1)(a).

62. *State v. Jennings*, 647 So. 2d 294 (Fla. 3d Dist. Ct. App. 1994).

63. *Id.* at 295. The district court distinguished this case from other cases where the defendant had been placed under arrest before swallowing the object involved. See *McKinney v. State*, 640 So. 2d 1183 (Fla. 2d Dist. Ct. App. 1994); *McKenzie v. State*, 632 So. 2d 276 (Fla. 4th Dist. Ct. App. 1994). Under this scenario, the district court would either have found Jennings guilty of tampering with evidence if the swallowed object was not recovered and attempted tampering if it was recovered. For a post-*Jennings* case finding the accused not guilty of tampering with evidence and citing *McKinney*, as authority, see *State v. Gilmore*, 658 So. 2d 629 (Fla. 2d Dist. Ct. App. 1995), where an accused who was confronted by officers for the purpose of arresting him placed a bag of marijuana in his mouth but later spit it out on the officer’s demand and was found not guilty of tampering with evidence. The court found that “[a]t most, such conduct may be attempted tampering.” *Id.* However, the court did not rule as such for unexplained reasons.

64. The district court and the supreme court found that there was conflict between the third district’s opinion and the fourth district’s decision in *Hayes v. State*, 634 So. 2d 1153 (Fla. 4th Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994).

65. The supreme court noted that it made no difference what Jennings had swallowed, as long as all the elements were satisfied, since section 918.13(1)(a) pertained to “any record, document, or thing.” Thus, as long as a physical object of some sort is involved, section 918.13 forbids its tampering or alteration under the circumstances specified.

66. 560 So. 2d 1383 (Fla. 2d Dist. Ct. App. 1990).

court characterized this as “merely abandon[ing] the evidence,”⁶⁷ which would not violate section 918.13.⁶⁸ In *Jennings*, the Supreme Court of Florida rejected the district court’s interpretation of *Boice* as too broad.⁶⁹ The supreme court found that depending on the circumstances,⁷⁰ “tossing evidence away in the presence of a law enforcement officer . . . could amount to tampering or concealing evidence.”⁷¹

The supreme court then turned to the district court’s ruling that under the facts *Jennings* could not have known an investigation of the object was about to occur. The supreme court agreed with the district court’s conclusion that *Jennings* was not under arrest when he swallowed the suspected rocks. However, that did not mean he could not possess the requisite

67. *Id.* at 1384.

68. *Boice* felt that a contrary decision could lead to scenarios that the legislature did not intend. The court gave as an example a teenager, who when confronted by police for illegally drinking beer, throws the beer can from his car. *Boice* noted that if this was concealment under section 918.13, the teenager could be guilty of a third degree felony when the suspected crime initiating the act of concealment was merely a misdemeanor.

69. Thus, the supreme court did not disapprove *Boice*, but merely limited its holding to the specific situation involved.

70. The court unfortunately did not explain what these circumstances were. However, *Jennings* cites, with apparent approval, *Hayes v. State*, 634 So. 2d 1153 (Fla. 4th Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994), wherein the district court found that throwing a bag of suspected rock cocaine into a drain while being chased by a law enforcement officer was tampering with evidence.

If the supreme court intended *Hayes* to serve as an example of when tossing something away in an officer’s presence can be tampering or concealing evidence, then courts will have to distinguish between acts of merely discarding an object and acts of discarding an object in such a way that it cannot likely be retrieved and used against the person getting rid of it.

For a recent case from another state finding that merely abandoning narcotics while being pursued by a law enforcement officer is not sufficient to support a conviction for tampering with evidence, see *Commonwealth v. Delgado*, 679 A.2d 223 (Pa. 1996). The Pennsylvania statute in question in this case is substantially similar to section 918.13 of the *Florida Statutes*.

71. *Jennings*, 666 So. 2d at 133. The court cited with approval both *McKinney* and *McKenzie*, two cases also cited with approval by the district court. Since the supreme court reversed the district court’s decision, readers of these two opinions may be initially confused with how both courts could cite the same two cases with approval. However, the cases were cited by these two courts *when discussing different issues*. The supreme court cited them to refute the trial court’s reasoning, not the district court’s.

Readers should also note that the supreme court did not find that the act of swallowing potential evidence will always be concealment, merely that it sometimes could be. The trial court had ruled, pursuant to its ruling on the motion to dismiss (which could only be granted if these facts were insufficient as a matter of law), that such an act could never constitute concealment.

knowledge. Jennings had swallowed the objects as soon as the word "police" had been shouted. Again, viewing this fact from the standard of whether reasonable people could find Jennings knew of the impending police investigation, the supreme court found reasonable minds could differ and thus found that granting a motion to dismiss on this point was inappropriate.

Jennings is clearly an important decision from a law enforcement standpoint. Section 918.13 was passed to protect the integrity of criminal proceedings by preventing destruction or alteration of evidence relevant to them. Swallowing drugs is one of the easiest ways to avoid their seizure by police. If such an act could not constitute destruction or concealment, then suspects could possibly avoid prosecution both under section 918.13 and drug offense statutes by simply tossing the suspected items into their mouths and gulping them down before the police could stop this.⁷² Surely, the legislature would not want such absurd results along with the obvious frustration of law enforcement efforts. Likewise, people may know that they will be the subject of an investigation prior to being formally under arrest. The supreme court was clearly correct in deciding that both questions posed by *Jennings* should be determined on a case by case basis according to the facts and not as an absolute matter of law in either situation.

D. *Burglary*

Burglary, at common law, was the breaking and entering of the dwelling house of another in the nighttime in order to commit a felony therein. Modern burglary statutes have significantly broadened this definition.⁷³

72. Alternatively, following the trial court's ruling would possibly lead to more situations where police would wrestle with or choke suspects to avoid having them swallow evidence. This could lead to more injuries to the police and suspects alike.

Of course, police could also wait until the suspect defecates or alternatively have the suspect's stomach forcibly pumped. One assumes that few officers would have the incentive to go to such lengths.

Readers who believe such scenarios never occur should remember *Rochin v. California*, 342 U.S. 165 (1952), where police officers broke into a suspect's bedroom and then choked Rochin in an effort to prevent him from swallowing two capsules that he had tossed into his mouth. When the police were unsuccessful in these efforts to obtain the potential evidence, they handcuffed Rochin and took him to a hospital where his stomach was pumped to force him to vomit up the items. Although these efforts were successful, the Supreme Court suppressed the evidence because the police actions were so extreme that they violated Due Process.

73. Section 810.02(1) 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,

Florida's definition of burglary has been expanded beyond the common law to protect structures and conveyances as well as dwellings.⁷⁴ Similarly, the intruder need not have the intent to commit a felony; the intent to commit any criminal offense would do. The burglary chapter's definitions of "structures"⁷⁵ and "dwellings"⁷⁶ also include the "curtilage"⁷⁷ of these two places. However, the term "curtilage" is not specifically defined in chapter 810 or elsewhere in the *Florida Statutes*.⁷⁸ Florida courts have previously

unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." FLA. STAT. § 810.02(1) (1995).

Under this definition, non-consent to the entry or remaining in the dwelling is not an element of the offense. Rather, consent is an affirmative defense which the accused must raise. See *Strachn v. State*, 661 So. 2d 1255 (Fla. 3d Dist. Ct. App. 1995). Ordinarily, a person would ordinarily be incapable of burglarizing his own home. However, this may not always be the case. Recently, in a case of apparent first impression, the Second District Court of Appeal found that a husband who violated a court restraining order by entering his former home to commit a crime inside could be legally found guilty of burglary, since at the time of entry he "did not have a possessory right in the premises." *State v. Suarez-Mesa*, 662 So. 2d 735, 736 (Fla. 2d Dist. Ct. App. 1995), *review denied*, 669 So. 2d 252 (Fla. 1996).

For a recent case discussing the "entering" element of burglary, see *Braswell v. State*, 671 So. 2d 228 (Fla. 1st Dist. Ct. App.), *review denied*, No. 88,012, 1996 LEXIS 1588, at *1 (Fla. Aug. 26, 1996) (finding that the accused entered a conveyance by reaching into the open bed of a pickup truck and taking personal property from it).

For recent cases discussing the sufficiency of evidence to support burglary convictions, see *Persaud v. State*, 659 So. 2d 1191 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 667 So. 2d 775 (Fla. 1996) (finding that when the defendant was stopped in his car filled with stolen property from a dwelling, shortly after a citizen had reported what looked like a possible break-in, this could support a burglary of a dwelling conviction) and *Walker v. State*, 656 So. 2d 950 (Fla. 5th Dist. Ct. App. 1995) (finding that a defendant could be convicted of burglary based on the finding of his fingerprint on the window of a back bedroom that was used as the point of illegal entry).

74. FLA. STAT. § 810.02(1).

75. See *id.* § 810.011(1). This section begins its definition by describing a "[s]tructure" as "a building of any kind . . ." Similar language is used at the start of the definition of "[d]welling." See *id.* § 810.011(2).

The word "building" is not defined in chapter 810. Recently, the fourth district in *Dozier v. State*, 662 So. 2d 382, 383 (Fla. 4th Dist. Ct. App. 1995), found no error in a trial court's instruction to jurors in a burglary trial that for the purpose of defining structure, "there's no special legal definition for building, so you should take building to mean what is normally associated with the term in your every day life."

76. See FLA. STAT. § 810.011(2).

77. Both subsections (1) and (2) of section 810.011 contain the language "together with the 'curtilage' thereof" in their definitions of structure and dwelling. FLA. STAT. § 810.011(1)-(2). However, not all statutory definitions of burglary include "curtilage." See MODEL PENAL CODE § 221.1(1).

78. Whether certain conduct takes place within the "curtilage" of a dwelling is also relevant to charges of disorderly conduct under section 877.03 of the *Florida Statutes*. See *Miller*

interpreted the term “curtilage” to include a structure’s enclosed grounds,⁷⁹ fenced-in yard,⁸⁰ enclosed parking area,⁸¹ garage,⁸² and driveway.⁸³ Under the current definition of “curtilage,” some past Florida decisions have even held that merely walking up to the door of someone’s house with the intent to break in and commit a crime will be a burglary even if the house’s threshold is not crossed, since the “curtilage” has been entered.⁸⁴ Recently, the Supreme Court of Florida settled any question concerning what basic requirements there are before a particular area can be considered a structure or a dwelling’s “curtilage.”

In *State v. Hamilton*,⁸⁵ Hamilton and an accomplice, Thomas, entered the yard of a home intending to steal motors from a boat located in the yard. The homeowner saw the two would-be thieves and confronted them with a shotgun. Subsequently, the homeowner shot and killed Thomas. Hamilton was charged with one count of burglary of a dwelling and a second count of second degree felony murder for the death of his accomplice, Thomas. At trial, the prosecution presented very little evidence concerning the appearance of the backyard where the motors were located.⁸⁶ Hamilton requested that the trial court give the definition of structure that is found in the *Florida Standard Jury Instructions in Criminal Cases*. Under that definition, a “structure” is “any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure.”⁸⁷ Despite this request, the trial court gave a modified instruction that omitted any requirement that the area beyond the building itself be “enclosed” and which defined “curtilage” as

v. State, 667 So. 2d 325 (Fla. 1st Dist. Ct. App. 1995) (reversing the defendant’s conviction for disorderly conduct based on his loud cursing in his yard as this occurred in his dwelling and no facts showed that the language used incited others or posed an imminent danger to them).

79. See *Tobler v. State*, 371 So. 2d 1043 (Fla. 1st Dist. Ct. App.), *cert. denied*, 376 So. 2d 76 (Fla. 1979).

80. See *T.J.T. v. State*, 460 So. 2d 508 (Fla. 3d Dist. Ct. App. 1984).

81. See *Greer v. State*, 354 So. 2d 952 (Fla. 3d Dist. Ct. App. 1978).

82. See *State v. Rolle*, 577 So. 2d 997 (Fla. 4th Dist. Ct. App. 1991).

83. See *J.E.S. v. State*, 453 So. 2d 168 (Fla. 1st Dist. Ct. App. 1984); *Joyner v. State*, 303 So. 2d 60 (Fla. 1st Dist. Ct. App. 1974), *cert. discharged by* 325 So. 2d 404 (Fla. 1976).

84. See *M.M. v. State*, 610 So. 2d 55 (Fla. 3d Dist. Ct. App. 1992).

85. 660 So. 2d 1038 (Fla. 1995).

86. The State only presented a photograph showing the place as a “semi-secluded area adjacent to the home surrounded by several unevenly spaced trees.” *Id.* at 1039 n.2 (quoting *State v. Hamilton*, 645 So. 2d 555, 557 (Fla. 2d Dist. Ct. App. 1994)). Other than this, there was no evidence that the backyard was enclosed in any matter.

87. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 136 (1981).

“the ground and buildings immediately surrounding a structure and dwelling and customarily used in connection with it.”⁸⁸ Following these instructions, the jury found Hamilton guilty of burglary of a dwelling and second degree felony murder.

The Second District Court of Appeal⁸⁹ found the trial court committed reversible error by deviating from the standard jury instruction on “structure” by not including in its instructions the requirement that the “curtilage” be enclosed.⁹⁰ The court, however, declined to decide to what extent the area around a structure must be enclosed before it could be considered to meet the meaning of “curtilage.” Although it reversed Hamilton’s convictions for burglary and for second degree felony murder,⁹¹ the district court certified both of these issues to the Supreme Court of Florida as questions of great public importance.

The Supreme Court of Florida accepted the certified questions and affirmed the decision of the second district.⁹² In so doing, the *Hamilton*

88. *Hamilton*, 660 So. 2d at 1039. Both the supreme court and the district court noted that this definition was based on virtually identical language as that found in *A.E.R. v. State*, 464 So. 2d 152, 153 (Fla. 2d Dist. Ct. App.), *review denied*, 472 So. 2d 1180 (Fla.), *cert. denied*, 474 U.S. 1011 (1985) (footnote omitted).

89. *Hamilton*, 645 So. 2d at 556.

90. Both the district court and the supreme court also found that the trial court should have explained on the record why the standard instruction was not given. The State had requested the deviation from the standard language, evidently to cure problems with the deficiency of proof that the yard was within the “curtilage.” As the district court noted, the State’s prosecution rested solely on the jury finding that the killing took place during the commission of a burglary. Without such a finding there would not be any statutorily required predicate felony for application of the felony murder doctrine. Although Hamilton was convicted of third degree grand theft, this is not one of the specifically enumerated felonies under section 782.04 of the *Florida Statutes*, which can support a felony murder conviction. *See* FLA. STAT. § 782.04 (1995).

The instruction that the trial court gave was based on the language of another district court opinion. Thus, the trial court had some basis for its deviation from the standard instruction. However, this ultimately turned out to be incorrect. Prosecutors and trial judges should carefully note the second district’s admonition in this case that “[p]assages from appellate opinions, taken out of context, do not always make for good jury instructions.” *Hamilton*, 645 So. 2d at 559 n.5 (quoting *Sarduy v. State*, 540 So. 2d 203, 205 (Fla. 3d Dist. Ct. App. 1989)).

91. The district court also reduced Hamilton’s conviction for grand theft from a second degree to a third degree felony. Additionally, the district court rejected claims that Hamilton’s motion for judgment for acquittal should have been granted and that the trial court erred by not instructing the jury on justifiable and excusable homicide. The district court’s opinion does not give any reasons for these rulings.

92. The exact question both certified and accepted is “DOES FLORIDA’S BURGLARY STATUTE REQUIRE THAT THE ‘CURTILAGE’ BE ENCLOSED AND, IF SO, TO WHAT EXTENT?” *Hamilton*, 660 So. 2d at 1039.

opinion provides an organized and thoughtful discussion of the gradual evolution of burglary law in Florida. Florida's original statutory definition of burglary was extremely close to the common law definition.⁹³ This original definition protected mainly dwellings. Any other "building or structure"⁹⁴ was only included within the scope of this original definition if they were "within the 'curtilage' of a dwelling house though not forming a part thereof."⁹⁵ However, this definition was repealed in 1974, and burglary, as an offense, was expanded to apply to all roofed buildings of any kind. The current definitions of structure and dwellings both explicitly contain language making the "curtilage" part of these places. Thus, the present Florida burglary statute extends protection not only to buildings, but also potentially to the grounds around them.⁹⁶ As the *Hamilton* court succinctly noted, "[t]he legislature has [therefore] redefined the crime of burglary as it was treated at common law, but has utilized the common law term 'curtilage' to expand the reach of the burglary statute beyond buildings and vehicles."⁹⁷ Thus, deciding whether a particular locale now comes within the definition of "curtilage" is of extreme importance for determining potential criminal liability.

Hamilton began its exploration of what should be considered as the present appropriate definition of "curtilage" by discussing the earlier meanings given to this term. The court noted that at common law, the cluster of buildings and the surrounding ground near the dwelling home would usually be enclosed in some fashion. At common law, use of the word "curtilage" with reference to burglary was a way of protecting not only the dwelling itself but also the buildings and areas so intimately associated with the dwelling that they were virtually a part of it. The court found that early treatises and dictionary definitions generally required some sort of

As the second district's opinion recognized, this actually is two questions, not one. The second district found that beyond requiring that the "curtilage" be enclosed it was hard "to be more precise given the myriad arrangements an owner can fashion in enclosing..." *Hamilton*, 645 So. 2d at 561. The second district thus left the second question unanswered. Similarly, the supreme court failed to expressly address this second question. Like so many other factual issues, this second question is likely to be gradually answered on a case-by-case basis, rather than in one sweeping decision.

93. See 1895 Fla. Laws ch. 4405 (later codified at FLA. STAT. § 810.01 (1941)).

94. *Id.*

95. *Id.*

96. The burglary statutes also protect conveyances, but the term "curtilage" is not used in the definition of "conveyance." Thus, there is presently no such concept as a "curtilage of a conveyance" for purposes of burglary in Florida.

97. *Hamilton*, 660 So. 2d at 1041.

enclosure in order for a place to be considered part of a dwelling's "curtilage." *Hamilton* concluded that the term "curtilage" had a rather precise definition at common law.

The supreme court noted that Florida has expressly incorporated the common law into its own body of law.⁹⁸ Despite this incorporation, Florida courts have been inconsistent in defining what constitutes a "curtilage." *Hamilton* mainly attributed this inconsistency to the different factual and legal contexts in which the term "curtilage" is used. The court noted that most district court opinions had construed the term "curtilage" for purposes of the burglary statute as requiring some sort of enclosure. However, the same courts have used a different definition when examining the term "curtilage" for purposes of deciding whether an illegal search and seizure has taken place. In *United States v. Dunn*,⁹⁹ the United States Supreme Court adopted a four-part test for determining whether a certain location was a part of a building's "curtilage" when trying to determine if an illegal search occurred. Whether the area was enclosed within the same immediate area as a home was only one part of that test.¹⁰⁰ Under the *Florida Constitution*, Florida courts are required to interpret the *Florida Constitution's* prohibition against unreasonable search and seizures¹⁰¹ in conformity with the decisions in the United States Supreme Court construing the Fourth Amendment. In *Hamilton*, the Supreme Court of Florida found no inconsistency in using different tests for determining whether a place was within the "curtilage" depending upon the legal issue involved.

In addition to noting that Florida's criminal law had expressly incorporated the common law, *Hamilton* also found that other basic principles involving construction of criminal statutes required that the "curtilage," for purposes of burglary statutes, must mean an enclosed area. First, there is the principle that citizens must be given ample notice as to which aspect of their conduct will violate the criminal law. Although ignorance of the law is generally no defense, a certain amount of notice must be given or else there will be due process problems.¹⁰² Second, Florida statutory criminal law

98. See FLA. STAT. § 775.01 (1995).

99. 480 U.S. 294 (1987).

100. The other three parts of the test were: (1) the proximity of the area alleged to be "curtilage" to the dwelling; (2) the nature and use to which this area was put; and (3) the steps taken to protect the area from observation by passersby. *Id.* at 301.

101. See FLA. CONST. art. I, § 12.

102. Lack of adequate notice brings up questions of vagueness. See *infra* text accompanying notes 121–54 (discussing additional constitutional issues surrounding potentially vague criminal statutes).

expressly provides that criminal statutes should be strictly construed in a fashion "most favorabl[e] to the accused."¹⁰³ Since the supreme court could not determine whether the legislature intended to adopt the common law definition of "curtilage" or to eliminate the requirement of enclosure, as some jurisdictions had, fairness required the current burglary statute to be interpreted to contain such a requirement. Finally, the supreme court agreed with the district court's reasoning that to not require some sort of enclosure could possibly lead to harsh and absurd results.

Hamilton is clearly an important case on construction of the Florida burglary statute. As a result of *Hamilton*, the Supreme Court of Florida has provided a somewhat more precise definition for the concept of "curtilage."¹⁰⁴ However, in so doing, the court expressly acknowledged that the legislature could amend the burglary statutes and give the term "curtilage" any definition that it believed to be appropriate.¹⁰⁵ This could include eliminating the requirement of an enclosure for certain areas, as had been done in other jurisdictions. So far, the legislature has not so acted. The real question facing the legislature is whether it wishes to use the burglary statute as a means of expanding criminal responsibility and punishment for offenders who otherwise are breaking the criminal law. *Hamilton's* facts provide a classic example of this scenario. Presently, *Hamilton* could only be successfully prosecuted for theft.¹⁰⁶ If the burglary statute is amended to expand the definition of "curtilage" to include areas close to a dwelling or structure but not necessarily enclosed, then the two perpetrators would be guilty of burglary as well. Certainly, if one believes in the deterrent theory behind criminal law, expanding the definition of "curtilage" to make *Hamilton's* act a burglary in addition to maybe a trespass¹⁰⁷ and theft is not troubling. Theoretically, people would then know that entering another's

103. FLA. STAT. § 775.021(1) (1995).

104. As previously noted, the supreme court only answered one of two questions certified by the district court. *See supra* note 92.

105. The legislature has recently amended the definition of "dwelling" to include any "attached porch" on a building or conveyance that would otherwise qualify as a "dwelling." *See* ch. 96-388, § 47, 1996 Fla. Laws 2301, 2337 (amending FLA. STAT. § 810.011(2) (effective October 1, 1996)). However, so far the legislature has not statutorily defined what should be considered as "curtilage."

106. *Hamilton* could probably not be successfully prosecuted for trespass, under section 810.09(1) of the *Florida Statutes*, unless the homeowner had given the two would-be thieves actual notice to get off of his property. *See* FLA. STAT. § 810.09(1) (1995). Even if such notice had been given here, the trespass would be only a first degree misdemeanor under the facts given. *See id.* § 810.09(2)(b).

107. *See id.*

property might make them susceptible to harsher punishment. However, the critical issue behind expanding the definition of "curtilage" for purposes of the burglary statute is really posed by the felony murder rule. When the death of someone occurs during certain enumerated felonies, then the surviving felons are liable for first degree murder under the theory of felony murder. Unlike some other jurisdictions, which have adopted different means of abrogating the harshness of the felony murder doctrine, Florida has adopted a relatively strict and harsh interpretation of this doctrine.¹⁰⁸ Thus, the fact that the killing in this particular case was not done by one of the felons, or that the person killed was a co-felon,¹⁰⁹ would not make a difference in applying the felony murder doctrine to Hamilton. Whether the Florida Legislature wishes to achieve such a result should be one of the prime concerns in considering whether "curtilage" should be legislatively defined to abrogate the result reached in *Hamilton*.¹¹⁰

E. Attempted Murder of a Law Enforcement Officer

Florida criminal law punishes attempted as well as completed crimes. The rationale for so doing that a person who possesses the requisite intent to

108. The Florida Legislature could have adopted an even harsher version of the felony murder rule. Florida currently applies the felony murder rule only to a certain number of specifically enumerated felonies. The harshest version of the felony murder doctrine would be to apply it to all statutory felonies.

The felony murder rule's harshness may also be alleviated by applying the independent act doctrine. Generally, felons are responsible for all killings committed by their accomplices during the course of the underlying felony. However, when a co-felon's homicidal act so deviates from the original plan and does not further the commission of the felony, it will not be attributed to the other co-felons. Obviously whether such a deviation exists must be determined under the particular facts of each case. For a recent case discussing this doctrine, see *Dell v. State*, 661 So. 2d 1305 (Fla. 3d Dist. Ct. App. 1995), which found no error in the trial court's refusal to instruct the jury about the independent act doctrine and discussed situations where such an instruction would be appropriate.

109. See *People v. Washington*, 402 P.2d 130 (1965) (reversing defendant's conviction for felony murder where his accomplice was killed by the victim during a robbery).

110. The Supreme Court Committee on Standard Jury Instructions in Criminal Cases has proposed the following new definition for "[d]welling" in section 810.02: "'Dwelling'" means a building [or] [conveyance] of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with enclosed space of ground and outbuildings immediately surrounding it." *Proposed Standard Jury Instruction Amendments*, FLA. BAR NEWS, Aug. 1, 1996, at 14.

There is no indication in the published version of the new instruction that it was proposed in response to *Hamilton*. If this is indeed the reason, one would also expect a new instruction for "structure."

commit a criminal act and takes some steps toward the completion of this criminal act poses a sufficient threat to society for the criminal law to intervene. Generally, attempted crimes are punished to a lesser degree than completed crimes.¹¹¹ There are two justifications for such difference in punishment. First, since the criminal object was not actually obtained, generally punishing an attempted crime to the same extent as a completed crime would pose problems of disproportionality. Second, and perhaps more important, punishing attempts to a lesser degree than the completed offense provides an incentive for a perpetrator to abandon his or her criminal scheme before attaining its completion.

During this past year, the Supreme Court of Florida, in *State v. Iacovone*,¹¹² addressed challenges to the former sentencing schemes for the offense of attempted murder of a law enforcement officer. Iacovone became involved in a violent domestic dispute with his former girlfriend who also happened to be the mother of their three children. When a police officer tried to intervene, Iacovone tried to flee in his car. During his escape attempt, Iacovone struck the officer with the car. Iacovone was subsequently tried and convicted of several offenses,¹¹³ including attempted third degree murder of a law enforcement officer. Under the general statutory provisions for third degree murder and for attempt crimes, third degree murder would have been considered a second degree felony¹¹⁴ and would be punished as a third degree felony.¹¹⁵ However, since the attempted murder here involved a crime against a police officer, special statutory sections regarding punishment applied. Former sections 775.0823, 775.0825, and 784.07 of the *Florida Statutes* attempted to provide increased protection to Florida law

111. Section 777.04(4)(d) of the *Florida Statutes* lists several exceptions to this principle. FLA. STAT. § 777.04(4)(d) (1995). Where an attempted crime is punished to the same degree as the completed offense, the attempted crime is not considered a lesser included offense of the completed crime. In such a situation, it is error to instruct a jury on both the completed offense and the attempted offense. See *Nurse v. State*, 658 So. 2d 1074 (Fla. 3d Dist. Ct. App. 1995), review denied, 667 So. 2d 775 (Fla. 1996) (finding that the trial court committed reversible error by instructing the jury on attempted burglary of a dwelling as well as burglary of a dwelling, both of which were punishable as third degree felonies under the facts). *Nurse* contains an excellent, extensive discussion on what are necessary lesser included and permissive included offenses under current Florida criminal law.

112. 660 So. 2d 1371 (Fla. 1995).

113. The other offenses were burglary, criminal mischief, aggravated assault, and aggravated battery. None of these offense convictions are pertinent to the issue discussed in the appellate decision in this case.

114. See FLA. STAT. § 782.04 (1991).

115. See *id.* § 777.04(4)(c) (1991).

enforcement officers and other law enforcement officers acting within the course of their duties by providing increased penalties for certain offenses committed against them. The obvious purpose of these sections is to deter the commission of such offenses against law enforcement officers.

In his appeal, Iacovone challenged the constitutionality and rationality of these former sentencing provisions. Under former section 775.0823(3), a person convicted of third degree murder of a law enforcement officer would have received a sentence of fifteen years with a fifteen year mandatory minimum. However, former section 784.07(3) contained a special sentencing provision for attempted murder of law enforcement officers. This section made all attempted murders of law enforcement officers life felonies. Additionally, former section 775.0825 made anyone convicted of the attempted murder of a law enforcement officer ineligible for parole until twenty-five years incarceration have been served. If read literally, an accused would actually receive less punishment for the completed third degree murder of a law enforcement officer than for an attempted murder. Iacovone claimed that the special offense classification and sentencing provisions of former sections 784.07(3) and 775.0825 violate the Equal Protection Clause.

The Second District Court of Appeal¹¹⁶ recognized the legislature's general power to fix the offense classifications and to determine the punishment for these offenses. Additionally, the court acknowledged the general rule that "[s]tatutes are presumed to be constitutional."¹¹⁷ However, in this case, these two principles were insufficient to uphold the constitutionality of the sections involved. The district court noted that traditional equal protection analysis did not apply here,¹¹⁸ but found that "irrational [offense and sentencing] classifications may violate fundamental constitutional principles . . ."¹¹⁹ Protecting law enforcement officers in the performance of their duties was certainly a valid legislative goal. However, punishing some attempted murders of law enforcement officers more harshly than completed murders of the same personnel did not further that goal. Indeed, such a punishment scheme would actually be inconsistent with the furtherance of that goal. Thus, the second district found that the statutory sections would

116. Iacovone v. State, 639 So. 2d 1108 (Fla. 2d Dist. Ct. App. 1994).

117. *Id.* at 1109 (citing State v. Wilson, 464 So. 2d 667 (Fla. 2d Dist. Ct. App. 1985)).

118. The court reasoned that this was because people charged with an attempted murder and those charged with a completed murder are "not similarly situated because they are charged with different offenses." *Id.*

119. *Id.*

be unconstitutional as applied due to the irrational results that they would cause.

Although the Supreme Court of Florida arrived at the same ultimate conclusion as the district court, it did so for different reasons. The supreme court avoided reaching the constitutional issue addressed below. Instead, the court relied on standard principles of statutory construction. Two such principles are that courts must construe statutes to effectuate the legislative intent behind their passage. However, statutes should not be read literally, if doing so would lead to results conflicting with their purpose. Here, the court found that “[t]he legislature unquestionably intends to give law enforcement officers the greatest possible protection.”¹²⁰ This object would not be attained by applying former sections 784.07(3) and 775.0825 to all degrees of murder.¹²¹ If applied to all degrees of murder, a would-be killer would actually be sometimes better off as far as punishment if his victim was killed rather than if the victim survived. As the court noted, this “would seem to encourage, not discourage, lethal attacks.”¹²² However, if these sections were applied only to first degree murder, then their application would be rational because the penalty for an attempted first degree murder of a law enforcement would still be less than that for the completed act although both would be enhanced. Thus, the court held that former “sections 784.07(3) and 775.0825 apply only to first-degree murder.”¹²³

The long range effect of the supreme court’s holding in *Iacovone* is not likely to be significant. The legislature has already repealed both former sections 784.07(3) and 775.0825. Penalties for violent crimes against law enforcement officers are still enhanced under sections 775.0823 and 784.07. All degrees of both attempted and completed murders of law enforcement officers are now punished under the Florida sentencing guidelines, with the exception of first degree murder. However, the significance of the court’s reasoning in *Iacovone* should apply to all offense classification and punishment. Both the district and supreme court opinions require rationality in criminal statutes. When such rationality does not exist on the face of a statute, the statute will either be construed in a way such that rationality can be provided or it will be declared invalid. Indeed, literally applying these former sections would have been inconsistent with the general principles behind punishment. One goal of punishment is deterrence. The theory

120. *State v. Iacovone*, 660 So. 2d 1371, 1373 (Fla. 1995).

121. *Id.*

122. *Id.*

123. *Id.* at 1374.

behind this is that the potentially higher the punishment the less incentive there is to commit the forbidden act. Here, as both courts recognized, literal application of these sections would actually have provided a disincentive to desist, rather than an incentive to desist. Another theory behind punishment is retribution. However, one principle of retribution is proportionality. Under this principle, commonly stated as "let the punishment fit the crime," vastly disproportionate sentences for virtually the same acts should not exist, and when they do so, such disproportionality must be strictly justified. As no such justification existed for the sections in question in *Iacovone*, the supreme court really had no choice but to either find them unconstitutional or construe them in a way to avoid reaching a disproportionate and absurd result.

III. CONSTITUTIONAL CHALLENGES TO FLORIDA CRIMINAL LAWS

A. *Vagueness*

Due process challenges to Florida criminal statutes based upon allegedly vague language continue to concern the Supreme Court of Florida. Criminal statutes must give a reasonable person sufficient notice of what conduct is likely to be proscribed for a number of reasons. First, the criminal law expects that every citizen will conform his or her conduct so as to avoid violating the law. Without knowing exactly what conduct violates the law, reasonable people cannot possibly be expected to govern their actions accordingly. Second, vague statutes allow the police undue freedom to interpret what actions violate the law. This potentially allows the police to arrest, search, and charge citizens in an inconsistent and potentially discriminatory manner. Third, if the statute is so vague that the conduct which violates it is unclear, citizens can find themselves being charged at the whim of a prosecutor. Fourth, citizens fearing potential imposition of criminal sanctions may forego the valid exercise of their constitutional rights rather than risk arrest and/or conviction. Finally, without sufficient standards as to what conduct violates a statute, jury decision making as to when individuals are guilty of violating the criminal law is not likely to be sufficiently consistent to merit public confidence. Thus, unconstitutionally vague statutes are general risks to the rights of individual citizens and to the confidence of the general public in the criminal justice system. Individual

Supreme Court of Florida cases addressing challenges to Florida criminal statutes based on vagueness are discussed below.¹²⁴

1. Negligent Treatment of Children

In *State v. Mincey*,¹²⁵ the Supreme Court of Florida considered arguments that Florida Statute section 827.05 concerning negligent treatment of children was unconstitutionally void for vagueness. The state charged Mincey under the negligent treatment statute after his five-year-old stepson was found wandering the streets late at night clad only in pajamas. This charge was based purely on simple negligent conduct. Mincey moved to dismiss the charges claiming that section 827.05 was unconstitutionally vague. The county court agreed and certified its decision to the Fourth District Court of Appeal, which likewise found section 827.05 constitutionally deficient.¹²⁶ However, the Supreme Court of Florida accepted the

124. In addition to the recent Supreme Court of Florida cases discussing the void for vagueness doctrine, a number of district court of appeal decisions dealt with this topic. During the last two survey periods, vagueness was the most frequently raised basis for constitutional challenges to Florida criminal laws. The relatively large number of cases raising vagueness challenges suggest that this will continue to be the one of the most, if not the most, popular grounds on which to attack criminal statutes. For further general discussion on the void for vagueness doctrine, see LAFAVE & SCOTT, *CRIMINAL LAW* 2.3 (2d ed. 1986).

For district court of appeal decisions during this survey period raising vagueness challenges to Florida Statutes, see *Morey's Lounge, Inc. v. State of Florida, Dept. of Business and Professional, Division of Alcoholic Beverages and Tobacco*, 673 So. 2d 538, 540 (Fla. 4th Dist. Ct. App.), *review denied*, No. 88,240, 1996 LEXIS 1723, at *1 (Fla. Sept. 18, 1996) (upholding the constitutionality of section 561.29(1)(a) which allows the Department to suspend or revoke a beverage license for violation of "any of the laws of this or of the United States") (quoting *Florida Bar v. Dubow*, 636 So. 2d 1287 (Fla. 1994)). See also *Jennings v. State*, 667 So. 2d 442, 444 (Fla. 1st Dist. Ct. App.), *review granted*, 676 So. 2d 1368 (Fla. 1996) (finding that the words "12 A.M." in section 893.13(1)(c) of the *Florida Statutes*, increasing the penalty for selling narcotics near a school during certain hours, were not unconstitutionally vague); *Falco v. State*, 669 So. 2d 1053, 1054 (Fla. 4th Dist. Ct. App.), *review denied*, 672 So. 2d 542 (Fla. 1996) (finding that the term "custodial authority" in section 794.041(2)(b) of the *Florida Statutes*, criminalizing sexual activity by a person in custodial authority with a child, was not vague); and *Quinn v. State*, 662 So. 2d 947, 949 (Fla. 5th Dist. Ct. App. 1995) (upholding the constitutionality of section 337.135 of the *Florida Statutes*, under which it is a second degree felony, to "fraudulently represent an entity as a socially and economically disadvantaged business enterprise" to qualify for certification under a Department of Transportation program to assist such businesses in obtaining contracts) (quoting FLA. STAT. § 337.135 (1989)).

125. 672 So. 2d 524 (Fla. 1996).

126. *State v. Mincey*, 658 So. 2d 597 (Fla. 4th Dist. Ct. App. 1995).

certified question concerning validity of section 827.05¹²⁷ from the district court's decision.

Florida Statute section 827.05 makes it a second degree misdemeanor for a person "though financially able" to "negligently deprive a child" of the necessities of life when such deprivation either significantly impairs the child's physical or emotional health or significantly endangers it.¹²⁸ This section is not Florida's first attempt to criminalize the negligent treatment of children. Former section 827.05 of the *Florida Statutes* had made it a second degree misdemeanor to "negligently depriv[e] a child of, or allo[w] a child to be deprived of" necessities. However, this statute had not passed constitutional muster. In *State v. Winters*,¹²⁹ the supreme court found this language constitutionally deficient because the statutory language evidently punished simple negligent conduct without any showing of willfulness. After *Winters*, the legislature amended section 827.05 to add the words "though financially able" and additional language of causation which would link the alleged deprivation to the danger of harm.¹³⁰ Besides former section 827.05, Florida also at the same time had a general child abuse statute, former section 827.042, which made it a crime to "wilfully or by culpable negligence" deprive a child of life's necessities when doing so either caused the child's "physical or mental health . . . to be endangered."¹³¹ The year after *Winters*, in *State v. Joyce*,¹³² the defendants attempted to convince the Supreme Court of Florida that the general criminal child abuse statute,

127. The exact question accepted by the supreme court is as follows:

WHETHER THE ADDITION OF LANGUAGE ADDRESSING FINANCIAL ABILITY AND A CAUSAL RELATIONSHIP BETWEEN THE RESIDENTIAL ENVIRONMENT AND SIGNIFICANT IMPAIRMENT OF THE CHILD'S PHYSICAL AND EMOTIONAL HEALTH IN SECTION 827.05 AMOUNTS TO A WILLFUL INTENT OR SCIENTER REQUIREMENT SUFFICIENT TO OVERCOME THE HOLDING IN *WINTERS*.

Mincey, 672 So. 2d at 525 (footnote omitted).

128. See FLA. STAT. § 827.05 (1995).

129. 346 So. 2d 991 (Fla. 1977).

130. The additional causation language in revised section 827.05 which was added to the end of the former statute provides: "when such deprivation . . . causes the child's physical or emotional health to be significantly impaired or to be in danger of being significantly impaired" FLA. STAT. § 827.05 (1995).

131. FLA. STAT. § 827.04(2) (1975). Section 827.04 has since been amended to prohibit depriving a child of necessities when such deprivation "inflicts or permits the infliction of physical or mental injury to the child." FLA. STAT. § 827.04(2) (1995). Depending upon the degree or duration of the injury, the crime will be either a third degree felony under 827.04(1), or a first degree misdemeanor under 827.04(2).

132. 361 So. 2d 406 (Fla. 1978).

former section 827.04, was unconstitutional for the same reasons that former section 827.05 had been found deficient. However, the supreme court rejected this argument and distinguished the two. *Joyce* noted that the basis for holding former section 827.05 unconstitutional in *Winters* was that “the negligent treatment statute [827.05] made criminal acts of simple negligence—conduct which was neither willful nor culpably negligent.”¹³³ Since former section 827.04(2) had a requirement of willfulness or culpable negligence, the deficiency present in former section 827.05 was not present with the statute in *Joyce*.

In *Mincey*, both the fourth district and the supreme court noted the different results reached on the vagueness challenges in *Winters* and *Joyce*. Both courts also noted that the only difference between former section 827.05 and the present version was the additional statutory language relating to causation and the offender’s financial ability. The district court found that the addition of this language did not “address the lack of willfulness, scienter, or mens rea,”¹³⁴ and thus did not cure the defect in former section 827.05. The Supreme Court of Florida arrived at the same result, finding that the addition of the new statutory language “does not clarify the type of conduct that is prohibited under the statute.”¹³⁵ Thus, the *Mincey* court held that the new language did not correct the vagueness problems recognized in earlier decisions and found section 827.05 unconstitutionally vague.

Mincey is an interesting decision because it may have arrived at the right result for the wrong reason. Arguably, section 827.05 does have a mens rea requirement in it. If so, then how could it be considered vague? The statute explicitly contemplates a person who “negligently deprives a child.”¹³⁶ The type of conduct involved here seems to involve negligence. Certainly the language found constitutional in section 827.04 requiring willfulness explicitly requires a much higher mens rea than negligence.¹³⁷

133. *Id.* at 407.

134. *Mincey*, 658 So. 2d at 598.

135. *Mincey*, 672 So. 2d at 526.

136. *See* FLA. STAT. § 827.05 (1995).

137. “Willfulness” generally requires an act as opposed to a failure to act. *See, e.g.*, MODEL PENAL CODE § 202(8) (providing that “[a] requirement that an offense be committed wilfully if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.”). Under a “negligence” standard, deciding whether a person has acted or failed to act may not be as easy as it seems. For example, did *Mincey* act negligently by affirmatively allowing his child to wander the streets or did he “act” negligently by not preventing his child from wandering the streets?

The Supreme Court of Florida in *Winters* recognized that negligence can arise from both action or inaction. As the court noted in *Winters*, “[n]egligence may consist either in doing

On the other hand, section 827.04 also criminalizes “culpable negligence” in addition to willfulness.¹³⁸ But when one looks at how the Florida courts have defined “culpable negligence,”¹³⁹ it is clear that this is the equivalent or virtually the equivalent of what would be considered “recklessly” by some criminal codes.¹⁴⁰

Mincey and the court’s previous decision in *Winters* therefore seem to stand for the simple proposition that statutes which criminalize simple negligent conduct will not pass constitutional muster.¹⁴¹ Section 827.04 already criminalizes willful child abuse. Thus, persons who willfully harm children can be punished under that statute. The same statutory section also punishes what would be considered “culpable negligence.” Those individuals exhibiting a high degree of lack of care for children can likewise be prosecuted. One of the purposes of the criminal law is to clarify what conduct will subject someone to criminal liability. If a statute makes it too easy to subject someone to criminal liability, then there is the problem that

something that a reasonabl[e] . . . person would not do . . . or in failing to do something that a reasonabl[e] . . . person would do under like circumstances.” *Winters*, 346 So. 2d at 993.

138. See FLA. STAT. § 827.04(1)–(2).

139. For example, in *Hodges v. State*, 661 So. 2d 107 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 940 (Fla. 1996), the court mentioned that the culpable negligence needed for a manslaughter would have to be “of a gross and flagrant character, evincing reckless disregard of human life . . . or that reckless indifference to the rights of others, *which is equivalent to an intentional violation of them.*” *Id.* at 109 n.2 (emphasis added).

140. The Model Penal Code defines the culpability level of “Recklessly” as “consciously disregard[ing] a substantial and unjustifiable risk” MODEL PENAL CODE § 2.02(2)(c). The disregard of the risk involved must be “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” *Id.*

Under the Model Penal Code, there are four levels of culpability or mens rea that can support a criminal charge depending upon the wording of the statute involved: purposely, knowingly, recklessly, or negligently. See *id.* § 2.02(2). The first three levels of culpability reflect some level of awareness of the conduct the defendant is accused of doing. *Id.* § 2.02(2)(a)–(c). Negligently, the fourth and lowest level of culpability, does not reflect a level of awareness and is only sufficient to support a conviction in rare circumstances. *Id.* § 2.02(d).

141. The only other case during this survey period which discussed section 827.05 also found it unconstitutional. See *State v. Ayers*, 665 So. 2d 296 (Fla. 2d Dist. Ct. App. 1995), *aff’d*, 673 So. 2d 869 (Fla. 1996). However, *Ayers* noted in its opinion that child abuse statutes from several other states that had negligence as one of the levels of culpability had been upheld against vagueness attacks. *Id.* at 298. *Ayers* also noted that at one time certain acts of negligence, such as careless driving, had been punished criminally. *Id.* at 299.

Neither the district court nor the supreme court in *Mincey* make any mention of these other state statutes which appear to prohibit much the same conduct prohibited by section 827.05.

virtually anybody can be held liable.¹⁴² The facts in *Mincey* are a good example. Although one would surely not want to have a five-year-old wandering the streets at night (whether clad only in pajamas or fully dressed), charging somebody with a second degree misdemeanor for one simple act of negligence for allowing such a thing to happen seems a little severe. Many parents, at one time or another, probably do something that negligently expose their child to danger. Luckily, the vast majority of parents hardly ever do this, and luckily most children are not hurt despite being exposed to such dangers. Furthermore, parents who consistently negligently fail to care for their children are subject to state intervention under statutes other than those for criminal offenses. The decisions in *Mincey*, *Winters*, and *Joyce* show that these statutes are probably the appropriate avenue to pursue when parents engage in simple negligence with regards to their children.

2. Bribery

In *Roque v. State*,¹⁴³ the Supreme Court of Florida sustained a vagueness challenge to section 838.15 of the *Florida Statutes*, which created the crime of commercial bribe receiving. This statute made it a third degree felony¹⁴⁴ for a person to “solicit[], accept[], or agree[] to accept a benefit with intent to violate a statutory or common-law duty”¹⁴⁵ which that person owes another in a certain capacity.¹⁴⁶ Part of Roque’s job as a company credit manager was to extend credit to companies seeking to finance construction equipment. Roque worked with Mr. Smith, an independent contractor, who located suitable candidates for loans from Roque’s company. Smith, as an independent contractor, was paid by commission. The state charged Roque with entering into an unauthorized side agreement

142. The language in section 827.05 actually would pose this very problem if construed literally. This section is not limited to parents or those in a caretaking posture towards children. Instead, section 827.05 applies to whoever “is financially able.” FLA. STAT. § 827.05 (1995). Thus, one must ask if a millionaire who knows that children are starving and neglects to donate some money to see that the starving children are fed would be prosecutable.

Since the purpose of the criminal statute is to not only specify what acts are prohibited but also to clarify who may be criminally responsible for acting or failing to act under certain circumstances, then arguably section 827.05 could have been declared vague because by making so many persons potentially responsible, it fails to give the notice which due process of law requires.

143. 664 So. 2d 928 (Fla. 1995).

144. FLA. STAT. § 838.15(2) (1995).

145. *Id.* § 838.15(1).

146. *Id.* § 838.15(1)(a)–(e).

whereby Smith kicked back to Roque part of each commission he received for finding a suitable candidate. At the trial court level, Roque successfully moved to dismiss the commercial bribery charges against him, claiming that section 838.15 was unconstitutionally vague and susceptible to arbitrary application. The Third District Court of Appeal disagreed and found section 838.15 to be constitutional.¹⁴⁷ The district court found that there are two separate questions under a vagueness challenge. The first was whether “the statute [in question] gives a person of ordinary intelligence fair notice of what constitutes [the] forbidden conduct.”¹⁴⁸ Second, a challenged statute had to be “specific enough that it is not susceptible to arbitrary and discriminatory enforcement.”¹⁴⁹ Roque claimed that the inclusion of the words “with intent to violate a statutory or common law duty” made section 838.15 unconstitutionally vague.¹⁵⁰ The district court of appeal rejected this argument for two reasons. This statutory language was found to be specific enough by its reference to the professional or legal relationships specified elsewhere in the statute. The court found that “[a] person who fits into one or more of these categories is certainly aware of the duties which are commensurate with that station.”¹⁵¹ The use of the word “bribe” also helped indicate the nature of the prohibited conduct. When given its common meaning, this word sufficiently conveyed such notice that a person with reasonable intelligence would understand what conduct section 838.15 prohibited. The district court then turned to the second question of the vagueness analysis; whether the statute is susceptible to arbitrary enforcement, and it answered in the negative. Since the word “commercial” modified the words “bribe receiving” in the title of section 838.15 and in its definitional section, the statute by its language only applied to private industry and commercial transactions, not to public officials. Additionally, the court found that the specific professions and relationships enumerated in the statute served to limit the amount of prosecutorial discretion in charging violations of section 838.15.

The district court’s opinion had briefly noted the Supreme Court of Florida’s previous discussion of the void for vagueness doctrine in its

147. *State v. Roque*, 640 So. 2d 97 (Fla. 3d Dist. Ct. App. 1994), *review granted*, 650 So. 2d 991 (Fla. 1995).

148. *Id.* at 99 (quoting *Brown v. State*, 629 So. 2d 841, 842 (Fla. 1994)).

149. *Id.*

150. FLA. STAT. § 838.15(1).

151. *Roque*, 640 So. 2d at 99. *See also* FLA. STAT. § 838.15(1).

relatively recent decision in *Cuda v. State*¹⁵² which contrasted the different results in two other previous decisions. The *Cuda* court found that former section 415.111(5) of the *Florida Statutes*, which made it a third degree felony for anyone to exploit an aged or disabled adult “by the improper or illegal use or management”¹⁵³ of such person’s property was unconstitutionally vague.¹⁵⁴ In this case, the supreme court had focused on the words “improper” and “illegal” in finding this section unconstitutional. In so doing, the court had contrasted *Cuda* with its decision in two earlier cases, one holding a statute unconstitutionally vague and the other upholding a statute against such a challenge. In *State v. Rodriguez*,¹⁵⁵ the court had upheld former section 409.325(2)(a)¹⁵⁶ of the *Florida Statutes*, which criminalized certain acts regarding food stamps when the acts done were “not authorized by law.”¹⁵⁷ *Rodriguez* found that because of the program’s peculiar nature and because chapter 409 itself gave notice that there were federal regulations governing the program, these words actually meant “not authorized by state and federal food stamp law.”¹⁵⁸ Thus, when the section being challenged was read in conjunction with the remainder of the chapter, constitutional notice problems were satisfied. Contrary to its decision in *Rodriguez*, in *Locklin v. Pridgeon*,¹⁵⁹ the supreme court had struck down a statute containing the exact same language. Former section 839.22 of the *Florida Statutes* made it unlawful for any government officer to “commit any act under color of authority . . . when such act is not authorized by law”¹⁶⁰ This statute was considered unconstitutionally vague because it required every governmental employee to determine what acts were authorized by law and what acts were not authorized by law. The “law” in *Locklin* was not limited to a narrow area like the “law” in *Rodriguez*. Thus, the term “law” could mean any and all laws, civil or criminal. A person could never know how to govern their conduct to avoid violating the section without

152. 639 So. 2d 22 (Fla. 1994). For extensive discussion about this decision, see Mark M. Dobson, *Criminal Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 67, 104–08 (1995).

153. FLA. STAT. § 415.111(5) (1993).

154. *Cuda*, 639 So. 2d at 25.

155. 365 So. 2d 157 (Fla. 1978).

156. Section 409.325(2)(a) of the *Florida Statutes* contains this challenged statutory language. See FLA. STAT. § 409.325(2)(a) (1995).

157. *Rodriguez*, 365 So. 2d at 159.

158. *Id.*

159. 30 So. 2d 102, 103 (Fla. 1947).

160. FLA. STAT. § 839.22 (1945).

having an all-encompassing knowledge of all law—something which was definitely an impossible task. The third district in *Roque* had found that section 838.15 was more like the statute found constitutional in *Rodriguez* than the ones declared invalid in *Cuda* and *Locklin*. Since section 838.18 specifically referred to certain professional relationships that the appropriate statutory and common law applied to, the district court determined this gave sufficient notice of the law which a person must avoid to not violate section 838.15.

When it came time for the Supreme Court of Florida to adjudicate the constitutionality of section 838.15, it was not so generous, nor detailed in its analysis. The supreme court focused on the statutory language “common law duty” in finding section 838.15 unconstitutionally vague. The court felt that few people would be aware that they owed such a “common duty” to their employers and that fewer still could define the duty’s dimensions. In order to do so *Roque* found that “substantial legal research would be required by many employees to determine their obligations under the law.”¹⁶¹ Therefore, the statute was unconstitutionally vague. Additionally, the court found that the statute could be susceptible to arbitrary applications. Since section 838.15 prescribed the violation of every statutory or common law duty many acts could be prosecuted, according to the court, “no matter how trivial or obscure, whether it results in harm or not.”¹⁶² Thus, individual prosecutors must decide, based on their own subjective opinion, which violations are sufficiently substantial to warrant criminal prosecution. The statute considered in *Roque* therefore failed the second part of the vagueness analysis described in the district court’s opinion.

The Supreme Court of Florida’s opinion in *Roque* is important for several reasons. First, besides invalidating section 838.15, *Roque* also calls into question the constitutionality of section 838.16, titled “Commercial bribery.”¹⁶³ Section 838.16 defines the crime of commercial bribery as “knowing that another is subject to a duty described in s. 838.15(1) and with intent to influence the other person to violate that duty . . .”¹⁶⁴ the offender gives that person a benefit. If *Roque* found that a person receiving a commercial bribe could not possibly know which acts “violate a statutory or common-law duty” under section 838.15(1) then logically a person charged

161. *Roque*, 664 So. 2d at 929.

162. *Id.* at 930.

163. See FLA. STAT. § 838.16 (1995).

164. *Id.* § 838.16(1).

with making a commercial bribe would not know the same thing.¹⁶⁵ Thus, it is hard to see how section 838.16(1) could be considered constitutional if the language that it refers to was found deficient in *Roque*. *Roque* is also important because it indicates that the Supreme Court of Florida is not disposed to uphold the constitutionality of statutes containing language which criminalizes the violation of certain legal duties when those duties are broadly defined. If it wishes to criminalize conduct similar to that proscribed in sections 838.15 and 838.16 perhaps the best approach that the legislature could undertake is the approach suggested by the decision in *Cuda*. There the court had discussed a similar statute from another state which imposed criminal sanctions for financial exploitation of the elderly that had been upheld against challenges for vagueness. As noted in *Cuda*, the Illinois statute the supreme court cited with approval was quite specific in describing the conduct prohibited. Unfortunately in *Roque*, the supreme court did not give any examples of commercial bribery statutes from other jurisdictions which had been upheld against vagueness attacks. Perhaps, if the legislature could find statutes from other states which contain more specific language than that found in sections 838.15 and 838.16, these would be more likely to be upheld.

B. *Overbreadth*

1. Stalking

Several recently decided Supreme Court of Florida cases considered challenges to criminal statutes on the grounds that they were both vague and overbroad. *Bouters v. State*¹⁶⁶ presented such challenges to the constitutionality of the Florida Stalking Law, which is codified at section 784.048 of the *Florida Statutes*.¹⁶⁷ This section actually contains three separate offenses. Under subsection (2), anyone who “wilfully, maliciously, and repeatedly follows or harasses another person” is guilty of stalking, a first degree misdemeanor.¹⁶⁸ Under subsection (3), any person who does the same things and additionally “makes a credible threat with the intent to place that person [the victim] in reasonable fear of death or bodily injury” is guilty of aggravated stalking, a third degree felony.¹⁶⁹ Finally, under subsection (4),

165. *Id.* § 838.15(1).

166. 659 So. 2d 235 (Fla.), *cert. denied*, 116 S. Ct. 245 (1995).

167. FLA. STAT. § 784.048 (1995).

168. *Id.* § 784.048(2).

169. *Id.* § 748.048(3).

anyone who engages in similar conduct after the person being harassed or followed has attained an injunction against this activity also commits aggravated stalking, again a third degree felony.¹⁷⁰ The terms “harasses,” “course of conduct,” and “credible threat” are all defined in subsection (1) of the statute.¹⁷¹

Bouters had been charged with aggravated stalking under subsection (4) due to a series of alleged acts against his former girlfriend. The former girlfriend filed a complaint with the police alleging that Bouters had been calling her several times daily causing emotional distress and that he had beaten her in the past and threatened to kill her. The girlfriend had obtained a domestic violence injunction against Bouters, but that evidently did no good as the defendant had allegedly entered her home without permission but left when the victim called the police. The victim claimed that she believed that Bouters would have hit her if she had not been on the phone with the sheriff’s office and that she was in fear for her safety as well as her life due to his actions against her. At the trial level, Bouters moved to dismiss the charges contending that section 784.048(4) was facially unconstitutional due to vagueness and overbreadth. When that motion was unsuccessful, Bouters pled nolo contendere and then filed an appeal. In a short opinion, the Fifth District Court of Appeal¹⁷² upheld the constitutionality of section 784.048. The Supreme Court of Florida, in a short but important opinion, laid to rest any questions about the constitutionality of this criminal law.

The Supreme Court of Florida turned to United States Supreme Court decisions for the procedure to use in analyzing overbreadth and vagueness challenges to the facial validity of section 748.084. Under the procedure laid down by the United States Supreme Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,¹⁷³ when such a challenge is brought, a court must first “determine whether the enactment reaches a substantial amount of constitutionally protected conduct.”¹⁷⁴ If it does not, then the overbreadth challenge must be rejected. Following this analysis, the reviewing court should examine whether the challenged statute is facially vague. According to the *Village of Hoffman Estates* test, “assuming the enactment implicates

170. *Id.* § 748.048(4).

171. *Id.* § 748.048(1).

172. *See* Bouters v. State, 634 So. 2d 246 (Fla. 5th Dist. Ct. App. 1994).

173. 455 U.S. 489 (1982).

174. *Id.* at 494 (footnote omitted).

no constitutionally protected conduct,”¹⁷⁵ the statute should be declared unconstitutional due to facial vagueness “only if the enactment is impermissibly vague in all of its applications.”¹⁷⁶ The Supreme Court of Florida followed this two-step procedure and first examined whether section 784.048 was overbroad due to its interference with either Bouters’s own First Amendment rights or the First Amendment rights of others. Bouters contended that under this section an arrest could occur if he engaged in almost any “emotionally charged activity.”¹⁷⁷ In his view, as long as the complaining victim and a law enforcement officer both agreed that the activity engaged in served no legitimate purpose and that the person complaining to the police showed substantial emotional distress, someone could be arrested for such constitutionally protected activities, such as political protest or investigative reporting. The Supreme Court of Florida rejected this argument, finding that “[s]talking, whether by word or deed, falls outside the First Amendment’s purview.”¹⁷⁸ Section 784.048 proscribed a certain type of criminal activity which was particularly described in the statute. This conduct had to be malicious, repeated and designed to cause a reasonable person distress. Furthermore, the supreme court noted that under the definition of “harasses,”¹⁷⁹ the conduct must “serve[] no legitimate purpose” and that under the definition of “course of conduct,”¹⁸⁰ constitutionally-protected activity was explicitly excluded from the statute’s coverage. The court recognized that the First Amendment gives a citizen the right to express himself or herself. However, this does not give one the right to engage in conduct which jeopardizes the health and safety of others. In this particular case, the supreme court found that Bouters had indeed allegedly engaged in this type of behavior. Bouters allegedly repeatedly threatened to kill his former girlfriend, and his threats were deemed credible as he had battered her before. Finally, Bouters allegedly violated the domestic violence injunction by entering the victim’s home and leaving only when he believed law enforcement authorities would arrive. Thus, the conduct that Bouters engaged in was not constitutionally protected.

The Supreme Court of Florida likewise had no difficulty in rejecting Bouter’s claim that section 784.048 was facially vague. To sustain such a

175. *Id.*

176. *Id.*

177. *Bouters*, 659 So. 2d at 237.

178. *Id.*

179. *See* FLA. STAT. § 784.048(1)(a).

180. *See id.* § 784.048(1)(b) (Supp. 1992).

claim, Bouters had to show that “the law [was] impermissibly vague in all its applications”¹⁸¹ and thus vagueness could occur only if the prohibitions of a statute were not clearly defined. With regard to section 784.048, Bouters claimed the statutory definition of “harasses” was unconstitutionally vague. Under that definition, “harasses” meant “to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.”¹⁸² The defendant claimed that this definition created a subjective standard for “substantial emotional distress” and that someone who was unduly sensitive could suffer such distress from what would be entirely innocent and permissible contact. If this was so, and if the party causing the distress could be criminally charged, then the average citizen could never be sure that any of his or her conduct towards another person could not end up subjecting the citizen to the reach of section 784.048.

The Supreme Court of Florida had no problem rejecting such a claim. According to the court’s analysis, the stalking statute was analogous to the criminal assault statute. Under the criminal assault statute, the well-founded fear necessary to be caused by another person was measured by the reasonable person standard rather than a subjective standard. Here the same principle was found to apply to the stalking statute. If the conduct was such that it would cause substantial emotional distress in a reasonable person, then it would violate section 784.048. Conduct causing substantial emotional distress in another person but which would not have caused such in a reasonable person would not come within the purview of section 784.048. Thus, the Supreme Court of Florida rejected both attacks on the stalking law’s constitutionality.

2. Cross Burning

Florida’s criminal “cross burning” statute also came under constitutional attack under this survey period. Section 876.18 of the *Florida Statutes* makes it a first degree misdemeanor “to place . . . on the property of another . . . a burning or flaming cross or any manner of exhibit in which [such a cross] is a whole or part without first obtaining written permission of the owner or occupier of the premises to do so.”¹⁸³ In *State v. T.B.D.*,¹⁸⁴ the

181. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

182. FLA. STAT. § 784.048(1)(a) (1995).

183. *Id.* § 876.18 (1995).

State charged a minor with erecting a flaming cross on another's property in violation of this section. However, the trial court found that this section was unconstitutional, because it infringed upon protected First Amendment rights. The First District Court of Appeal agreed with the trial court's ruling and held that section 876.18 "criminalizes a substantial amount of expression protected by the First Amendment and is, therefore, overbroad."¹⁸⁵ The district court first found that since the activity prohibited by section 876.18 was undoubtedly a form of expressive conduct, this conduct fell within the purview of the First Amendment's protection. While the district court recognized that the state has more leeway to restrict expressive conduct than merely written or spoken expression, the court noted that the state cannot do so because of the content of the message to be conveyed. Thus, although the message behind placing a flaming cross in another's property was reprehensible, this conduct still implicated protected First Amendment concerns, making section 876.18 subject to particularly close scrutiny. United States Supreme Court decisions have decreed that when conduct and not speech is involved "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."¹⁸⁶ Applying this test to section 876.18, the district court concluded that the overbreadth here was both "real" and "substantial." The expressive conduct prohibited here could not be considered limited to "fighting words," words which by their very utterance tend to inflict injury and/or incite an immediate breach of the peace. Although the conduct here and the message it conveyed might be reprehensible, the government was still not free to prohibit such activities merely because of its offensive nature.¹⁸⁷ The district court also concluded that even if section 876.18 could be narrowly construed and was limited only to fighting words, it would still have to be found unconstitutional for several reasons. First, the court found that the section

184. 638 So. 2d 165 (Fla. 1st Dist. Ct. App. 1994), *rev'd on other grounds*, 656 So. 2d 479 (Fla. 1995), *cert. denied*, 116 S. Ct. 1014 (1996).

185. *Id.* at 166.

186. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

187. The district court's opinion gives one example of how the court believed the state could end up using section 876.18 to suppress prosecution conduct, which although offensive, was still protected by the First Amendment. The court posited the situation where the Ku Klux Klan erected a flaming cross on one of its member's property but failed to "first obtain[] written permission of the owner." *T.B.D.*, 638 So. 2d at 168 (discussing FLA. STAT. § 876.18).

The owner might have even been happy to see the cross go up and might orally have consented to having it on the property. However, if read and enforced as literally written, such conduct would violate section 876.18 and make those who put up the cross subject to prosecution.

proscribed only one type of conduct based upon the content of the message expressed. Second, such conduct discrimination was not necessary in order to further the legitimate interests which the statute sought to promote.¹⁸⁸ On this basis, the first district upheld the constitutional challenge to section 876.18.

The Supreme Court of Florida, in a relatively short opinion, given the questions involved, disagreed with the district court's analysis and found that section 876.18 passed constitutional muster.¹⁸⁹ The supreme court recognized that under the First Amendment "[c]ontent-based restrictions are presumptively invalid."¹⁹⁰ However, one exception to this general principle is where the speech or conduct was of such slight social value that it is outweighed by "the social interest in order and morality."¹⁹¹ Three examples of this exception are: 1) defamatory speech; 2) obscenity; and 3) fighting words. The supreme court noted that threats of violence can be regulated because citizens have an interest in being protected by the government from fears of violence. Fighting words are such that "by their very utterance [they] inflict injury or tend to incite an immediate breach of the peace."¹⁹² The court found that section 876.18 was concerned with conduct that came within these "threats of violence."¹⁹³ Given the historical background to cross burning in the United States and its relationship to such lawless activity as lynchings, shootings, and other means of persecution, the court easily determined that "[t]he connection between a flaming cross in the yard and forthcoming violence is clear and direct."¹⁹⁴ When such a symbol is placed without authorization on someone's property, it cannot help but to inflict harm by causing the occupant fear. The Supreme Court of Florida noted that United States Supreme Court had recently struck down an ordinance from another state attempting to deal with similar conduct. In *R.A.V. v. City of St. Paul*,¹⁹⁵ a juvenile had been charged with placing a

188. The court specifically stated that the conduct which section 876.18 proscribes could already make one subject to prosecution under a number of other sections of the *Florida Statutes* including section 784.011 (assault); section 877.03 (breach of the peace or disorderly conduct); section 806.13 (criminal mischief); section 823.01 (criminal nuisance); section 877.15 (failure to control or report a dangerous fire); and sections 810.08-.09 (trespassing).

189. *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995), *cert. denied*, 116 S. Ct. 1014 (1996).

190. *Id.* at 480.

191. *Id.*

192. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

193. *Id.* at 481.

194. *T.B.D.*, 656 So. 2d at 481.

195. 505 U.S. 377 (1992).

burning cross in a neighbor's yard. The City statute there made it a crime to "plac[e] on public or private property a symbol . . . including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . ." ¹⁹⁶ The Court found this ordinance invalid because rather than prescribing all sorts of fighting words, the ordinance only prohibited them when they offended due to reasons such as race, color, creed, etc. Therefore, the statute did not provide protection to all citizens from such fighting words but only to exclusive groups, constituting a form of impermissible favoritism to certain subjects while prohibiting others. On the other hand, the Supreme Court of Florida found that section 876.18, protected all citizens who had flaming crosses placed, without authorization, on their property; therefore the law showed no unconstitutional favoritism to select groups or topics. Once the supreme court found that section 876.18 proscribed fighting words not constitutionally protected, it also had no difficulty in concluding that the statute was not overbroad. The court agreed that when applied to conduct, the overbreadth of a challenged statute must be both real and substantial. Because the conduct prohibited by the statute, the unauthorized placing of flaming crosses on the property of another, was not protected by the First Amendment, it likewise could not be considered unconstitutionally overbroad. ¹⁹⁷ Thus, the supreme court upheld the constitutionality of Florida's cross burning law.

196. *Id.* (quoting St. Paul, Minn. Legis. Code § 292.02 (1990)).

197. The Supreme Court of Florida did not directly address the first district's example of how section 876.18 could be used impermissibly to suppress offensive but protected conduct. Instead, the supreme court's opinion merely declared that the threat of impermissible suppression by overbroad application was "speculative at best and is insufficiently substantial to invalidate the statute on its face." *T.B.D.*, 656 So. 2d at 482. Even if one could conceive of isolated instances where section 876.18 could be improperly utilized, this was not enough to find it was substantially overbroad. *Id.*

APPENDIX A: SENTENCING GUIDELINES AND RELATED TOPICS

Cases discussing sentencing guidelines and related topics were a major focus of a significant number of Supreme Court of Florida cases this last survey year. Readers interested in these areas should consult the following recent supreme court decisions as listed below:

A. Sentencing Guidelines

1. Collateral Attack on Departure Sentence

Davis v. State, 661 So. 2d 1193 (Fla. 1995).

The court found that an improper departure sentence due to the trial court's failure to timely file written reasons could not be challenged for the first time through collateral attack under Rules 3.800(a) and 3.850 of the *Florida Rules of Criminal Procedure*, as long as the sentence itself was within the maximum period set forth by statute. Such a sentence is not an illegal sentence and thus cannot be considered "fundamental error" which can be raised in collateral proceedings.

2. Scoring of Prior Convictions on Appeal

State v. Peterson, 667 So. 2d 199 (Fla. 1996).

In this decision, the Supreme Court of Florida found that when the defendant is to be sentenced for a subsequent offense, prior convictions on appeal should be included for scoring purposes on a sentencing scoresheet. However, the court noted in dicta that if the prior conviction was reversed after the defendant was sentenced for the subsequent offense, the defendant could file for post-conviction relief. This dicta is consistent with the supreme court's recent decisions regarding the crime of felony possession of a firearm. For a discussion of these cases, see *supra* text accompanying notes 36–54.

3. Scoring of Out-of-State Convictions

Dautel v. State, 658 So. 2d 88 (Fla. 1995).

The court held that only the elements of an out-of-state crime, and not the underlying facts, should be considered in determining what Florida offense the out-of-state conviction is analogous to for purposes of scoring the conviction under the sentencing guidelines.

4. Reasons for Departure

Rahmings v. State, 660 So. 2d 1390 (Fla. 1995).

This case stands for the proposition that a convicted defendant's subsequent failure to appear for sentencing was not a valid reason for departing upward from the sentencing guidelines; however, the court distinguished this decision from its previous decision in *Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988), where it upheld departure due to the defendant's failure to appear at sentencing. The accused in *Quarter-*

man had agreed, pursuant to a negotiated plea, that such failure would serve as grounds for a departure. There was no such negotiated plea arrangement in *Rahmings*.

State v. Darrisaw, 660 So. 2d 269 (Fla. 1995).

Here, the court found that a convicted felony defendant who was previously convicted of two misdemeanors could not be given a departure sentence based on an escalating pattern of criminal conduct since the offenses, while “escalating” in nature, were not part of a pattern since they were not temporally close or similar in nature.

Jory v. State, 668 So. 2d 195 (Fla. 1996).

The court concluded that the defendant’s professed belief that sexual acts with minors were not wrong and that his prosecution was part of a homophobia by the State did not show that the defendant was unamenable to rehabilitation and that he posed a danger to society. Thus, the defendant’s statements were inadequate to support an upward departure under the sentencing guidelines.

5. Correct Sentencing Procedure When Probation Cases are Sentenced in Conjunction with a New Substantive Offense

State v. Lamar, 659 So. 2d 262 (Fla. 1995).

The court held that where two offences exist, two sentencing scoresheets should be prepared. The new offense should be listed as the primary offense in one scoresheet and the prior offense in the other. The sentencing court should then use the scoresheet which would result in the more severe sanction.

B. Sentences for Misdemeanors

Armstrong v. State, 656 So. 2d 455 (Fla. 1995).

A defendant convicted of multiple misdemeanors can be sentenced to consecutive terms in a county jail even if the cumulative effect of the sentence exceeds one year.

C. Jury Instructions on Punishment

Knight v. State, 668 So. 2d 596 (Fla. 1996).

The court held that a defendant accused of a non-capital offense for which a minimum mandatory sentence must be imposed is not entitled to have the jurors instructed as to that minimum mandatory sentence since it is irrelevant to their decision.

D. Plea Agreements and Sentencing

1. Departure Sentences Pursuant to Plea Agreements

State v. Williams, 667 So. 2d 191 (Fla. 1996).

This decision provides authority for the proposition that a departure sentence imposed pursuant to a valid plea agreement does not need to be accompanied by written reasons for the departure as long as the sentence does not exceed the statutory maximum and the record reflects the agreement’s terms.

2. Withdrawal of Plea Due to Court’s Departure from Plea’s Terms

Goins v. State, 672 So. 2d 30 (Fla. 1996).

The court found that if there is a firm agreement for a specified sentence, as opposed to an agreement only to recommend a specified sentence, a trial judge's decision to dishonor the agreement gives the defendant the right to withdraw the plea. Furthermore, the defendant does not have to immediately make a motion to do so in order to preserve the issue for appeal.

E. Habitual Offender Sentences

1. Habitual Violent Felony Offender

White v. State, 666 So. 2d 895 (Fla. 1996).

Here, the court held that a prior conviction for manslaughter by culpable negligence can serve as a predicate offense for the imposition of a subsequently convicted felon's sentence as a habitual violent felony offender pursuant to FLA. STAT. § 775.084(1)(b)(1) (1995).

See also case cited *infra* Part I.

2. Collateral Attack on Consecutive Habitual Felony Offender Sentences

State v. Callaway, 658 So. 2d 983 (Fla. 1995).

Defendants who received consecutive habitual felony sentences arising out of same criminal episode more than two years prior to the decision in *Hale v. State*, 630 So. 2d 521 (Fla. 1993), *cert. denied*, 115 U.S. 278 (1994) (declaring such sentences statutorily impermissible). The defendant should be given a two-year time period after *Hale* to move pursuant to Rule 3.850 of the *Florida Rules of Criminal Procedure* for an evidentiary hearing to challenge these convictions.

F. Control Release

1. Denial of Control Release Eligibility

Gramegna v. Parole Commission, 666 So. 2d 135 (Fla. 1996).

The court held that an offender convicted of committing a lewd assault upon a child pursuant to section 800.04 of the *Florida Statutes* is automatically, as a matter of law, deemed ineligible by former section 947.146(4)(d) (1991) (which is now codified as section 947.146(3)(c) (1995)) for control release despite the victim's actual consent to the act involved.

2. Evidentiary Basis for Denial of Control Release

See id.

In the *Gramegna* decision, the court also decided, citing section 947.146(3) (1991) of the *Florida Statutes*, that the Control Release Commission can rely on any official document in the court record that was generated during a criminal investigation or proceeding, including an arrest report, which is similar to the present statutory law.

G. Revocation of Probation

Credit for Time Previously Served

Shoda v. State, 666 So. 2d 134 (Fla. 1996).

When probation is revoked and the accused receives a new community control sentence, credit must be given for time previously spent on probation so that the total period does not exceed the statutory maximum for a particular offense.

Waters v. State, 662 So. 2d 332 (Fla. 1995).

A result similar to that obtained in *Shoda* is required where the new sentence following a probation revocation is a probationary split sentence combination of actual incarceration followed by probation.

H. *Conditions of Probation*

Notice to Defendants of Imposition of Conditions

State v. Hart, 668 So. 2d 589 (Fla. 1996).

The court construed the *Florida Rules of Criminal Procedure* and found that general conditions 1 to 11 contained in the probation form in rule 3.986 are standard conditions of probation which need not be orally announced at sentencing to give adequate notice of such; however any special conditions of probation must be orally pronounced so that the defendant has an opportunity to object to them.

I. *Stacking of Minimum Mandatory Sentences*

Jackson v. State, 659 So. 2d 1060 (Fla. 1995).

This decision held that a defendant could not be sentenced to a minimum mandatory sentence as a habitual offender followed by a firearm usage minimum mandatory sentence for offenses occurring within a single criminal episode.

APPENDIX B: HOMICIDE OFFENSES

A number of Supreme Court of Florida decisions involving homicide offenses are not discussed in this article. Readers interested in supreme court cases discussing whether the state has proven a particular homicide offense may wish to consult the following cases:

A. *First-Degree Murder*

1. Insufficient Evidence of Premeditation

Rogers v. State, 660 So. 2d 237, 241 (Fla. 1995).

Here, the court found that there was insufficient evidence of premeditation where the evidence merely showed that the accused shot the victim during a struggle over a gun as there was no evidence the defendant had ever “formed a conscious purpose to kill”; however, the court found sufficient evidence for a second degree murder conviction. *Id.* (quoting Wilson v. State, 493 So. 2d 1019 (Fla. 1986)).

Mungin v. State, 667 So. 2d 751, 754 (Fla. 1995).

The court concluded that there was not sufficient evidence to support a premeditated murder conviction where the evidence of guilt was wholly circumstantial and there was no confession or other evidence to suggest the proof was not “consistent with a killing that occurred on the spur of the moment;” however, the general first degree murder verdict was affirmed on the state’s alternative theory of felony murder.

2. Sufficient Evidence of Premeditation

Finney v. State, 660 So. 2d 674 (Fla. 1995), *cert. denied*, 116 S. Ct. 823 (1996).

A defendant’s contention that he did not kill a bound and gagged victim who died from multiple stabs wounds was sufficiently inconsistent with the theory that the victim died during consensual erotic sex that a jury could find premeditation.

B. *Instructions on Premeditation*

Kearse v. State, 662 So. 2d 677, 681 (Fla. 1995).

In this decision, the court held that the trial court did not err by adding language to the standard premeditation instruction. The language stated that “[a]mong the ways that premeditation may be inferred is from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted.” Apart from the court’s use of the word “murder,” the remaining language was a correct statement of the law, thus the trial judge could use it since part of a trial judge’s responsibility is to accurately and completely charge the jury. The court agreed that the word

“murder” should not have been used but found that the failure to object to this at trial waived this issue for appeal.

C. Felony Murder

Kearse v. State, 662 So. 2d 677 (Fla. 1995).

Kearse also held that an indictment does not need to separately charge felony murder for the prosecution to proceed on both this theory and one of premeditated murder; likewise, the state does not have to give defense notice of the underlying felony that it will use to prove felony murder.

Evidence: 1996 Survey of Florida Law

Dale Alan Bruschi*

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I. INTRODUCTION

This year's survey of Florida law demonstrated a familiar pattern in Florida evidence. Criminal evidentiary cases outnumbered civil evidentiary cases almost four to one. Once again, hearsay was the predominant area, with expert testimony and scientific evidence drawing the most divergent opinions. A troubling theme throughout the survey period was the incredibly high number of cases being reversed without timely objections being made to the error.¹ The majority of these reversals occurred during closing argument, although cases involving improper voir dire and opening statements also received reversals.² The district courts seem intent on curbing the unethical behavior of attorneys who use "scorched earth" tactics in the presentation of their case to the jury.³ It appears that the appellate courts

1. See FLA. STAT. § 90.104 (1995). Section 90.104(1)(a) requires a timely objection in order to preserve error for appeal. *Id.*

2. A few of the cases that have been reversed without objection are: *Baptist Hosp., Inc. v. Rawson*, 674 So. 2d 777 (Fla. 1st Dist. Ct. App. 1996) (reversed for improper closing argument, calling defendant's witnesses "idiots," referring to defenses as "unbelievable" as to insult jurors, and including numerous other improper comments); *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016 (Fla. 4th Dist. Ct. App. 1996) (reversed for threat to jurors that a verdict for opposing side would destroy jurors' lifestyles); *Muhammad v. Toys "R" Us, Inc.*, 668 So. 2d 254 (Fla. 1st Dist. Ct. App. 1996) (reversed for improper closing arguments, including personal opinion and comments which accused plaintiff of perpetrating fraud upon court and jury).

Although an objection was made in *Williams v. State*, 673 So. 2d 974 (Fla. 1st Dist. Ct. App. 1996), the comment was deemed innocuous. This case was reversed due to an improper comment which was made by the prosecutor during closing argument, wherein the prosecutor stated: "I submit to you that it's not reasonable to consider that sworn police officers, doing their job, could come into court and perjure themselves." *Id.* at 975. The district court felt that this was improperly bolstering the credibility of the police officers. *Id.* However, this was one of the more innocuous comments as compared to many other cases.

3. The district courts of appeal should be commended for attempting to stop this type of in-court behavior, such as when attorneys call witnesses and other attorneys "liars," "scum," and other expletives too numerous to discuss. However, this praise is not without reservation. It seems that there could be a growing trend toward "gotcha" trial tactics when one side is able to sit idly by and make no objections and then complain for the first time on appeal that there was error warranting a reversal. Section 90.104 of the *Florida Evidence Code* requires a timely objection in order to preserve a point for appeal. FLA. STAT. § 90.104(1)(a). The district courts are unable to consider an assertion of error in the admission of evidence, made in the trial court, if counsel fails to make a contemporaneous objection at trial. Only if the error is *fundamental* should an appellate court consider the issue on appeal. However, the Supreme Court of Florida has indicated that fundamental error should be found *infrequently*. *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970). As the supreme court stated: "The

have had enough of attorneys “pushing the envelope” of unethical behavior during trial.⁴ The Florida Legislature made no significant changes to the evidence code this year. Nevertheless, the Supreme Court of Florida took up the issue of DNA admissibility, and the district courts of appeal were divided over the admissibility of child abuse profile evidence.⁵

II. OFFERS OF PROOF

One of the most important provisions in the *Florida Evidence Code* is the offer of proof provision in section 90.104.⁶ The importance of this section cannot be overlooked if a chance at a successful appeal is being considered. Section 90.104(1)(b) provides that when a trial judge erroneously sustains an objection, counsel must make an offer of proof of how the witness would have responded if allowed to answer the question, in order to preserve the point for appeal.⁷ An offer of proof may be made in the following ways: 1) by having the witness answer the question on the record out of the presence of the jury; 2) by including in the record a written statement of the anticipated answer; or 3) by a professional statement of counsel to the court divulging the answer which is made on the record. An offer of proof permits the trial court to learn the answer of the witness to the excluded question. An offer of proof gives the trial court the opportunity to change its ruling and provides the appellate court the opportunity to properly examine the full question and answer in determining if an error was made by the trial court. If an appellate court has to speculate as to the answer to an excluded question, it is unlikely that error will be preserved or found.⁸

Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly.” *Id.*

4. *See Devlin v. State*, 674 So. 2d 795 (Fla. 5th Dist. Ct. App. 1996) (Dauksch, J., dissenting), wherein the dissent reproduced a page of improper comments and stated that these comments were inappropriate because they: “1) evoke sympathy for the state’s witness; 2) constitute an improper comment on defendant’s right to remain silent; 3) shift [the] burden of proof; 4) vouch for the credibility of the state’s witnesses; 5) state the prosecutor’s beliefs; 6) disparage defense counsel; and 6) [sic] invade the jury’s province.” *Id.* at 798 (footnote omitted). This case provides a plethora of improper and inflammatory comments that should be avoided by counsel during trial.

5. *See, e.g., Pierce v. State*, 671 So. 2d 186 (Fla. 4th Dist. Ct. App. 1996).

6. FLA. STAT. § 90.104. This section is entitled “Rulings on Evidence.”

7. *Id.* § 90.104(1)(b).

8. *See Nava v. State*, 450 So. 2d 606 (Fla. 4th Dist. Ct. App. 1984), *cause dismissed*, 508 So. 2d 14 (Fla. 1987). Section 90.104(1)(b) also provides that an offer of proof is not necessary if the substance of the answer “was apparent from the context within which the questions were asked.” FLA. STAT. § 90.104(1)(b). However, counsel should never count on

During the survey period, the Third District Court of Appeal addressed the issue of how an offer of proof is made when the trial court excludes *documents* from evidence. In *Brantley v. Snapper Power Equipment*,⁹ the third district reversed the trial court's ruling, granting the defendant's motion in limine, which excluded from evidence post-manufacture, pre-accident notices, service bulletins, and correspondence on which the plaintiffs were relying to prove the existence of a defect in a product.¹⁰ At the hearing on the motion in limine, the plaintiffs made no offer of proof of the excluded documents, nor were the excluded documents made part of the record at the trial. Although the plaintiffs felt they were excused from making the necessary offer of proof, the district court disagreed.¹¹ The district court stated:

When the trial court excludes evidence, an offer of proof is necessary . . . if the claimed evidentiary error is to be preserved for appellate review. This can be done without violating the order in limine by offering the excluded documents at trial *outside* the presence of the jury. "Excluded *documents* . . . should be marked for identification with a number and described fully in the record. This makes a record of the excluded evidence available to an appellate court so it can determine if error was committed in excluding the

the appellate court's generosity in finding that an answer was "apparent" from the context of the questions. A proffer should *always* be forthcoming. See Dale A. Bruschi, *Evidence: 1992 Survey of Florida Law*, 17 NOVA L. REV. 255, 257 (1992). This article provides additional cases which discuss offers of proof in criminal and civil cases.

9. 665 So. 2d 241 (Fla. 3d Dist. Ct. App. 1995).

10. *Id.* at 242.

11. *Id.* at 243. Apparently, the plaintiffs attempted to rely on *Bender v. State*, 472 So. 2d 1370, 1372-73 (Fla. 3d Dist. Ct. App. 1985), for the proposition that once the trial court has excluded evidence pursuant to a pretrial motion in limine, the proponent of the evidence should not attempt to elicit the testimony to preserve the error. *Brantley*, 665 So. 2d at 243. Professor Ehrhardt, in his treatise on evidence, seems to agree with this position, in stating that, "[s]ince the purpose of the motion [in limine] is to prevent a proffer of the evidence at trial, a party who abides by the court's ruling should not be put in a position of waiver." CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 104.5, at 22 (1996) (footnotes omitted). However, the Third District Court of Appeal in *Brantley* stated that *Bender* (also a Third District Court of Appeal case) stands for the proposition that the proponent of the excluded evidence should not violate the order in limine by offering the excluded evidence at trial in the presence of the jury. *Brantley*, 665 So. 2d at 243 n.3. *Bender* does not preclude the proffer of excluded evidence outside the presence of the jury. *Id.* The court felt that *Bender* proceeded on the implied assumption that an adequate record of the excluded evidence had been made during the motion in limine hearing. *Id.* However, where that has not been done, an offer of proof must be made at trial. *Id.* Unless an adequate offer of proof has been made in the motion in limine hearing, the necessary offer of proof *must* be made during the trial. *Id.*

evidence and also makes it available for post trial motions." . . . Alternatively, if an adequate record of excluded evidence has been made at the hearing on the motion in limine, it is not necessary to make an offer of proof at trial.¹²

Naturally, the most prudent course of action, when a motion in limine has been granted excluding evidence, is to make an offer of proof during the trial. An offer of proof should still be made, outside the presence of the jury, even if an adequate record was made at the motion in limine hearing. This will give the trial court an opportunity to reconsider the ruling in light of the changing dynamics of the trial.¹³ This procedure will also demonstrate to the appellate court that trial counsel has not abandoned this matter and that the trial court has remained steadfast in its determination to exclude the evidence.

III. SUMMING UP AND COMMENT BY THE JUDGE

During the survey period, one of the few cases that discussed trial judges interrogating witnesses was reviewed by the Fourth District Court of Appeal. In *Moton v. State*,¹⁴ the defendant appealed a trial court's conviction for armed robbery of a convenience store clerk.¹⁵ The defense at trial was that the State had charged the wrong man. During the examination of a key prosecution witness (the store clerk), the trial judge asked a series of questions regarding the enclosure that separated the clerk from the shopping area. The trial judge then inquired of the clerk where the defendant was standing.¹⁶ The defense timely objected to these questions.

The Fourth District Court of Appeal agreed with the defendant that questioning by the trial judge can, and often does, suggest to the jury that some evidence may be more important than other evidence.¹⁷ This causes

12. *Brantley*, 665 So. 2d at 243 (emphasis added) (citations omitted).

13. *See* *Swan v. Florida Farm Bureau Ins. Co.*, 404 So. 2d 802, 804 (Fla. 5th Dist. Ct. App. 1981).

14. 659 So. 2d 1269 (Fla. 4th Dist. Ct. App. 1995).

15. *Id.* at 1269.

16. As can best be gleaned from the opinion, this was in an apparent attempt to clear up some confusion regarding which individual the witness was referring to when he was examining a group photograph (or videotape) which contained the defendant's picture.

17. *Moton*, 659 So. 2d at 1270; *but see* *Williams v. State*, 143 So. 2d 484, 488 (Fla. 1962) (holding that the judge is permitted to ask questions in order to clarify the issues but he should not lean to the prosecution or defense lest it appear that his neutrality is departing from center).

the jury to focus on evidence it may not otherwise have strongly considered. In *Moton*, the case was apparently a very close call, with the identification of the defendant being a central issue in the case.¹⁸ Because of the closeness of the case, the district court was unable to find the questioning by the trial judge harmless and reversed the case for a new trial.¹⁹

IV. JUDICIAL NOTICE

In the case of *Cordova v. State*,²⁰ the Third District Court of Appeal wrestled with judicial notice in criminal cases.²¹ In *Cordova*, the defendant was found guilty of indirect criminal contempt, for violating a domestic violence injunction.²² During the nonjury trial, the court took judicial notice of the fact that the defendant had been served with a copy of the injunction. The trial court based this, in part, on the stamped return of service for the injunction.

The district court framed the issue to be “whether a trial court may judicially notice the fact that a defendant was served with an injunction where he is charged with indirect criminal contempt for violating its provisions.”²³ The parties to the action agreed that notice of an injunction is an essential element of the charge of violating its provisions.²⁴

The district court noted that before the enactment of the evidence code, judicial notice of a fact meant that it was taken as true without the necessity

18. *Moton*, 659 So. 2d at 1270. It appears that there was little other evidence, such as fingerprints, etc., to tie the defendant to the crime. Thus, the case balanced on the credibility of the eyewitness and his ability to make a positive identification of the defendant during an emotionally charged few moments.

19. *Id.* The two concurring opinions make it clear that questioning by the trial judge, though not specifically improper, is unwise. Justice Stone indicated that neutral questions by the trial judge to “clarify the direction from which a photograph is taken or a diagram viewed, or, as here, where a witness has referred to an individual on a videotape containing more than one person in the picture and it is not clear to which individual the testimony refers,” can be helpful to the jury and the appellate court. *Id.* (Stone, J., specially concurring). However, a judge travels a dangerous road in attempting to avoid the pitfalls associated with questioning witnesses in front of a jury and, for the most part, should remain a neutral and impartial mediator.

20. 675 So. 2d 632 (Fla. 3d Dist. Ct. App. 1996).

21. *Id.* at 634.

22. *Id.*

23. *Id.*

24. In criminal cases, the state must prove every essential element of the crime charged by proof beyond a reasonable doubt. Therefore, the analysis must be aimed at the effect the judicial notice has on the state’s constitutional burden.

of offering evidence by the party who would do so.²⁵ However, the rule did not prevent an opposing party from introducing rebuttal evidence after a fact had been noticed. Therefore, judicial notice served as prima facie evidence of the fact so noticed.

When the evidence code was enacted in 1976, section 90.206 required the trial judge to instruct the jury to accept as a fact, a matter judicially noticed.²⁶ A matter judicially noticed was meant to be binding on the trier of fact, and no evidence disputing or rebutting the matter was permitted, once it had been noticed by the judge.²⁷ The mandatory “shall” section of the rule was later changed to “may,” and the provision now reads that the judge “may instruct the jury during the trial to accept as a fact a matter judicially noticed.”²⁸ The district court found that the change now allowed the trial court the discretion to determine whether taking judicial notice of a particular fact is conclusive as to that fact, or whether the opposing party can introduce conflicting evidence.²⁹

The district court examined the use of judicial notice in a criminal case and noted that for a defendant’s Sixth Amendment right to a jury trial to operate within constitutional boundaries, “judicial notice should only be used as a device to establish the prima facie existence of a particular fact which the finder of fact is free to disregard despite the defendant’s failure to introduce evidence to the contrary.”³⁰ The district court’s main concern now was whether the foregoing principles would apply in a case where the defendant does not have a right to a jury trial. The district court examined the law regarding mandatory presumptions in making its determination and stated:

Conclusive judicial notice not only establishes the existence of a particular fact, it precludes the adverse party from introducing evidence to rebut it. Such a device would certainly run afoul of the same due process rights implicated in the case of mandatory presumptions. Even in the case of a bench trial, judicial notice “must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a rea-

25. *Cordova*, 675 So. 2d at 635 (citing FLA. STAT. ANN. § 90.206 (West 1979) (Law Revision Council Note-1976)).

26. *Id.* (citing EHRHARDT, *supra* note 11, § 206.1).

27. *Id.* (citing FLA. STAT. ANN. § 90.206).

28. *Id.* (quoting EHRHARDT, *supra* note 11, § 206.1).

29. *Id.*

30. *Cordova*, 675 So. 2d at 635.

sonable doubt.” Accordingly, much like a permissive inference, a constitutional use of judicial notice in a criminal case allows, but does not require, the trier of fact to accept as true a fact so noticed.³¹

Having determined that judicial notice of elemental facts in a criminal case is constitutionally permissible, the district court turned its attention to whether the judicial notice in this case was correctly taken.³² The trial court took judicial notice under sections 90.202(11) and (12) of the evidence code.³³ The district court determined that these sections were inappropriate for judicial notice of an injunction.³⁴ First, an injunction is not “generally known within the territorial jurisdiction of the court.”³⁵ Judicially noticing an injunction simply does not fit under this exception. Second, the district court found that service of the injunction is not the type of fact that is not subject to dispute because it is capable of accurate and ready determination by resort to a source whose accuracy cannot be questioned.³⁶ This section was also improper for judicially noticing an injunction.³⁷

Having determined that the injunction could not be judicially noticed under the sections argued by the State, the district court upheld the conviction, finding that the trial court was right for the wrong reasons.³⁸ The district court found that the trial court could allow the State to use a permissive inference to establish the fact of service.³⁹ “A permissive inference allows, but does not require, the trier of fact to infer an elemental fact [service] upon proof of a basic fact [return of service] and places no burden on the defendant.”⁴⁰ The defendant would also be permitted to introduce evidence to rebut these facts.⁴¹

31. *Id.* at 636 (citation omitted).

32. *Id.*

33. Section 90.202(11) of the *Florida Statutes* states, “[f]acts that are not subject to dispute because they are generally known within the territorial jurisdiction of the court.” FLA. STAT. § 90.202(11) (1993). Section 90.202(12) states, “[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.” *Id.* § 90.202(12).

34. *Cordova*, 675 So. 2d at 636.

35. *Id.* (quoting FLA. STAT. § 90.202(11)).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Cordova*, 675 So. 2d at 636–37.

40. *Id.* at 637 (alterations in original) (quoting *Marcolini v. State*, 673 So. 2d 3, 5 (Fla. 1996)).

41. *Id.*

V. RELEVANT EVIDENCE

A. *Computer Animations*

During the survey period, an interesting case arose regarding the use of a computer generated accident reconstruction animation to illustrate an accident reconstruction expert's opinion. In *Pierce v. State*,⁴² the defendant appealed from a conviction when he was found guilty of vehicular homicide and leaving the scene of an accident, involving the death of a young girl.⁴³ Eyewitnesses to the accident indicated that the vehicle which struck the child was a Chevrolet Silverado truck with a camper top. At the scene of the accident, the police investigators located a piece of a grille and a piece of plastic from a turn signal lens. The medical examiner opined that there might be a dent in the vehicle caused by the impact on the victim's head. Three weeks after the accident, the police located the defendant's truck, which had a dent where the hood meets the grille. Although this truck did not have a camper top, neighbors stated that the defendant recently removed the camper top from his vehicle.

The State Attorney's Office filed a Notice of Intent to offer computer generated animation of its expert's accident reconstruction.⁴⁴ The State intended to illustrate its expert's opinions of how the accident occurred through the computer animation. The State's expert in accident reconstruction testified that the AUTOCAD computer program which was used for the illustration was accepted in the engineering field as one of the leading computer aided design programs. The expert's accident reconstruction measurements were fed directly into the computer.

The State contended that the computer animation was a visualization of its expert's opinion as to how the accident occurred. The State proffered the computer animation as a demonstrative exhibit, to help its accident reconstruction expert explain his opinion to the jury, and as substantive evidence. The trial court found the computer animation would express the expert's opinion and was not a scientific or experimental test which would subject its

42. 671 So. 2d 186 (Fla. 4th Dist. Ct. App. 1996).

43. *Id.* at 187.

44. *Id.* at 188.

animation to the *Frye* test.⁴⁵ The trial court also ruled that the computer animation could not be used as substantive evidence.⁴⁶

Demonstrative exhibits may be used during a trial as an aid to help the jury understand a material fact or issue. A demonstrative exhibit must be an accurate and reasonable reproduction of the object involved. This is the same foundation that must be established for any photographic evidence, such as a videotape, motion picture, or photograph. However, before admitting the computer generated animation, the proponent of the evidence must first establish the foundational requirements necessary to introduce an expert opinion.⁴⁷

Any preliminary facts constituting the foundation for the admissibility of evidence must be proven to the court by a preponderance of the evidence, even in a criminal case.⁴⁸ In *Pierce*, the appellate court found that the trial court made the appropriate findings of preliminary facts, supported by evidence introduced at the pretrial hearing.⁴⁹ The expert was found to be qualified as an expert in accident reconstruction and his opinion as to how the accident occurred was applied to evidence offered at trial.⁵⁰ The data the expert relied on in forming his opinion was of a type reasonably relied upon by experts in the field.⁵¹ Finally, the trial court specifically found that the computer animation was a fair and accurate depiction of the expert's opinion as to how the accident occurred and that the expert's opinion and the computer animation would aid the jury in understanding the issues in the case.⁵²

45. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Tests such as DNA or blood splattering are subject to the *Frye* analysis to determine whether they are accepted in the scientific community.

46. *Pierce*, 671 So. 2d at 188.

47. The foundation requirements for expert testimony are: 1) the opinion evidence must be helpful to the trier of fact; 2) the witness must be qualified as an expert; 3) the opinion evidence must be applied to evidence offered at trial; and 4) pursuant to section 90.403 of the *Florida Statutes*, the evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value. FLA. STAT. § 90.702 (1995). See *Kruse v. State*, 483 So. 2d 1383, 1384 (Fla. 4th Dist. Ct. App. 1986), *cause dismissed*, 507 So. 2d 588 (Fla. 1987). Another foundational requirement is that the facts or data relied on by the expert in forming the opinion expressed by the computer animation must be of a type reasonably relied upon by experts in the subject area. FLA. STAT. § 90.704 (1995).

48. *Pierce*, 671 So. 2d at 190 (citing CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* § 105.1 (1995)).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

B. *Bolstering Witness Credibility*

In *Smith v. State*,⁵³ the district court reversed the conviction of a New Smyrna Beach police officer who was found guilty of lewd and lascivious assault upon a child under the age of sixteen years.⁵⁴ The district court reversed the conviction, finding that the trial court committed reversible error.⁵⁵ The trial court erred by allowing the victim's mother to testify that the victim never made false statements against anyone, and for allowing the State's expert witness to bolster the victim's credibility.⁵⁶

The testimony at trial indicated that the defendant was a twenty-four-year-old police officer. He met the victim through her boyfriend, who was a police explorer. A short time after, the victim tried to commit suicide. The defendant befriended the victim and her mother and acted as a counselor to the victim. After getting to know the child and his mother, the victim would go to the defendant's house to watch Music Television ("MTV"). It was during one of these visits, that the defendant allegedly fondled, caressed, and had intercourse with the victim, which was consensual. After intercourse, the defendant allegedly told the victim to keep it a secret because he was twenty-four and she was fourteen and, as a police officer, he could get into trouble.

The victim allegedly told her best friend about the incident and some weeks later, she told her mother about the sexual relationship. The mother reported the allegations to the police. The crime was reported approximately one month after it occurred, and the police could not obtain any medical or physical forensic evidence to corroborate the child's testimony. The only direct evidence was the child's testimony and hearsay statements. This testimony was contested by the defendant, who testified that the victim had been to his house, but they did not have sex.

During trial, the State offered the testimony of the victim's mother and, over defense objection, elicited from the mother that the victim had never "made any false criminal allegations against anyone else."⁵⁷ This was error.⁵⁸ The victim's credibility was a crucial factor in the case, since no medical or physical evidence corroborated the victim's testimony.⁵⁹ Allow-

53. 674 So. 2d 791 (Fla. 5th Dist. Ct. App. 1996).

54. *Id.* at 792.

55. *Id.* at 794.

56. *Id.* at 793.

57. *Id.* (citation omitted).

58. *Smith*, 674 So. 2d at 793.

59. *Id.*

ing the mother to testify that the child never made false statements against anyone was extremely prejudicial, unnecessarily bolstered the credibility of the victim, and was improper character evidence.⁶⁰

The district court also found that testimony from the State's child abuse expert was reversible error.⁶¹ The State's expert testified that most sexual abuse victims come from single parent households, that children who were previously sexually abused were at a greater risk of being abused a second time, and that this victim was sexually abused by the defendant. Evidence at trial indicated that the victim's parents were separated, that the victim lived with her mother, and that the victim had been previously sexually abused. The district court found that admission of this testimony was reversible error.⁶²

The district court distinguished *Glendening v. State*,⁶³ in which the Supreme Court of Florida held that it was not fundamental error to allow a child abuse expert to testify that the child had been abused.⁶⁴ However, in *Glendening*, the child was three and one-half-years-old at the time of the abuse, which would make it difficult for the child to describe the incident. Here, in *Smith*, the victim was fifteen years of age. Additionally, the expert's testimony in *Glendening* was limited to and supported by a recorded "doll interview" which was played for the jury.

The district court noted that in the present case, the State's expert provided no support for her opinion that the victim had been abused.⁶⁵ The State's expert testified regarding the numerous child abuse cases she worked on and testified that she reviewed the child's deposition and her statements to the police and victim's advocate, but she did not give any foundation in science, or any other area of specialized knowledge, to support her belief that the victim had been abused.⁶⁶ The district court found that with no foundation for this belief, "the expression of this belief amounted to no more than an impermissible comment on the credibility of the child."⁶⁷ Additionally, the district court noted that, unlike the expert testimony in *Glendening*,

60. *Id.* The district court indicated that the defense did not attack the victim's character relating to truthfulness or put the child's character or reputation at issue. *Id.* Therefore, the testimony was not admissible under either section 90.609(2) or 90.404(1)(b). *Id.*

61. *Smith*, 674 So. 2d at 794.

62. *Id.*

63. 536 So. 2d 212 (Fla. 1988), *cert. denied*, 492 U.S. 907 (1989).

64. *Id.* at 220.

65. *Smith*, 674 So. 2d at 793.

66. *Id.*

67. *Id.*

the State's expert testimony in *Smith* was not helpful to the jury, since the child in this case was fifteen-years-old and fully capable of describing what happened.⁶⁸ The testimony by the State's expert that she believed the defendant abused the child is a classic example of irrelevant and impermissible evidence. Testimony regarding the guilt or innocence of the accused is almost always inadmissible because the probative value of the testimony is outweighed by the danger of unfair prejudice.⁶⁹

The district court also examined the logical relevance⁷⁰ of the expert's statistics regarding abused children. The State's expert stated that most abused children came from single family homes and that children who have been previously abused are at a greater risk of being abused a second time. The district court questioned how these statements, or statistics, make it more likely than not that a crime was committed against this victim and/or that the defendant committed the crime.⁷¹ Conversely, if the evidence was presented to demonstrate the propensity on the part of a child to be victimized, the district court found it to be impermissible character evidence.⁷²

VI. IMPEACHMENT

During the survey period, a rather novel piece of impeachment work was discussed by the Third District Court of Appeal in *Little Bridge Marina, Inc. v. Jones Boat Yard, Inc.*⁷³ In this case, the plaintiff appealed from an adverse final judgment in a breach of contract action.⁷⁴ Since each party disputed the facts upon which the case was based, the trial centered around the question of credibility of the main witnesses on each side.

At trial, defense counsel questioned the plaintiff about being an attorney. Defense counsel's cross-examination in this area ended with the following question: "In fact, the type of law you did you represented crimi-

68. *Id.*

69. See FLA. STAT. § 90.403 (1995). This section is titled "Exclusion on Grounds of Prejudice or Confusion." See also *Glendening*, 536 So. 2d at 221.

70. Evidence should always be examined from the standpoint of whether the evidence is logically relevant and whether the evidence is legally relevant. Logical relevance is simply whether the evidence will make a fact in issue more or less probative. Evidence is examined for legal relevancy to determine whether another rule of law excludes the evidence even if it proves a fact in issue. For a thorough explanation of logical and legal relevancy, see Dale A. Bruschi, *Evidence: 1990 Survey of Florida Law*, 15 NOVA L. REV. 1131, 1136 (1991).

71. *Smith*, 674 So. 2d at 794.

72. *Id.*

73. 673 So. 2d 77 (Fla. 3d Dist. Ct. App. 1996).

74. *Id.* at 78.

nals. You got them off.”⁷⁵ It is presumed that defense counsel felt this impeachment was a rather brilliant tactic. However, as pointed out by the district court, and probably by defense counsel’s trial advocacy professor, this was patently improper.⁷⁶

The resolution of the case depended upon the jury’s view of the credibility of the parties’ account of the facts. The district court found that it was reversible error to allow the trial attorney to use the plaintiff’s past career as a criminal defense attorney as impeachment.⁷⁷ The district court went on to say:

These statements by appellee’s attorney were not only inappropriate, but they were also legally immaterial and irrelevant to the case. Furthermore, the statements cannot be condoned by this court as a form of impeachment. Clearly, these recriminations were intended to denigrate the witness, Mr. Gustinger, in the eyes of the jury by inflaming the jury against Mr. Gustinger based on the sentiment held by many laypersons in the community to the effect that attorneys are not to be respected.⁷⁸

The district court found the statements to be even more damaging, since the credibility of the witness was critical, as it was the primary testimony to be measured against the testimony of the appellee.⁷⁹ The district court also noted that the cross-examination did not attempt to demonstrate that the witness had done anything wrong, but was merely done to establish that the witness was a criminal attorney and was meant to lower the jury’s opinion of the witness.⁸⁰ Since the outcome of the case hinged on the credibility of the witnesses, the improper impeachment destroyed the plaintiff’s opportunity for a fair trial.⁸¹

75. *Id.* at 79.

76. *Id.*

77. *Id.*

78. *Little Bridge Marina*, 673 So. 2d at 79 (citations omitted).

79. *Id.*

80. *Id.*

81. *Id.*

VII. EXPERT OPINION TESTIMONY

A. *Scientific Evidence*

In *Hayes v. State*,⁸² the Supreme Court of Florida addressed, for the first time, the admissibility of DNA evidence in a criminal trial.⁸³ The facts in *Hayes* revealed that a female groom at the Pompano Harness Track was murdered in her dormitory room. Crime scene investigation found the victim on the floor wearing only blue jeans and a T-shirt. A tank top shirt was found lying nearby on the floor. The victim was clutching a piece of brown hair. Seminal fluid was found on the tank top, the blue jeans, and in a vaginal swab taken from the victim. Robert Hayes, another groom who worked at the harness track, was arrested for the murder.

In addressing the issue of the admissibility of DNA evidence, the Supreme Court of Florida made it clear that Florida utilizes the *Frye* test⁸⁴ to determine the admissibility of new or novel scientific evidence.⁸⁵ A four-part inquiry must be addressed by the trial court before expert opinion testimony will be admitted at trial.⁸⁶ First, the expert testimony must assist the trier of fact in understanding the evidence or in determining a fact in issue.⁸⁷ Second, the scientific principle or discovery must be sufficiently established to have gained general acceptance in the scientific field in which it belongs.⁸⁸ Third, the expert witness must be qualified to present evidence on the subject in issue.⁸⁹ Fourth, expert opinion must be presented to the jury.⁹⁰

The Supreme Court of Florida earnestly examined the report on DNA standards and methodologies drafted by the National Research Council of the National Academy of Sciences.⁹¹ The report explains that in applying

82. 660 So. 2d 257 (Fla. 1995).

83. *Id.* at 259.

84. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

85. *Hayes*, 660 So. 2d at 262.

86. *See Ramirez v. State*, 651 So. 2d 1164, 1166 (Fla. 1995) (holding that Florida utilizes the *Frye* test to determine the admissibility of new or novel evidence, such as DNA evidence).

87. *Hayes*, 660 So. 2d at 262.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* *See NATIONAL ACADEMY OF SCIENCES, DNA TECHNOLOGY IN FORENSIC SCIENCE* (1992). This report and the full language of this case should be meticulously studied by anyone who will be the proponent of DNA evidence or who will be defending against DNA evidence.

the *Frye* test to DNA testing procedures, there are four pertinent assumptions.⁹² Though all four of these assumptions are important, the Supreme Court of Florida focused on the second and fourth assumptions.⁹³ The second assumption concerned the reliability of the underlying theory regarding “correcting for band shifting.”⁹⁴ The fourth assumption concerned the proper procedures that must be followed for DNA evidence to be admissible.⁹⁵

In the *Hayes* case, the DNA test on the tank top was inconclusive. However, after the prosecution’s expert witness applied the controversial “band shifting” technique, a three band match was found with samples taken from the defendant. The defense challenged the expert on the “band shifting” technique, claiming that a three band match was not truly a match. The defense also claimed that any corrections that were made due to “band shifting” were not accepted in the scientific community. The supreme court examined the findings of the National Research Council and agreed with the Council’s report that “[u]ntil testing laboratories have published adequate studies on the accuracy and reliability of such corrections, we recommend that they adopt the policy of declaring samples that show apparent band shifting to be ‘inconclusive.’”⁹⁶ Therefore, the Supreme Court of Florida found that the test on the tank top was unreliable.⁹⁷

The Supreme Court of Florida next examined the DNA test done on the vaginal swab taken from the victim.⁹⁸ There was a seven band match on this sample. The supreme court felt that this DNA evidence could not be excluded as a matter of law.⁹⁹ However, the supreme court also believed that it could not approve this evidence for admission at this juncture, since it found that the *Frye* test was not properly applied, as suggested in the National Research Council’s report.¹⁰⁰

In summarizing its findings, the Supreme Court of Florida stated:

92. NATIONAL ACADEMY OF SCIENCES, *supra* note 91, at 133–34.

93. *Hayes*, 660 So. 2d at 263.

94. NATIONAL ACADEMY OF SCIENCES, *supra* note 91, at 133–34.

95. *Id.* Even if proper procedures are followed, the probative force of the evidence will depend on the *quality* of the laboratory work.

96. *Hayes*, 660 So. 2d at 264 (alteration in original) (quoting NATIONAL ACADEMY OF SCIENCES, *supra* note 91, at 60–61).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* The supreme court suggested that the vaginal swab DNA evidence could be presented by the State if the methodology utilized by the technician in performing the test met the requirements of the *Frye* test. *Hayes*, 660 So. 2d at 264.

[W]e find that the DNA evidence would assist the jury in this case in determining a fact in issue. We take judicial notice that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the *Frye* test to protect against false readings and contamination. With regard to the tank top, we find that the DNA test was inadmissible because it did not meet accepted scientific principles. Finally, we find that, while this record does not support a proper application of the required *Frye* test to the procedures utilized to obtain the DNA test results on the vaginal swab, the DNA evidence may be presented upon retrial subject to a proper finding under the *Frye* test.¹⁰¹

B. *Testimony by Experts*

During the survey period, two district courts of appeal¹⁰² wrestled with the dilemma of whether the *Frye*¹⁰³ standard should be applied to testimony of a psychologist that the alleged victim in a child sex abuse case exhibits symptoms consistent with those of a child who has been sexually abused. This is commonly referred to as the “child abuse profile.”

The child abuse profile arises when an expert in the area of psychology gives an opinion that the victim in a child abuse case fits within the profile. Naturally, in child abuse cases, there are no eyewitnesses, and the evidence generally comes down to the statements of the child victim and, in some cases, the protestations of innocence by the defendant.¹⁰⁴ However, the addition of a psychological expert testifying that the child victim fits within the profile of an abused child, or that the child victim’s case is consistent with that of other abused children, tends to bolster the credibility of the child’s story. This is generally to the detriment of the defendant, who may be claiming that another individual abused the child.

Syndrome testimony has been difficult for the Florida district courts of appeal to interpret due to the divergent opinions rendered by the Supreme

101. *Id.* at 264–65.

102. *Beaulieu v. State*, 671 So. 2d 807 (Fla. 5th Dist. Ct. App. 1996); *Hadden v. State*, 670 So. 2d 77 (Fla. 1st Dist. Ct. App. 1996).

103. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

104. This is so often the case because there is generally no objective physical evidence of the abuse which may have occurred months or years before.

Court of Florida in the last few years.¹⁰⁵ The inconsistency is due in part because the court in *Flanagan v. State*¹⁰⁶ held that “profile” evidence is inadmissible because it does not meet the *Frye* test.¹⁰⁷ However, the court in *State v. Townsend*,¹⁰⁸ apparently relying on the relevance standard of section 90.702,¹⁰⁹ held that “if relevant, a medical expert witness may testify as to whether, in the expert’s opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused.”¹¹⁰

The First District Court of Appeal in *Hadden v. State*,¹¹¹ attempted to harmonize these cases by intimating that *Flanagan* dealt only with new and novel scientific profiles, which requires a *Frye* analysis.¹¹² *Townsend*, the *Hadden* court surmised, recognized that evidence which is not new or novel and which has been received in cases under the more relaxed relevancy standard, does not have to meet the *Frye* standard.¹¹³ In *Beaulieu v. State*,¹¹⁴ as well as in *Hadden*, the issue was the admissibility of the child abuse syndrome, or child abuse profile. Both courts reasoned that this evidence had been admissible in a number of cases and was, therefore, no longer new and novel and subject to *Frye*.¹¹⁵ However, the issue remains whether the Supreme Court of Florida follows the view that the child abuse profile need not be subjected to a *Frye* analysis. The Fifth District Court of Appeal in *Beaulieu* was so perplexed that it stated: “Because *Flanagan* did not mention *Ward* or *Kruse*, *Townsend* did not mention *Flanagan*, and *Ramirez* . . . did not mention *Townsend*, who can tell?”¹¹⁶ Both courts certified the

105. *State v. Townsend*, 635 So. 2d 949 (Fla. 1994); *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 492 U.S. 907 (1989).

106. 625 So. 2d 827 (Fla. 1993).

107. *Id.* at 829.

108. 635 So. 2d 949 (Fla. 1994).

109. FLA. STAT. § 90.702 (1993). This section is entitled “Testimony by Experts.”

110. *Townsend*, 635 So. 2d at 958.

111. 670 So. 2d 77 (Fla. 1st Dist. Ct. App. 1996).

112. *Id.* at 82. The *Hadden* court felt that new and novel scientific profiles included pedophile and child sex offender profiles. *Id.*

113. *Id.* at 82.

114. 671 So. 2d 807 (Fla. 5th Dist. Ct. App. 1996).

115. *Id.* at 809; *Hadden*, 670 So. 2d at 82. *See also* *Ward v. State*, 519 So. 2d 1082 (Fla. 1st Dist. Ct. App. 1988).

116. *Beaulieu*, 671 So. 2d at 809 (footnotes omitted) (citations omitted). *See* *Ramirez v. State*, 651 So. 2d 1164 (Fla. 1995) (establishing a four-step process under section 90.702 in order to determine the admissibility of a new or novel scientific principle; one such step requires a *Frye* analysis); *Kruse v. State*, 483 So. 2d 1383 (Fla. 4th Dist. Ct. App. 1986).

issue to be of great public importance,¹¹⁷ so a decision clearing up this quandary should be forthcoming from the Supreme Court of Florida in the coming year.

C. *Basis of Expert Opinion*

In a lengthy personal injury case, the First District Court of Appeal examined the use of expert testimony relative to the seat belt defense. Although no startling evidentiary issues are present, the case does elaborate on the use of expert opinions and the facts which experts rely on in forming their opinions.

*Houghton v. Bond*¹¹⁸ is a classic case of an attorney stepping over the bounds of proper trial advocacy and pushing the limits of ethical behavior.¹¹⁹ A head on collision was the impetus of the *Houghton* case. Mr. Houghton, the single occupant of his vehicle, was killed in the accident. The driver of the other vehicle was the plaintiff, Mr. Bond, who was not wearing a seatbelt. Mr. Bond was seriously injured in the crash. However, his passenger, Mr. Lindsay, was wearing a seat belt and walked away from the accident with only superficial injuries.

The two main contentions at trial were who caused the accident, and the seat belt defense. The plaintiff's expert on accident reconstruction opined that Mr. Houghton was partially in Bond's lane when the accident occurred. The plaintiff's expert was not qualified to render an opinion regarding seatbelts and offered no crash test testimony.

The defendant's expert was qualified at trial as an expert on accident reconstruction, occupant kinematics, and biomechanics related to an automobile seat belt restraint system in a motor vehicle involved in a crash. The testimony from the defendant's expert dealing with accident reconstruction demonstrated that the vehicle in which Bond and Lindsay were riding drove off the shoulder of the road, and Bond over-corrected and swerved across the center line of the highway into the path of Houghton's vehicle.¹²⁰

In examining the use of a seat belt in this accident, the defense expert opined that had Bond been wearing his seatbelt, the forces he experienced and injuries he sustained would have been less than or, at most, equal to

117. *Beaulieu*, 671 So. 2d at 811; *Hadden*, 670 So. 2d at 83.

118. 21 Fla. L. Weekly D1067 (1st Dist. Ct. App. April 24, 1996).

119. The district court points out these shortcomings in a sharply written opinion that is recommended reading for anyone interested in doing trial work.

120. Apparently, the jury was convinced by the defendant's accident reconstruction expert, as the verdict was clearly in favor of the defendant and against the plaintiff.

those sustained by Lindsay.¹²¹ The defense expert also testified regarding government crash test data on cars including head injury criteria. This material was important because had Bond been wearing a seatbelt, the defense expert contended, the forces inside the car during the collision would not have been sufficient for him to sustain a serious head injury.

The jury returned a verdict, finding that Bond was eighty percent responsible for the collision, and ninety percent of Bond's injuries resulted from his failure to wear a seatbelt. Therefore, Bond's damages of \$3,000,000 were reduced to \$60,000.¹²² Bond's counsel filed post-trial motions for a new trial and directed verdict. Bond's counsel also filed affidavits contesting the defendant's expert's opinions. The purpose of these affidavits was to contradict and discredit portions of the defense expert's testimony.¹²³

The trial court inexplicably granted the plaintiff's motions and allowed the plaintiff's attorney to "draft a detailed order that makes specific reference in the record to the testimony necessary to support the court's order on appeal."¹²⁴ This order granted Bond's post trial motion for directed verdict and struck the defendant's seatbelt defense in its entirety.¹²⁵

121. Lindsay walked away from this accident with only superficial injuries. The plaintiff, Bond, on the other hand, was not expected to live, since his injuries were so severe when he was brought to the hospital. Both Lindsay and Bond were riding in the same vehicle. This is a pretty clear indication that seatbelts should always be worn and the seatbelt defense should be used to properly apportion those damages associated with *not* wearing one.

122. Mr. Houghton sustained damages of \$472,000 which was reduced by twenty percent to \$377,600.

123. How the attorney determined this was proper is hard to say. The district court was unable to find any authority to support this action. *Houghton*, 21 Fla. L. Weekly at D1069. Since the plaintiff's attorney did not assert any of the grounds laid out in the affidavits prior to or during trial, he cannot seek a reversal of the judgment now. See FLA. R. CIV. P. 1.480; *Allstate Ins. Co. v. Gonzalez*, 619 So. 2d 318 (Fla. 3d Dist. Ct. App. 1993).

124. *Houghton*, 21 Fla. L. Weekly at D1069.

125. *Id.* The district court's review of this order is some of the more interesting reading that will be found in an appellate opinion and is recommended reading for those who do not wish to be embarrassed by the appellate court for inappropriate behavior. The district court stated:

Notwithstanding Bond's counsel's commitment to the trial court to make "specific reference in the order to the testimony necessary to support the court's order" if permitted to draft a "detailed order," the order entered contains *no such references*. Indeed, the order primarily reflects counsel's rather generalized disdain for both Dr. Benedict and his testimony, which was underscored at one point during the proceedings below when counsel advised the court that "Benedict is the source of my irritation" and referred to him later as the actor/witness Benedict.

The district court reversed the order and in doing so, specifically addressed the issue that the defense expert's use of government conducted crash tests rendered him a conduit for inadmissible hearsay evidence.¹²⁶ The district court first pointed out that no objection was made to the use of the governmental data during the testimony.¹²⁷ The district court went on to find that the defense expert used the crash data to determine the speed of the vehicles involved in this accident.¹²⁸ Naturally, the government crash test data does not in and of itself have to be admissible for the expert's opinion to be admissible.¹²⁹ The court concluded that the testimony aided the jury in understanding the defense expert's opinion, and was not a conduit for inadmissible evidence.¹³⁰

Id. at D1070 (emphasis added). The trial court order went on to find that there was no plausible basis for the jury finding that ninety percent of plaintiff Bond's injuries were caused by his failure to wear an available seatbelt. The district court naturally disagreed with this finding, and stated, "The record contains *more than ample evidence* to support this finding quite apart from Benedict's apportionment testimony." *Id.* (emphasis added). This district court went on to state:

Given the appealed order's reliance on Bond's counsel's personal opinions regarding Dr. Benedict's "demeanor", "custom" and "habit" to support striking the seatbelt defense, we have carefully plumbed the record to find support for what have become *findings by a stroke of the judicial pen*. Our independent research has failed to turn up the "testimony necessary to support the court's order" as promised by Bond's counsel, which seems to us a *reasonably predictable result when counsel for one of the parties to a hotly contested lawsuit requests and is permitted to prepare a dispositive order in that litigation without judicial guidance of record and counsel's work product is uncritically accepted and entered as submitted*. If, for example, as the order finds, Dr. Benedict's "performance on the stand" was more a debate with counsel than a proper attempt to answer the questions posed by bond's counsel, *such was due in no small measure to the tenor of counsel's often argumentative and sarcastic questioning of the witness*.

Id. (emphasis added).

126. *Houghton*, 21 Fla. L. Weekly at D1070.

127. *Id.*

128. *Id.*

129. Section 90.704 of the *Florida Statutes* provides:

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made know to, him at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, *the facts or data need not be admissible in evidence*.

FLA. STAT. § 90.704 (emphasis added). See also EHRHARDT, *supra* note 11, § 704.1; Barber v. State, 576 So. 2d 825 (Fla. 1st Dist. Ct. App. 1991).

130. The district court also found that whether a defendant is obliged at all to present expert testimony in support of a seatbelt defense appears to depend upon the nature of the plaintiff's injuries. *Houghton*, 21 Fla. L. Weekly at D1071. The rule appears to be that in

VIII. HEARSAY

A. Nonhearsay

Occasionally, a poor argument in the trial court and a cold transcript read by the district court leads to a poor opinion. In *Aneiro v. State*,¹³¹ this is apparently what happened. The defendant, Aneiro, was convicted of trafficking in cocaine.¹³² The issue for appeal was whether the trial court improperly admitted hearsay testimony of a taped telephone conversation between the confidential informant (“CI”) and the defendant.¹³³ The defendant argued entrapment at trial and testified that the CI induced him to deliver cocaine in return for \$200 and the use of the CI’s car for fifteen days.

The Fourth District Court of Appeal reversed the defendant’s conviction.¹³⁴ The exact sixteen word conversation that caused this reversal is as follows:

[CI]: What kind of car will you be in?
 [Appellant]: A Nissan.
 [CI]: A Lincoln?
 [Appellant]: Gray. A gray Nissan.¹³⁵

The district court found this to be inadmissible hearsay because it was offered to prove that the CI did not know what kind of a car appellant would use to transport the cocaine.¹³⁶ The prosecution used this conversation in closing argument to demonstrate that the CI had no knowledge of the type of

certain cases, such as those involving *non-impact* sprain/strain or orthopedic injuries (e.g., a herniated disc), the party offering a seatbelt defense is required to present expert testimony, because the precise cause of the plaintiff’s injury (i.e. whether the injury would have occurred had the plaintiff worn his seatbelt) is not within the province of the jury. *Id.* at D1071.

131. 674 So. 2d 913 (Fla. 4th Dist. Ct. App. 1996).

132. *Id.* at 913.

133. *Id.*

134. *Id.*

135. *Id.* Please pay close attention to the punctuation used by the district court and reprinted in the opinion, as this will offer a clue as to the correct analysis of this matter.

136. *Aneiro*, 674 So. 2d at 913. From the meager facts presented, the best that can be discerned is that the defendant was claiming that the CI entrapped him and, accordingly, wanted to show that the CI *did know* what type of car the defendant would bring the cocaine in, in order to prove that the CI gave him the car as an inducement to bring the cocaine. The prosecution used this taped telephone conversation to argue, in closing, that the CI had no knowledge of the type of car the defendant would be in and this would thus demonstrate to the jury that the defendant’s argument, that the loan of the car was an inducement for the drug transaction, was untrue. This is, of course, a guess based on what few facts were given.

car the defendant was in, and in turn, used this to demonstrate that the defendant's argument that the deal was induced, in part, by the loan of a car, was untrue.¹³⁷ If the defendant was not induced into the deal, in part, by the loan of the car, then there may be no entrapment. Arguably, if the CI had to ask what kind of car the defendant would be in, this would rebut the defense that he lent the defendant the car, and therefore, entrapped him.

The district court of appeal rejected the State's argument that this conversation constituted "verbal acts" and was not hearsay.¹³⁸ This was probably due to two separate things. First, the prosecution made no argument in the trial court that the hearsay was merely verbal acts.¹³⁹ It was argued for the first time on appeal. Second, the conversation was used by the prosecution to demonstrate the truth of the statements.

The district court rejected the plethora of case law which held that verbal acts evidence is admissible in these types of cases because the statements serve to prove the nature of the act.¹⁴⁰ The dissent written by Judge Shahood is the better analysis;¹⁴¹ however, the opinion can also be upheld on two different analyses. First, reciprocal conversations between two individuals, one of whom is an opposing party in a case, is generally not hearsay. All the statements made by the party against whom the statement is being offered is simply admissible as a statement of a party opponent under section 90.803(18) of the evidence code.¹⁴² Questions by the other individu-

137. Apparently, at the trial, the prosecution failed to make any arguments that this statement was simply not hearsay, as the district court pointed out that this was argued for the first time on appeal. *Id.* at 914. Additionally, no objection was made and no limiting instruction for the hearsay statement was requested by the defense when the prosecution argued about the type of car the defendant would be in. This was a nice job of finding error, when there was no objection to the use of this closing argument by the defense, no limiting instruction was requested, and there was no finding that the error was fundamental.

138. *Id.*

139. However, this could be of no real importance, because evidence admitted by the trial judge for the wrong reasons will not cause a reversal if there were proper grounds to admit the evidence. *Irving v. State*, 627 So. 2d 92, 94 n.1 (Fla. 3d Dist. Ct. App. 1993) (holding that an appellate court will not reverse when the trial court reaches the right result for the wrong reason); *see also* *Belvin v. State*, 585 So. 2d 1103 (Fla. 2d Dist. Ct. App. 1991). Additionally, a conviction should not be reversed unless the admittance of the evidence deprived the defendant of a fair trial.

140. *Aneiro*, 674 So. 2d at 914. *See* *Breedlove v. State*, 413 So. 2d 1 (Fla.), *cert. denied*, 459 U.S. 882 (1982); *Chacon v. State*, 102 So. 2d 578 (Fla. 1957); *Decile v. State*, 516 So. 2d 1139 (Fla. 4th Dist. Ct. App. 1987); *State v. McPhadder*, 452 So. 2d 1017 (Fla. 1st Dist. Ct. App. 1984), *quashed*, 475 So. 2d 1215 (Fla. 1985).

141. *Aneiro*, 674 So. 2d at 915-16 (Shahood, J., dissenting).

142. FLA. STAT. § 90.803(18)(a) (1995).

als are simply not hearsay because they are not within the definition of hearsay. Generally, only a “declaratory” statement can be considered hearsay. Interrogatory, imperative, or exclamatory statements are not within the definition of hearsay because they are not statements of opinions or facts similar to a declaratory statement.¹⁴³ Therefore, the questions by the CI, asking what kind of car the defendant would be in, should not be considered hearsay, since they are not declarations of opinion or fact.¹⁴⁴

The statement could also be considered nonhearsay because it was not offered for the truth of the matter asserted, but was relevant for the following reasons: 1) to demonstrate that the defendant engaged in the conversation with the CI and took part in plans to supply illegal drugs; 2) to demonstrate lack of knowledge or notice on the part of the CI; and 3) to rebut the defendant’s entrapment claim.¹⁴⁵ The statement is not needed to prove that the

143. See *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990) (holding that while an “assertion” is not defined in the *Federal Rules of Evidence*, the term has the connotation of a positive declaration); *Lark v. State*, 617 So. 2d 782, 789 (Fla. 1st Dist. Ct. App. 1993) (holding that the defendant’s statement to police investigator, “Who shot Wes Butler?” was not hearsay. “We find that Lark’s query was not an oral assertion.”). See also Olin G. Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 73 (1982), which provides: “[A] verbal expression is hearsay only if it is (1) a declarative sentence (2) the terms of which ‘affirm positively, assuredly, plainly or strongly,’ the matter that it is offered to prove.” *Id.* Since generally, only declarative statements can be considered hearsay, a question to someone should not fall within the definition of hearsay.

144. Whenever a statement is entered into evidence as nonhearsay and therefore, not for the truth of the matter asserted, a limiting instruction can be requested that the truth of the matter not be argued to the jury. That limiting instruction was apparently not requested at the time of the entry of the statement, nor was an objection or a limiting instruction requested at the time the statements were used in closing argument. A contemporaneous objection is needed to preserve an issue for review. FLA. STAT. § 90.104. There was none here. Therefore, this issue should not have been heard, let alone used to reverse a conviction.

145. See *Warner v. Walker*, 500 So. 2d 645 (Fla. 2d Dist. Ct. App. 1986) (holding that hearsay statements concerning purported drug use by custodial parent’s new husband was admissible for limited purpose of showing child’s knowledge of drugs); *City of Miami v. Fletcher*, 167 So. 2d 638 (Fla. 3d Dist. Ct. App. 1964) (holding that proof that a statement was made was relevant to show knowledge of dangerous condition). Although the defendant allegedly borrowed the car from the CI, it was unusual that the defendant did not make some inquiry when the CI asked what type of car the defendant would be driving. One would think that the defendant would say, “Hey, what do you mean, what kind of car am I in, I’m in your car.” Therefore, maybe it could also be argued that the failure to correct this inconsistency or the defendant’s silence demonstrates the defendant’s knowledge of the ownership of the car and rebuts his assertion of entrapment. The defendant’s silence in the face of this unusual question might be considered an adoptive admission under section 90.803(18)(b). Under limited circumstances, a party’s failure to deny a statement made by a third party will give rise to the inference that the party’s silence is an admission of the truth of such statement (i.e. that

defendant was really in a gray Nissan, but to prove the lack of knowledge of the type of car that defendant was driving (i.e. it is not proving the truth of the matter asserted, that defendant drove a gray Nissan, but the fact was relevant to prove the lack of knowledge on the CI's part and used to rebut the defendant's entrapment argument). Therefore, the statements were properly admitted; the dissent was correct, and this case was improperly reversed.

B. *Prior Inconsistent Statements as Substantive Evidence*

In a very important hearsay case for prosecutors and defense attorneys, the Supreme Court of Florida used some fancy footwork and circuitous reasoning to conclude that a prior inconsistent statement¹⁴⁶ that is taken as part of a discovery deposition, pursuant to rule 3.220¹⁴⁷ is not admissible under section 90.801(2)(a), as substantive evidence. This case will, unfortunately, only add to the complexity and problems associated with criminal depositions, as the high court obfuscates the true meaning of a trial as a "search for the truth."

In *State v. Green*,¹⁴⁸ the defendant appealed from a trial court's conviction of sexual battery and lewd, lascivious, and indecent assault on a child.¹⁴⁹ The fourteen-year-old child was also mildly retarded. In a defense deposition, the child victim implicated the defendant with statements about specific sexual offenses he had committed upon her. At trial, however, she recanted these earlier accusations. During the trial, she accused another man as the person who forced her to have sex. The prosecution used section 90.801(2)(a),¹⁵⁰ the victim's prior deposition testimony taken under oath, to

the CI did not know what type of car the defendant would be in because the CI did not lend him his car). See *Daughtery v. State*, 269 So. 2d 426 (Fla. 1st Dist. Ct. App. 1972); *Johnson v. State*, 249 So. 2d 452 (Fla. 4th Dist. Ct. App. 1971).

146. Section 90.801(2)(a) of the *Florida Statutes*, provides in part:

(2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

(a) Inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or *in a deposition*.

FLA. STAT. § 90.801(2)(a) (1989) (emphasis added).

147. FLA. R. CRIM. P. 3.220(h).

148. 667 So. 2d 756 (Fla. 1995).

149. *Id.* at 757.

150. The prosecution also utilized section 90.803(23), the child hearsay exception, to elicit from the victim's sister and sister-in-law the accusations the victim had related to them

impeach the witness' testimony, and used these statements as substantive evidence.¹⁵¹

A very divided First District Court of Appeal reversed the defendant's conviction.¹⁵² The district court found that the deposition statements were admissible as substantive evidence, pursuant to section 90.801(2)(a).¹⁵³ However, that evidence standing alone was insufficient to convict the defendant, because the only evidence that the defendant had committed a crime was that single out-of-court statement.¹⁵⁴

The Supreme Court of Florida began its analysis with the interpretation and use of section 90.801(2)(a).¹⁵⁵ Prior to the adoption of the *Florida Evidence Code*,¹⁵⁶ prior inconsistent statements could never be admitted as substantive evidence. The adoption of the *Florida Evidence Code* allowed, for the first time, the use of prior inconsistent statements as substantive evidence.

In *Moore v. State*,¹⁵⁷ the Supreme Court of Florida interpreted the words "other proceedings" found in section 90.801(2)(a) to mean Florida grand jury proceedings.¹⁵⁸ The supreme court found that since section 90.801(2)(a) was patterned after Rule 801 of the *Federal Rules of Evidence*,¹⁵⁹ and the federal rules were interpreted to include grand jury proceedings, prior inconsistent statements made in a Florida grand jury proceeding came within the confines of section 90.801(2)(a).¹⁶⁰ The Supreme Court of Florida in

concerning the defendant. These statements were allowed after extensive findings of reliability by the trial judge.

151. Statements taken pursuant to section 90.801(2)(a) can be used for impeachment and for substantive evidence. FLA. STAT. § 90.801(2)(a). See EHRHARDT, *supra* note 48, § 801.7; Bruschi, *supra* note 70, at 1162.

152. *Green*, 667 So. 2d at 758.

153. *Id.*

154. *Id.* See *State v. Moore*, 485 So. 2d 1279 (Fla. 1986) (holding that prior inconsistent statements standing alone are insufficient for a criminal conviction).

155. *Green*, 667 So. 2d at 758 (analyzing FLA. STAT. § 90.801(2)(a)).

156. The effective date of the *Florida Evidence Code* was July 1, 1979 for criminal actions and was applicable to all civil actions pending on or brought after October 1, 1981.

157. 452 So. 2d 559 (Fla. 1984).

158. *Id.* at 562.

159. FED. R. EVID. 801(d)(1).

160. *Moore*, 452 So. 2d at 562. Florida and federal grand jury proceedings rarely have opposing counsel available to cross-examine or ask any questions of the witnesses. It is generally the prosecution presenting the evidence to the grand jury and questioning the witnesses without any questions from an opposing viewpoint. The grand jurors can ask questions; however, they are not in an adversarial position. It seems incomprehensible how a grand jury proceeding, which includes only one side, the prosecution, could produce more trustworthy and reliable evidence than a criminal deposition with *both* sides, the defense and

Green concluded that federal interpretations of the rule could not be utilized in this instance because Florida discovery rules regarding depositions are much broader than Federal discovery rules¹⁶¹ regarding depositions.¹⁶² Therefore, no meaningful interpretation of a federal precedent could be used.

In *Green*, the Supreme Court of Florida recognized that the *Florida Rules of Criminal Procedure* have two types of depositions available in criminal cases. First, depositions which are taken to perpetuate testimony brought under rule 3.190(j) and second, depositions which are taken for the purpose of discovery brought under rule 3.220(h).¹⁶³

Depositions under rule 3.190(j) are taken for the specific purpose of entering the deposition at trial in a criminal case for substantive evidence. This is similar to Rule 1.330 of the *Florida Rules of Civil Procedure*.¹⁶⁴ The key here being that under either situation, subject to objections, the deposition can be read to a jury as substantive evidence.¹⁶⁵ The Supreme Court of Florida found that depositions taken pursuant to rule 3.220 are for discovery purposes only and:

How a lawyer prepares for and asks questions of a deposition witness whose testimony may be admissible at trial as substantive evidence under rule 3.190 is entirely different from how a lawyer prepares for and asks questions of a witness being deposed for discovery purposes under rule 3.220. In effect, the knowledge that a deposition witness's testimony can be used substantively at trial may have a chilling effect on a lawyer's questioning of such a witness.¹⁶⁶

the prosecution, in attendance and asking questions. The supreme court's ruling that criminal depositions under rule 3.220 were not intended to qualify as substantive evidence under section 90.801(2)(a) flies in the face of logic and reason. What raises testimony given in a grand jury proceeding to the level of being trustworthy and reliable, with only one side present and asking questions, above a criminal deposition with *both* sides present and the witness answering *both* sides' questions under oath? This is illogical, at best, and unsound and inconsistent reasoning, at worst.

161. Federal criminal discovery rules generally do not allow depositions of witnesses, unlike Florida's discovery rules, which allow depositions in criminal felony cases, and for good cause, in criminal misdemeanor cases.

162. *Green*, 667 So. 2d at 759.

163. *Id.*

164. FLA. R. CIV. P. § 1.330.

165. *Green*, 667 So. 2d at 759.

166. *Id.* It seems what the Supreme Court of Florida is saying between the lines is that since 90% of depositions in criminal cases are taken by the defense, the defense attorney would not ask a question that would incriminate his client, for fear that this could be used as

The only use of rule 3.190(j) is to perpetuate testimony. It is generally used by the prosecution, when securing the witness at trial would be impossible. The most common use is when the witness will not be alive for the trial. The prosecution moves to perpetuate the testimony and then the whole deposition can be read to the jury. The cross-examination by the defense attorney can also be read to the jury and all testimony is subject to objections. In reality, this section operates similarly to Rule 1.330 of the *Florida Rules of Civil Procedure*. The prosecution does not perpetuate testimony in anticipation of a deposed witness changing his testimony and neither does the defense.¹⁶⁷ Nevertheless, based on this court's ruling, it would be wise

substantive evidence at trial, if the witness recanted his or her testimony. This is absolutely absurd and flies in the face of the main tenet of what a trial is all about, a "Search For The Truth." This search is aided by the evidence code, which assists the court and attorneys in presenting only trustworthy and reliable information to the trier of fact. Testimony given before a grand jury with only one side present is simply *not* more trustworthy than evidence given before two adversarial opponents. It is illogical and irrational to believe otherwise. We devised an adversarial system of justice, and that wonderful engine called cross-examination, to seek out and find the truth. It is the common belief of many jurors and lay people alike that the courts and attorneys do not present them with all the evidence. This is probably a true statement when cases such as this fly in the face of logic and reason.

The logic which the supreme court uses is that an attorney in a discovery deposition would be less likely to ask certain questions because of the chilling effect on the lawyer's questioning of the witness, if the testimony could be used substantively at trial. This is absolutely absurd and if you apply this logic to a grand jury proceeding, you are faced with the unpleasant conclusion that the prosecutor will only ask the witnesses questions which would be favorable to getting an indictment. This clearly does not bolster the trustworthiness or reliability of the statements made at a grand jury proceeding. Therefore, it is fallacious reasoning at best to assume that a grand jury proceeding falls under the ambit of section 90.801(2)(a), and is therefore considered reliable and trustworthy evidence, but a criminal deposition taken under oath and with two adversarial opponents questioning the witness, is not sufficiently reliable and trustworthy.

The witness is under oath and is subject to perjury; why are these safeguards included in a discovery deposition? Why not just take an unsworn statement? It makes no sense. If the statement falls within the evidence code, it should come in at the trial.

167. However, it is apparent that in child molestation and rape cases, the prosecution should move to perpetuate testimony under rule 3.190(j). Rule 3.190(j)(2) specifically allows for a deposition of this sort:

If the defendant or the state desires to perpetuate the testimony of a witness living *in or out of the state* whose testimony is *material and necessary to the case*, the same proceedings shall be followed as provided in the preceding subdivision, but the testimony of the witness may be taken before an official court reporter, transcribed by the reporter, and filed in the trial court.

FLA. R. CRIM. P. 3.190(j)(2) (emphasis added). Additionally, rule 3.190(j)(1) states that perpetuation is desirable if the witness is outside the jurisdiction of the court or may not be

for both the defense and prosecution to *only* take depositions under rule 3.190 of material witnesses, for fear that if the witness changes his or her testimony at trial, the advocate will not be able to impeach the witness and argue the statement as substantive evidence.

In criminal cases, discovery depositions cannot be read to a jury as substantive evidence, as in civil cases.¹⁶⁸ However, a deposition, whether taken in a civil or criminal case, should be allowed in evidence if the testimony falls within the ambit of the *Florida Evidence Code*. The purpose of the evidence code in the search for the truth is to filter out unreliable and untrustworthy evidence and to only allow that testimony which is trustworthy and reliable to go to the trier of fact. There is no logical basis for disallowing evidence, which clearly falls within the ambit of the evidence code, based on whether the deposition is offered in a criminal or civil case. Professor Ehrhardt, in his treatise on Florida evidence, points out that:

the only depositions that are admissible [in criminal cases] are those taken to perpetuate testimony in compliance with Rule of Criminal Procedure 3.190(j). Thus the admissibility of a discovery deposition under the Evidence Code differs depending on whether the deposition is offered in a criminal or civil case. There appears to be no logical reason to draw the distinction.¹⁶⁹

Additionally, the Supreme Court of Florida ruled that “all present rules of evidence established by case law or express rules of court are hereby superseded to the extent they are in conflict with the code.”¹⁷⁰ The rules of criminal procedure determine the admissibility of deposition testimony and were established by an express rule of the court. When the evidence code

able to attend trial and “the witness’s testimony is *material*, and that it is necessary to take the deposition *to prevent a failure of justice*.” FLA. R. CRIM. P. 3.190(j)(1) (emphasis added).

168. In civil cases, it is important to remember that a discovery deposition can be read to the jury under two circumstances: 1) the deposition falls within the guidelines of Rule 1.330 of the *Florida Rules of Civil Procedure*; or 2) the deposition is admissible under the *Florida Evidence Code* (i.e. it is relevant and an admission of a party opponent). It is important to keep in mind that under either scenario, the deposition still cannot be read if it does not meet the prerequisites of the evidence code. For example, simply because the deposition fits within rule 1.330, it does not mean it can all be read to the jury. Only the relevant and material parts can be read. Likewise, simply because parts of the deposition can be read under the evidence code, it does not mean that double hearsay given in the deposition can be read to the jury, unless each part of the hearsay has an exception.

169. EHRHARDT, *supra* note 11, § 804.1.

170. *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla.), *clarified*, 376 So. 2d 1161 (Fla. 1979).

was adopted, it superseded any case law, or rules of court, which were in conflict with the code.¹⁷¹ If the criminal rules of procedure limit the use of depositions as evidence, thereby operating as a rule of evidence, they have been superseded by the *Florida Evidence Code* to the extent the criminal rule of procedure conflicts with the evidence code. Therefore, section 90.801(2)(a) controls, and that part of the deposition which was inconsistent with the victim's trial testimony should have been admissible as substantive evidence.

The supreme court's statement in *Green* that, "[t]o permit the use of rule 3.220 depositions as substantive evidence would discourage and chill the use of discovery depositions and would limit the criminal pre-trial discovery process"¹⁷² is unreasonable and illogical. The simple and limited use of inconsistent statements in a criminal discovery deposition as substantive evidence will in no way limit or chill the criminal pre-trial discovery process. The reliability and trustworthiness of testimony gathered in a criminal discovery deposition and the way a criminal discovery deposition is taken and utilized by both sides will not change in any manner. Any contention otherwise simply demonstrates the lack of understanding between our appellate judiciary and the day-to-day work of those trial attorneys for the prosecution and the defense who toil in the criminal justice system.¹⁷³ A trial is a search for the truth. The evidence code should perpetuate that goal and not subvert it in an attempt to place form over substance.

C. Child Hearsay Statements

In *A.E. v. State*,¹⁷⁴ the defendant appealed an adjudication which declared the defendant delinquent, for committing a sexual battery upon a

171. *Id.*

172. *Green*, 667 So. 2d at 759.

173. *Green* is another tough case making bad law. The supreme court was clearly concerned that the victim was retarded, had accused other individuals of the crime, and that a conviction based solely on the prior inconsistent statements of the victim would create too great a risk of convicting an innocent accused. These sentiments are significant in the court's determination of this case. However, the admission of the statements under section 90.801(2)(a) as substantive evidence would not have changed the outcome of the court's ruling, since inconsistent statements standing alone are insufficient as a matter of law to prove guilt beyond a reasonable doubt. See *State v. Moore*, 485 So. 2d 1279 (Fla. 1986). Therefore, the district court of appeal's finding, that the testimony from the deposition was admissible as substantive evidence under section 90.801(2)(a), should have been upheld by the supreme court.

174. 668 So. 2d 704 (Fla. 5th Dist. Ct. App. 1996).

five-year-old girl.¹⁷⁵ The defendant had a non-jury trial and the State called three witnesses to testify regarding out of court statements made by the child victim. The victim's statements to each witness included specific allegations of the sexual battery and an identification of the defendant as the perpetrator. The State introduced the statements pursuant to the applicable section 90.803(23) of the *Florida Statutes*.¹⁷⁶ This section authorized the introduction of hearsay statements of the child victim, if the statements are shown to be trustworthy and reliable.¹⁷⁷ The defense objected to the admission of the statements under the child hearsay exception, since the trial court did not make specific findings of fact on the record as to the basis for its ruling. At the conclusion of the trial, the defendant was found guilty and adjudicated delinquent.¹⁷⁸

On appeal, the defendant maintained that the trial court erred by not making the requisite findings of facts as required by section 90.803(23)(c).¹⁷⁹ The State conceded that the trial court did not comply with the statutory prerequisites, but argued that there was no reversible error because the requirement of the statute pertains only to jury trials.¹⁸⁰ However, no authority for this proposition was cited by the State or found by the appellate court. In fact, contrary to the State's assertion, if the trial court intends to use the hearsay evidence as a basis for its ruling in a nonjury trial, then it must support the use of the hearsay statements, by demonstrating that the prerequisites for the hearsay evidence have been complied with.¹⁸¹ In this way, the reliability and trustworthiness of the evidence will be met.

175. *Id.* at 705.

176. *See* FLA. STAT. § 90.803(23) (1993).

177. *Id.* Section 90.803(23) provides that out of court statements made by a child victim with a physical, mental, emotional, or developmental age of eleven or less, describing any act of sexual abuse, are admissible if the source of information or the method or circumstances by which the statement is reported indicate trustworthiness, and if the court finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. *Id.* Subsection (c) of the statute directs the trial court to make specific findings of fact on the record as to the basis for a ruling under this subsection. *Id.* § 90.803(23)(c).

178. *A.E.*, 668 So. 2d at 705.

179. *Id.*

180. *Id.*

181. This proposition is probably easier to understand by viewing another hearsay exception. If the court used an excited utterance, under section 90.803(2), as a basis for its ruling, yet the prerequisites for an excited utterance were not met, i.e. the statement was not made in relation to a startling event, while the declarant was under the stress of excitement, then the statement may not be trustworthy, because there is room for reflective thought and fabrication. If the trial judge used a hearsay statement, which may have been a fabrication, and therefore untrustworthy, as the basis for his ruling, without other substantiating evidence, the ruling

If there is other evidence, notwithstanding the hearsay evidence, then the trial court's ruling might be sustained. However, the appellate court noted that "[t]he child never testified concerning penile penetration, and therefore, in an effort to establish the elements of the offense, the state necessarily relied upon the hearsay evidence regarding the child victim's out-of-court statements."¹⁸² If the trial court relied on the hearsay statements, and the prerequisites were not met, the conviction could be based on unreliable and untrustworthy evidence. This is insufficient for a conviction. The district court concluded that based on the evidence presented at trial, the lower court must have relied on the hearsay evidence in finding the defendant guilty as charged.¹⁸³ Therefore, the district court vacated the defendant's conviction.¹⁸⁴

D. Statements Against Penal Interest

In *Jones v. State*,¹⁸⁵ the Supreme Court of Florida examined the use of hearsay statements against penal interest,¹⁸⁶ in denying a convicted killer's motion for post conviction relief.¹⁸⁷ On May 23, 1981, a police officer was shot in his squad car in Jacksonville, Florida. Officers investigating the scene learned that the shots had been fired from a nearby apartment complex. Upon investigating the complex, the police came upon the defendant and his cousin in their apartment. During a cursory search of the apartment, the officers found several high-powered rifles in plain view. Later, the

could be in error. It could be based on unreliable, untrustworthy, and essentially, inadmissible evidence.

182. *A.E.*, 668 So. 2d at 706.

183. *Id.*

184. *Id.*

185. 678 So. 2d 309 (Fla. 1996).

186. Section 90.804(2)(c) of the *Florida Statutes* provides in part:

(2) HEARSAY EXCEPTIONS.—The following are not excluded under s. 90.802, provided that the *declarant is unavailable as a witness*:

....

(c) *Statement against interest*.—A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.

FLA. STAT. § 90.804(2)(c) (1995) (emphasis added).

187. *Jones*, 678 So. 2d at 315.

defendant confessed and signed a statement incriminating himself and exonerating his cousin. The defendant was convicted after a jury trial and sentenced to death.¹⁸⁸

The defendant filed numerous motions for post-conviction relief, claiming newly discovered evidence. During an evidentiary hearing on his last motion for post-conviction relief, the defendant claimed that another individual, Glen Schofield, confessed to the murder of the police officer. The trial court excluded the confession of Schofield at the hearing. The defendant argued that Schofield's confession was admissible, and the trial court erred because the alleged confessions were declarations against penal interest.

The supreme court began its analysis by stating that for a statement against penal interest to be admissible, section 90.804(2) requires a showing that the declarant is unavailable as a witness.¹⁸⁹ The party seeking to introduce a statement against penal interest, in this case, the defendant, has the burden of establishing the unavailability of the declarant.¹⁹⁰ The supreme court determined that the defendant did not carry this burden.¹⁹¹

At the evidentiary hearing, the prosecution stated that Schofield was available to testify. However, the defense refused to call him and instead, stated to the court that Schofield would merely take the stand and deny that he confessed to the murder of the police officer.¹⁹² The supreme court aptly stated that:

Contrary to Jones' attorney's position, we do not know what Schofield would have said had he been called as a witness. The burden was on Jones to establish that Schofield was unavailable and Jones failed to meet that burden. Consequently, we find that Schofield's alleged confessions are not admissible under the declaration against penal interest exception to the hearsay rule.¹⁹³

188. *Id.* at 310.

189. *Id.* at 313.

190. *Id.* at 314.

191. *Id.*

192. Apparently, the defense attorney handling the post-conviction hearing spent much time in preparation and in finding witnesses and newly discovered evidence. It is a shame the same attorney did not spend the time to learn that merely stating that someone will change his or her testimony is insufficient. It is also a shame that the attorney did not read the evidentiary rule regarding the unavailability of witnesses, especially when the party is the proponent of the evidence.

193. *Jones*, 678 So. 2d at 314.

The supreme court went on to find that the defendant also had the burden of presenting corroborating circumstances demonstrating the trustworthiness of Schofield's confessions.¹⁹⁴ The supreme court did not reach the determination of whether the defendant carried this burden, since the defendant did not demonstrate that Schofield was unavailable.¹⁹⁵

This case is a good reminder that attorneys who attempt to use any hearsay exception in section 90.804 must carry the burden of demonstrating that the declarant is unavailable. Otherwise, the evidence will be inadmissible. Additionally, for statements against penal interest, attorneys have the burden of presenting corroborating circumstances that demonstrate the trustworthiness of the statements they wish to admit under this exception.¹⁹⁶

The Supreme Court of Florida again addressed the admissibility of the declaration against penal interest hearsay exception in *Farina v. State*.¹⁹⁷ In *Farina*, two brothers were convicted of the fatal shooting of a seventeen-year-old employee of a Taco Bell restaurant and sentenced to death.¹⁹⁸ On appeal, Anthony Farina argued that he was denied a fair trial when incriminating statements of his co-defendant brother were offered against him at trial.¹⁹⁹ The State contended that the co-defendant's taped conversations

194. *Id.*; see also *United States v. Seabolt*, 958 F.2d 231 (8th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993) (holding that statements by one criminal to another is more likely to be jailhouse bragging than a statement against penal interest). The holding in *Seabolt* is a strong reason why other corroborating circumstances must be present before a statement against penal interest will be considered trustworthy enough to be admitted into evidence.

195. *Jones*, 678 So. 2d at 314.

196. The supreme court also went on to examine this case from the perspective of whether the statements were admissible under due process principles enunciated in *Chambers v. Mississippi*, 410 U.S. 284 (1973). *Jones*, 678 So. 2d at 314. The supreme court in *Jones* distinguished *Chambers*, finding that at the time *Chambers* was decided, Mississippi did not have a hearsay exception for declarations against penal interest; however, Florida did have such a rule in place at the time of Jones' trial. *Id.* Additionally, the court found that the alleged confessions in the present case did not have the persuasive assurances of trustworthiness that was present in *Chambers*. *Id.* Therefore, *Chambers* is distinguishable and the statements are not admissible under due process principles. *Id.*

197. 21 Fla. L. Weekly S176 (April 18, 1996).

198. *Id.* at S176.

199. *Id.* at S177. This occurs when there is a joint trial of two defendants. The co-defendants cannot be called to the stand by one another. This would violate their Fifth Amendment privilege against self-incrimination. Therefore, the statements entered by the State against one defendant and admissible under the evidence code against that defendant may not be admissible against the other co-defendant. This is especially true when the statement or confession incriminates the other co-defendant. This would violate the co-defendant's right to confront and cross-examine the witnesses against him. This is generally called a "*Bruton* violation" after *Bruton v. United States*, 391 U.S. 123 (1968), *cert. denied*,

were properly admitted as statements against penal interest pursuant to section 90.804(2)(c) of the *Florida Statutes*.²⁰⁰

Although the statement may be properly admissible as a statement against penal interest,²⁰¹ the problem occurs when the co-defendant's statement or confession incriminates or implicates another defendant and is admitted during their joint trial.²⁰² However, the United States Supreme

397 U.S. 1014 (1970). In *Bruton*, the United States Supreme Court held that a defendant's Sixth Amendment right to confrontation is violated when a co-defendant's confession is admitted at the joint trial, despite the fact that the jury is instructed that the confession is admissible only against the co-defendant. If the statement is independently admissible against the co-defendant, then he cannot complain that his confrontation rights were violated. Hearsay falling within "a firmly rooted hearsay exception" is presumptively reliable and bears sufficient indicia of reliability. See *Ohio v. Roberts*, 448 U.S. 56 (1980). However, even if hearsay evidence *does not* fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a showing of particularized guarantees of trustworthiness. *Id.* at 66.

200. *Farina*, 21 Fla. L. Weekly at S177 (citing FLA. STAT. § 90.804(2)(c) (1991)).

201. The State argued this as a statement against the declarant, Jeffery Farina's, penal interest under section 90.804(2)(c). However, the statement implicated his brother and co-defendant, Anthony Farina. The statement, in and of itself, against Jeffery Farina would clearly be an admission of a party opponent, since Jeffery Farina was a party. See FLA. STAT. § 90.803(18) (1995). Therefore, the statement would be admissible against Jeffery as an admission under section 90.803(18). The State apparently argued for entry of the statement against Anthony under section 90.804(2)(c), in an attempt to avoid a violation of the Confrontation Clause. A firmly rooted hearsay exception generally does not violate Confrontation Clause principles. *Roberts*, 448 U.S. at 66. A declaration against penal interest (with facts similar to the *Farina* case) which fits within the hearsay exception should be considered firmly rooted. See *Lee v. Illinois*, 476 U.S. 530, 551 (1986) (Blackmun, J. dissenting). However, the United States Supreme Court has stated that these statements are less reliable than ordinary hearsay because of a co-defendant's strong motivation to implicate the other defendant and to exonerate himself. *Id.* at 541. The Supreme Court of Florida followed this dictate and indicated that confrontation issues will arise when a *co-defendant's* statement against penal interest incriminates another defendant in a joint trial. *Farina*, 21 Fla. L. Weekly at S177. Statements and confessions made by co-defendants which implicate the other defendants in a joint trial are considered presumptively unreliable because of the strong incentive to throw the blame on the accomplice.

202. Generally, section 90.804 is used when the declarant is an unavailable *non-party* witness. Here, the declarant was a *party*. It is uncertain if the State felt that admission under section 90.804(2)(c) would automatically resolve the confrontation problem against the defendant, Anthony Farina, since the statement here was inherently reliable, given the facts of this case and, therefore, no further showing of particularized guarantees of trustworthiness would be needed.

Prior to 1990, the *Florida Evidence Code* contained the following language: "A statement or confession which is offered against the accused in a criminal action, and which is made by a co-defendant or other person implicating both himself and the accused, *is not within this*

Court has ruled that the presumption of unreliability that attaches to a co-defendant's confession or statement may be rebutted where there is a showing of particularized guarantees of trustworthiness.²⁰³

The supreme court, in examining the facts of *Farina*, found that the "indicia of reliability" existed to rebut the presumption of unreliability.²⁰⁴ The supreme court found that neither brother had an incentive to shift the blame during the conversations, as these were not statements or confessions to the police.²⁰⁵ Both brothers were calmly discussing the crime in the back of the police car. Unbeknownst to them, they were being taped. Since neither was aware that the conversations were being taped, it was unlikely that the motivation for fabrication was present. The court felt that Anthony was present and confronting his brother face-to-face throughout the conversations.²⁰⁶ Anthony could have taken issue with what was said during this conversation; however, this did not occur. The brothers tacitly agreed on what was being said and discussed details of the crime. This is different from the situation where a confession from one co-defendant has been taken by the police. The other co-defendant in this situation is not confronting the confessor and the confessing defendant has an incentive to shift the blame to his partner in crime. The supreme court determined that the taped conversations were admissible, since there was a showing of particularized guarantees of trustworthiness.²⁰⁷ Therefore, the court held that a confrontation violation did not exist and the statement was properly admitted under section 90.804(2)(c).²⁰⁸

IX. AUTHENTICATION

*Mills v. Barker*²⁰⁹ was one of the only cases during the survey period to discuss authentication and self-authentication under the *Florida Evidence*

exception." The import of this language was to clearly remove section 90.804(2)(c) from being the possible entry point of hearsay evidence against a codefendant in a joint trial. This was in an apparent attempt to codify *Bruton*. However, this language was deleted in 1990 because it was felt that this sentence may have broadened the impact of *Bruton*, by excluding evidence not specified by that decision.

203. *Lee*, 476 U.S. at 543.

204. *Farina*, 21 Fla L. Weekly at S178.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. 664 So. 2d 1054 (Fla. 2d Dist. Ct. App. 1995).

Code.²¹⁰ The issue in *Mills* was whether a modification agreement,²¹¹ signed and notarized, was properly authenticated for admission during a replevin action in a Florida circuit court.²¹² The circuit court excluded the agreement on the grounds that the document could not be properly authenticated. The district court reversed and held that although the document could not be authenticated by extrinsic evidence, the document was self-authenticating and therefore, admissible.²¹³

Before evidence can be admitted at a trial or at a hearing, it must first be identified or authenticated.²¹⁴ Section 90.901 of the *Florida Statutes* provides that “[a]uthentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”²¹⁵

Evidence may be authenticated by the testimony of a witness who has personal knowledge of facts which are sufficient to authenticate the evidence. It has long been held that a witness may testify about having seen the writer sign his or her name on several occasions and is able to identify the writer’s signature.²¹⁶ This is what happened in *Mills*. The proponent of the agreement, Mr. Mills, testified regarding the authentication of the modification agreement. Although Mr. Mills identified two of the signatures on the agreement, he could not properly identify the third signature purporting to be that of a Mr. Orland. Mr. Mills had never seen Mr. Orland affix his signature to any document, even though he had seen a signature which was purported to be Mr. Orland’s on more than one occasion. Therefore, the district court ruled that Mr. Mills testimony was insufficient to authenticate the modification agreement under section 90.901.²¹⁷

Although extrinsic testimony may not be sufficient to authenticate a document, the document may be admissible if is self-authenticating under

210. *Id.* at 1057.

211. The agreement was acknowledged by all parties to be governed by the law of California. *Id.* at 1056.

212. *Id.*

213. *Id.* at 1057.

214. Even if the evidence has been authenticated, it is not automatically admitted into evidence. If an exclusionary rule excludes the evidence, the evidence is inadmissible. *See United States v. One 1968 Piper Navajo Twin Engine Aircraft*, 594 F.2d 1040 (5th Cir. 1979) (holding that a certain authenticated document should be excluded as hearsay).

215. FLA. STAT. § 90.901 (1995).

216. *See Pittman v. State*, 41 So. 385, 393 (Fla. 1906).

217. *Mills*, 664 So. 2d at 1057.

section 90.902.²¹⁸ There are a number of exceptions to the requirement of using extrinsic evidence to prove a document is authentic.²¹⁹ When there is sufficient information contained in the document to meet one of these exceptions, the document is self-authenticating. The document proves itself and is admissible without further proof of extrinsic evidence.

In *Mills*, the district court found that the document was self-authenticating and admissible.²²⁰ The district court determined that the modification agreement was self-authenticating under section 90.902(9).²²¹ The district court read this in conjunction with section 92.50(2), which provides that a notary public and certain judicial officers may administer oaths and acknowledgments.²²² The certificate of the notary public is presumptive evidence that the person appeared before the notary and acknowledged the execution of the document.²²³ In the *Mills* case, the signatures were acknowledged by a notary public, who signed the modification agreement and attached his seal. Since the signatures were acknowledged by a notary public, and the legislature has declared that a document that is acknowledged by a notary public is presumptively authentic and genuine, the modification agreement was self-authenticating and should have been admitted into evidence.²²⁴

The district court also examined the necessity of proving that the notary public who signed the agreement was, in fact, a notary.²²⁵ The district court dismissed this by explaining that unless a statute specifically requires evidence of official character to accompany the official act which it authorizes, no additional proof is needed.²²⁶ In fact, extrinsic proof of the fact that

218. FLA. STAT. § 90.902 (1995). This section states that extrinsic evidence of authenticity as a condition precedent to admissibility is not required for documents falling under any of the ten enumerated exceptions listed in this rule. *Id.*

219. *Id.* § 90.902(1)–(10).

220. *Mills*, 664 So. 2d at 1057.

221. *Id.* See FLA. STAT. § 90.902(9). This section reads in part: “Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for . . . [a]ny signature, document, or other matter declared by the Legislature to be presumptively or prima facie genuine or authentic.” *Id.*

222. *Mills*, 664 So. 2d at 1057 (citing FLA. STAT. § 92.50(2) (1995)).

223. *Id.* See also *Mills v. Hamilton*, 163 So. 857 (Fla. 1935).

224. The side opposing the admission of a self-authenticating document can still attack the genuineness of the document; however, the document is admissible subject to the weight the jury intends to give it. See *Sunnyvale Maritime Co. v. Gomez*, 546 So. 2d 6 (Fla. 3d Dist. Ct. App. 1989).

225. *Mills*, 664 So. 2d at 1057–58.

226. *Id.* at 1058.

the notary was, in fact, a notary would destroy the whole premise behind self-authenticating documents, which is that no other extrinsic proof is needed to prove that the document is genuine. Since the document itself provides sufficient information to be admitted without further proof of its genuineness, any additional extrinsic evidence is redundant and unnecessary.

X. ADDITIONS AND AMENDMENTS TO THE FLORIDA EVIDENCE CODE

During the survey period, the Florida Legislature made very few changes to the *Florida Evidence Code*. Although the new code sections bear directly on the admissibility of evidence at trial, no major changes were forthcoming this year.

A. *Admissibility of Paternity Determinations in Certain Criminal Prosecutions*

During the survey period, the Florida Legislature created section 90.4025 of the *Florida Statutes*, which deals with the admissibility of paternity evidence in a criminal prosecution.²²⁷ In criminal prosecutions for sexual battery and child abuse, evidence of the paternity of the child will be admissible under this section. This new evidence section will facilitate the prosecution in establishing the identity of the offender.

B. *Prohibition Against a Prisoner Submitting Nondocumentary Physical Evidence Without Authorization of the Court*

During the survey period, the Florida Legislature created section 92.351 of the *Florida Statutes*, which prohibits prisoners from submitting nondocumentary evidence to the trial court without its authorization.²²⁸

227. Ch. 96-215, § 8, 1996 Fla. Sess. Law Serv. 575, 579 (West) (creating FLA. STAT. § 90.4025 (1996)). This section reads as follows: "If a person less than 18 years of age gives birth to a child and the paternity of that child is established under chapter 742, such evidence of paternity is admissible in a criminal prosecution under s. 794.011, s. 794.05, s. 800.04, and s. 827.04(4)." *Id.*

228. Ch. 96-106, § 3, 1996 Fla. Sess. Law Serv. 72, 74 (West) (creating FLA. STAT. § 92.351 (1996)). This section provides:

(1) No prisoner as defined by s. 57.085 who is a party to a judicial proceeding may submit evidence or any other item that is not in paper document form to a court or clerk of court without first obtaining authorization from the court. This prohibition includes, but is not limited to, all nondocumentary evidence or items offered in support of a motion, pleading, or other document filed with the court. This prohibition does not preclude a prisoner who is appearing in person

XI. CONCLUSION

A trial is a search for the truth. The evidence code facilitates that search by allowing only trustworthy and reliable evidence to be presented to the fact finder for a resolution of the case. The Supreme Court of Florida's guidelines regarding the admissibility of DNA evidence will promote that search for the truth, by allowing only DNA evidence that has met certain guidelines into evidence. This will be especially beneficial to prosecutors and defense attorneys who prepare for DNA evidentiary issues. In contrast, the Supreme Court of Florida's ruling on prior inconsistent statements used in criminal cases may invariably obscure that search. Although this ruling will not affect how the attorneys will question witnesses during discovery depositions, it may well affect how prosecutors and defense attorneys approach discovery depositions, if they feel there is a chance a witness may later change his or her story. Finally, the question of the admissibility of child abuse profiles is sure to reach the Supreme Court of Florida during the coming year. Hopefully, the court's analysis will facilitate trial attorneys in their never-ending search for truth and justice in our complex legal system.

or through counsel before a court at a trial or hearing from submitting physical evidence to the court at the appropriate time.

(2) A corrections or detention facility for prisoner may conduct a cursory examination of the outside of any package or other mailing from a prisoner to a court or clerk of court of this state to determine whether the package or mailing contains materials other than paper documents. If such package or mailing appears to contain materials other than paper documents, the facility shall refuse to forward it until the sender presents a court order authorizing the mailing of such nondocumentary items or demonstrates that the contents are not prohibited by this section.

Id.

Juvenile Law: 1996 Survey Of Florida Law

Michael J. Dale*

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I. INTRODUCTION

For the second year running, the Florida Legislature has not made significant changes in its juvenile justice and child welfare systems and juvenile code, with limited exceptions highlighted in this article. However, the intermediate appellate courts have been very busy interpreting legislative changes made in the 1993 and 1994 sessions, as well as continuing a long standing practice of repeated corrections of simple, regular, and fundamental

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errors made by the trial courts. The intermediate appellate courts have been most active in the areas of delinquency dispositions and terminations of parental rights. The Supreme Court of Florida was also active this past year, albeit in interpreting statutory matters more than constitutional questions.

II. DELINQUENCY

A. Detention Issues

Florida's legislative approach to juvenile detention has varied dramatically over the past two decades. Earlier survey articles in this law review have discussed the state's fluctuating approach to this issue.¹ Under Florida law, as it now stands, an intake counselor or case manager employed by the Department of Juvenile Justice² ("DJJ") makes the decision whether or not to detain a child.³ The decision is based upon a risk assessment instrument ("RAI") which is a device developed by the DJJ.⁴ The RAI is developed from statutory detention guidelines which are based most significantly upon the charge against the juvenile.⁵ The court has discretion to detain a child in a placement more restrictive than indicated by the results of the risk assessment instrument, but the court must state, in writing, clear and convincing reasons for such placement.⁶

The trial courts have had difficulty interpreting the detention requirements. For example, in *S.W. v. Woolsey*,⁷ the trial court securely detained a youngster after an adjudicatory hearing, despite the fact that the RAI reflected a score which would not allow for secure detention.⁸ The court based the post-adjudication secure detention upon the argument that the finding of adjudication was a change in circumstances and an aggravating factor which would allow the court to change the level of detention.⁹ First,

1. See Michael J. Dale, *Juvenile Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 191, 191 n.1 (1995) (citing prior articles that address juvenile detention issues).

2. Effective October 1, 1994, the legislature removed authority from the Department of Health and Rehabilitative Services and placed it in a new agency, the Department of Juvenile Justice. See ch. 94-209, § 1, 1994 Fla. Laws 1183, 1192 (creating FLA. STAT. § 20.316).

3. FLA. STAT. § 39.044(1)(b) (1995).

4. *Id.* § 39.042(2)(b) (1995).

5. *Id.* § 39.042(2)(b)1.

6. See *id.* § 39.044(2)(f).

7. 673 So. 2d 152 (Fla. 1st Dist. Ct. App. 1996).

8. *Id.* at 153.

9. *Id.* Section 39.044(9) of the *Florida Statutes* provides:

the appellate court held that the trial court failed to prepare a new RAI, rescored in compliance with the statute and prior case law.¹⁰ The trial court had added three points to the original RAI because at trial the child was found to have committed the charged delinquent act, which the trial court held was a change of circumstances and an aggravating factor. The appellate court noted, as a technical matter, that the trial court does not prepare the RAI, but rather the case manager, an employee of DJJ, does.¹¹ However, more importantly, the fact that the child was found to have committed the delinquent act with which she was charged was not a changed circumstance as contemplated by the law.¹² Changed circumstances, by definition, are circumstances not taken into account in the preparation of the original RAI.¹³ Obviously, the delinquent act with which the child was charged had been taken into account in the preparation of the original RAI.¹⁴ In fact, the appellate court explained that the RAI compilation presumes that the act charged was committed and the points are accordingly assigned.¹⁵ To allow additional points to be assigned for an act, after the finding had been made that the act was committed, would result in a double score for the same event. The court rejected this interpretation and reversed.¹⁶

*M.L.F. v. State*¹⁷ is an example of a case in which the trial court sought to use post-adjudication secure detention, although it lacked the authority to hold the child in secure detention, because neither the RAI nor any other statutory criteria supported the placement.¹⁸ When the child's attorney objected to the secure detention, which was based upon an RAI score of only two points, resulting from several second degree misdemeanor adjudications, but had no other statutory basis, the trial court cavalierly commented as follows:

If a child is on release status and not detained pursuant to this section, the child may be placed into secure, nonsecure, or home detention care only pursuant to a court hearing in which the original risk assessment instrument, rescored based on newly discovered evidence or changed circumstances with the results recommending detention, is introduced into evidence.

FLA. STAT. § 39.044(9).

10. *S.W.*, 673 So. 2d at 154-55 (citing *C.M.T. v. Soud*, 662 So. 2d 1382 (Fla. 1st Dist. Ct. App. 1995)); see also FLA. STAT. § 39.044(9).

11. *S.W.*, 673 So. 2d at 155.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *S.W.*, 673 So. 2d at 155.

17. 21 Fla. L. Weekly D1224 (1st Dist. Ct. App. May 20, 1996).

18. *Id.* at D1224.

Well, we're going to give the legislature something to think about and chew on and so forth, some of these edicts and so forth. They might just feel that's an inherent power of the court to do that and think it's wonderful legislation. I think what the state and [the Department of Juvenile Justice representative] said makes a lot of sense. I wish I could do it even longer. [Appellant], you will be in secure[] detention for fifteen working days and the Court will waive the RAI assessment that has been found to have some significance by some other courts and [you] will be in secure detention for fifteen working days for the reasons that were outlined by [the Department of Juvenile Justice representative], and then home detention with a monitor after the fifteen working days.¹⁹

The appellate court held that continued detention after adjudication is only premised upon a finding that it was initially permissible.²⁰ The child's RAI did not support placement in secure detention, and none of the statutory requirements in the *Florida Statutes* which would permit a court to order placement more restrictive than that indicated by the RAI, existed.²¹ Finally, the court's statement, that the fact that the appellant child had no home to go to was grounds for detention, is explicitly prohibited by the Florida law.²²

Because there are fewer detention facilities in Florida than there are judicial circuits, occasionally a youngster will be placed in a secure detention facility located in one judicial circuit, by a court sitting in another circuit. The issue that arose in *T.O. v. Alachua Regional Juvenile Detention Center*,²³ was whether it was proper for the child to bring a writ of habeas corpus, challenging the legality of his pre-trial detention within the jurisdiction of the appellate court where he was held in a detention center but where the appellate court did not have jurisdiction over the trial court that ordered the detention.²⁴ The appellate court held that the writ of habeas corpus was appropriate, given its purpose of determining the legality of the restraint under which the person is held.²⁵ In such a proceeding, the person named respondent is the individual holding custody and the one in a position to physically produce the petitioner. The judge entering the detention order

19. *Id.* at D1224–25 (alteration in original).

20. *Id.* at D1225.

21. *Id.* See FLA. STAT. § 39.044(2)(a)–(f).

22. *M.L.F.*, 21 Fla. L. Weekly at D1225. See FLA. STAT. § 39.043(1)(d) (1995).

23. 668 So. 2d 243 (Fla. 1st Dist. Ct. App.), *review granted*, 676 So. 2d 412 (Fla. 1996).

24. *Id.* at 244.

25. *Id.* at 245.

was not a proper respondent.²⁶ More significantly, a court only has authority to issue a writ of habeas corpus directed to a person within its judicial jurisdiction.²⁷ The court therefore ruled that the Fifth District Court of Appeal did not have jurisdiction and found a violation of the detention statute by the trial court, entitling the juvenile to relief.²⁸ The court recognized that the use of regional detention centers in Florida might result in the jurisdictional issue being presented again, and for that reason, the court certified the question to the Supreme Court of Florida.²⁹

In 1994, the legislature amended the juvenile code to allow for post-adjudication punishment using detention as an alternative.³⁰ The statute provides a mandatory period of detention of five days in a secure detention facility as well as the performance of 100 hours of community service if there has been a finding of a commission of a first offense that involves the use or possession of a firearm.³¹ In *T.A. v. Wimberly*,³² the child filed a petition for writ of habeas corpus challenging the court's order detaining the child without awaiting the scheduling of a formal disposition hearing or the preparation of a pre-disposition report.³³ While the statute itself does not provide explicit guidance, the appellate court nonetheless construed the law to provide that the imposition of the mandatory five day detention punishment must occur after a formal disposition hearing with a pre-disposition report.³⁴ Significantly, the court also recognized that, given the time frame in which the punishment is served, this is the kind of case that is capable of repetition and likely to evade review.³⁵ The result would be that if the court were to allow the full period of the penalty to be served before an appeal could be perfected, this would reasonably be seen as effectively eliminating the right of appellate review.³⁶ The court, thus, decided the issue.

26. *Id.* at 244.

27. *Id.*

28. *T.O.*, 668 So. 2d at 244-45.

29. *Id.* at 245.

30. *See* FLA. STAT. § 790.22(9) (1995).

31. *See id.* § 790.22(9)(a) (providing "[f]or a first offense, that the minor serve a mandatory period of detention of 5 days in a secure detention facility and perform 100 hours of community service"); *see also* Dale, *supra* note 1, at 203.

32. 660 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1995).

33. *Id.* at 1131.

34. *Id.*

35. *Id.* at 1132.

36. *Id.*

B. Trial Issues

Children, like adults, sometimes come before the juvenile court and a claim is made that they are incompetent to stand trial for the charge of juvenile delinquency. The question before the Fourth District Court of Appeal in *T.L. v. State*,³⁷ was whether the DJJ may be ordered by the court to provide treatment in restoring a juvenile's competency so that the child may stand trial in delinquency proceedings.³⁸ In *T.L.*, the parties agreed that the child did not meet the criteria for involuntary hospitalization although the court also found that the child was not competent to proceed to trial.³⁹ The trial court concluded that it lacked the authority to mandate either the DJJ or the Department of Health and Rehabilitative Services ("HRS") to provide services to the child.⁴⁰ First, the trial court held that the DJJ had no authority to provide the services because there was no statute or rule obligating the DJJ to look after a child until the youngster had been adjudicated delinquent.⁴¹ The trial court also declined to order HRS to provide the treatment because the Florida law governing involuntary commitment of defendants who are adjudicated incompetent to stand trial or incompetent for sentencing⁴² did not apply to juveniles as juvenile proceedings were governed solely by the *Florida Rules of Juvenile Procedure* and chapter 39.⁴³ Therefore, the trial court ordered the two agencies to "work together,"⁴⁴ whatever that might mean. Then, as reported by the appellate court, the DJJ made a referral to HRS, and it appeared that HRS would not provide the services recommended without a court order.⁴⁵ The child appealed.⁴⁶

37. 670 So. 2d 172 (Fla. 4th Dist. Ct. App. 1996).

38. *Id.* at 172.

39. *Id.*

40. *Id.* at 173.

41. *Id.*

42. See FLA. STAT. § 916.13 (1995).

43. *T.L.*, 670 So. 2d at 173 (citing Department of Health and Rehabilitative Servs. v. A.E., 667 So. 2d 429 (Fla. 2d Dist. Ct. App. 1996)). The court in *A.E.* held that section 916 of the *Florida Statutes* is inapplicable to juvenile proceedings and the juvenile court cannot order an involuntary commitment of juveniles. *A.E.*, 667 So. 2d at 429. The *A.E.* court further held that proceedings should be commenced under sections 39.046, 394.467, and 393.11, and if the child does not meet the involuntary commitment standards, the appropriate relief should be ordered pursuant to Rule 8.095 of the *Florida Rules of Juvenile Procedure*. *Id.* at 429–30.

44. *T.L.*, 670 So. 2d at 173.

45. *Id.*

46. *Id.*

The appellate court did not do much to resolve the matter. It did find that the DJJ, by statute after 1994⁴⁷ was responsible for matters involving juvenile crime before, during, and after formal proceedings are initiated.⁴⁸ It further found that the DJJ's budget included costs for contracting with HRS to provide evaluations, therapy services, and other services for juveniles charged with felonies who are found to be mentally incompetent to proceed through the adjudicatory process.⁴⁹ Furthermore, the court found that HRS is responsible for administering mental health provisions under chapter 394 of the *Florida Statutes*, and this includes children who have not yet been found delinquent.⁵⁰ Indeed, the juvenile code does provide that if it is necessary to place a child in a residential facility for services the procedures and criteria established in chapter 394 are to be used.⁵¹ The appellate court found that the statutory scheme requires "interplay between the agencies."⁵² The appellate court remanded the case back to the trial court because the trial court failed to comply with Rule 8.095 of the *Florida Rules of Juvenile Procedure*, which provides that if a child is incompetent to stand trial but does not meet the criteria for involuntary hospitalization, the trial court shall order the "appropriate nondelinquent treatment for the child in order to restore the child's competence to proceed with an adjudicatory hearing."⁵³ Because HRS was not a party to the proceedings, the appellate court did not resolve the dispute between the two agencies as a matter of law.⁵⁴ Rather, it ordered the trial court to bring both agencies before it for resolution.⁵⁵ The opinion does nothing to clarify what should happen when both agencies are before the trial court.

It seems quite clear that the trial court has the power to order the agencies to resolve their administrative differences and work out an agreement to care for this category of children. Unfortunately, however, it is common in Florida that the state agencies are unable to administratively resolve their differences. As a result, the agencies appear before the trial

47. See FLA. STAT. § 39.0206 (1995).

48. *T.L.*, 670 So. 2d at 173. See generally FLA. STAT. § 20.316(1)(b) (1995).

49. *T.L.*, 670 So. 2d at 173.

50. *Id.* at 173-74.

51. *Id.* at 174 (citing FLA. STAT. § 39.046(2) (1995)). Section 39.046(2) provides that the "procedures and criteria established in chapter 393, chapter 394, or chapter 397, whichever is applicable, shall be used." FLA. STAT. § 39.046(2).

52. *T.L.*, 670 So. 2d at 174.

53. *Id.* (alteration in original) (quoting FLA. R. JUV. P. 8.095(a)(4)(A)).

54. *Id.*

55. *Id.*

courts, and ultimately the appellate courts, for failure to carry out statutory mandates based upon the agencies' belief that the statutory mandates do not apply to them. This is a long standing problem that has been before the appellate courts on a number of occasions.⁵⁶

C. Adjudicatory Issues

The problem of violence in the schools has received substantial coverage in the media and academic circles.⁵⁷ Students who commit violent acts are subject to school disciplinary action⁵⁸ and charges of juvenile delinquency. In addition, fully independent of chapter 39 and its juvenile delinquency provisions, the State of Florida has enacted a statutory civil cause of action for a protective injunction in cases of repeat violence.⁵⁹ Alleged victims of violence may obtain a protective injunction to stop further acts of violence if they prove the existence of two incidents of violence or stalking committed by the respondent, one of which must have been within six months of the filing of the petition, which were directed toward the petitioner or the petitioner's immediate family.⁶⁰ In *H.K. v. Vocelle*,⁶¹ a fifteen-year-old high school student filed a petition for an injunction against repeated violence seeking protection from a seventeen-year-old classmate who had physically attacked her on school grounds.⁶² The trial court dismissed the petition on the grounds that chapter 39 of the *Florida Statutes* had preempted the repeat violence injunction statute.⁶³ The appellate court concluded that the civil provisions of the injunction statute applied both to adult and juvenile respondents.⁶⁴ The court found that the injunctive action

56. See *Department of Health and Rehabilitative Servs. v. State*, 655 So. 2d 227 (Fla. 5th Dist. Ct. App. 1995); *Department of Health and Rehabilitative Servs. v. Kahn*, 639 So. 2d 689 (Fla. 5th Dist. Ct. App. 1994). Sometimes the agency is correct that there is no authority to obligate them to act. See *Department of Health and Rehabilitative Servs. v. Jones*, 631 So. 2d 348 (Fla. 5th Dist. Ct. App. 1994); *Department of Health and Rehabilitative Servs. v. Ortiz*, 627 So. 2d 124 (Fla. 5th Dist. Ct. App. 1993).

57. See Jonathan Wren, *Alternative Schools for Disruptive Youths: A Cure For What Ails School Districts Plagued by Violence?*, 2 VA. J. SOC. POL'Y & L. 307 (1995); Allison C. Gregory, *Officers to Patrol Schools*, THE HERALD, June 20, 1996, at A1; *Violence in the Schools*, MIAMI HERALD, Apr. 25, 1996, at 24.

58. See MICHAEL J. DALE, REPRESENTING THE CHILD CLIENT 6-32 (1996).

59. See FLA. STAT. § 784.046(1)(b) (1995).

60. *Id.*

61. 667 So. 2d 892 (Fla. 4th Dist. Ct. App. 1996).

62. *Id.* at 892.

63. *Id.*

64. *Id.*

was not penal in nature.⁶⁵ Furthermore, the injunction statute was not limited to adults and was drafted with the recognition that such relief could be sought whether or not any other petition, complaint, or cause of action was currently available or pending between the parties.⁶⁶ Finally, the appellate court concluded that even had the trial court been correct that such relief was only available in a delinquency proceeding in juvenile court, there was no lack of jurisdiction because the juvenile court was simply a different administrative division of the circuit court.⁶⁷ The appellate court reversed on the merits, allowing the cause of action to proceed.⁶⁸

D. *Dispositional Issues*

Florida, like all other states, employs a two-part procedure in juvenile delinquency cases: the adjudicatory stage, discussed earlier, and the dispositional stage.⁶⁹ Dispositional hearings are governed by section 39.052(4) of the *Florida Statutes* which, at first glance, does not appear to be a complicated law.⁷⁰ Among the variety of dispositional alternatives provided in chapter 39 are restitution, community control, and commitment to various facilities which, in major part, are based upon increasing deprivation of liberty.⁷¹ However, the law has generated a plethora of reported opinions over the past decade. Among the issues regularly before the appellate courts, have been whether and if so, how much discretion the court has in making dispositional decisions, whether the court may change its dispositional decision, and how the adult court chooses to treat a child before that court for dispositional purposes.

As part of the juvenile delinquency dispositional process, Florida law requires the court to consider a pre-disposition report.⁷² The juvenile may

65. *Id.* at 893.

66. *H.K.*, 667 So. 2d at 893. A new federal statute available to challenge general violence, as well as school violence, is the 1994 Violence Against Women Act. *See* 42 U.S.C. § 13981 (1994).

67. *H.K.*, 667 So. 2d at 893.

68. *Id.*

69. *See generally* MARK SOLER ET AL., REPRESENTING THE CHILD CLIENT 5-54 to -90 (1996).

70. *See* FLA. STAT. § 39.052(4) (1995).

71. *See id.* § 39.054(1)(a) (1995).

72. Section 39.052(4)(a) of the *Florida Statutes* provides that the report:

shall indicate and report the child's priority needs, recommendations as to a classification of risk for the child in the context of his or her program and supervision needs, and a plan for treatment that recommends the most appropriate

waive the report requirement, but by supreme court decision, the trial court must advise the child of his or her rights under the statute and confirm that the juvenile understands the significance of the waiver of the right to the pre-disposition report.⁷³ In *Lunn v. State*,⁷⁴ the Second District Court of Appeal held that, while a child may execute a written waiver of the right to a pre-disposition report, the trial court must question the child personally to explain his or her rights under chapter 39.⁷⁵ Failure to do so is reversible error.⁷⁶

Florida law also provides that the court shall provide the reasons for adjudicating the child delinquent and committing him in writing.⁷⁷ The court must also consider the Department's placement and restrictiveness level recommendation for the child which, if the court disregards it, the court shall state its reasons on the record.⁷⁸ In *J.E.W. v. State*,⁷⁹ a child appealed an adjudication of delinquency after pleading no contest to charges of petty and grand theft.⁸⁰ The DJJ subsequently recommended that the disposition be continued until the child underwent a psychiatric evaluation so that the agency could complete a pre-disposition report which would contain placement and other recommendations and a treatment plan. Despite the fact that the DJJ advised the court that the psychiatric evaluation was pending, and despite the further fact that the Department had not completed the pre-disposition report, the trial court, incredibly, adjudicated the child delinquent and then sentenced him to a moderate risk residential level placement without reducing its order to writing.⁸¹ The appellate court held that the failure to comply with the statutory provisions was reversible error.⁸² In so doing, the court referred to a virtual litany of prior appellate court opinions

placement setting to meet the child's needs with the minimum program security that reasonably ensures public safety.

Id. § 39.052(4)(a).

73. See *State v. Berry*, 647 So. 2d 830, 832 (Fla. 1994).

74. 675 So. 2d 648 (Fla. 2d Dist. Ct. App. 1996).

75. *Id.* at 648.

76. *Id.*

77. FLA. STAT. § 39.052(4)(e)1; see also *Lunn*, 675 So. 2d at 648; *Thomas v. State*, 662 So. 2d 1334, 1335-36 (Fla. 1st Dist. Ct. App. 1995).

78. See FLA. STAT. § 39.052(4)(e)2-3.

79. 672 So. 2d 72 (Fla. 1st Dist. Ct. App. 1996).

80. *Id.* at 73.

81. *Id.*

82. *Id.* at 73-74.

and stated that strict statutory compliance in dispositional hearings is required under Florida law.⁸³

In *Nation v. State*,⁸⁴ the First District Court of Appeal was also faced with the lack of entry of a written order.⁸⁵ In that case, the court provided the trial court with guidance on how to solve the problem of a failure to make a written report, holding that a written *nunc pro tunc* sentencing order would satisfy the statutory requirements.⁸⁶ The court found that a new sentencing hearing was not required and that it was not necessary that the child be physically present in court for the ministerial act of entering a written order conforming to the oral pronouncement of the court.⁸⁷

A juvenile respondent's right to maintain innocence, even at the dispositional stage of a juvenile delinquency case, was before the Third District Court of Appeal recently in *A.S. v. State*.⁸⁸ In *A.S.*, the child was charged with the commission of an aggravated battery with a deadly weapon upon another juvenile.⁸⁹ The respondent denied the charges and an adjudicatory hearing followed in which the child was ultimately adjudicated by the court to be delinquent as charged. At the dispositional hearing, HRS recommended that the child not be committed but that he receive a withholding of adjudication and be ordered to perform twenty hours of community service. The State objected, urging that the juvenile be adjudicated and committed to a level six facility. A level six facility is a moderate risk residential facility involving twenty-four hour awake supervision for youngsters who do not need placement in facilities which are physically secure.⁹⁰ The trial court committed the child to a level four juvenile group treatment home to be followed by fifty hours of community service and reserved jurisdiction on the issue of restitution to the victim.⁹¹ The appellate court found that the trial court made it clear on the record that its disposition was significantly influenced by the child's continued protestation of inno-

83. *Id.* at 73 (citing *B.B. v. State*, 647 So. 2d 268 (Fla. 4th Dist. Ct. App. 1994); *M.H. v. State*, 621 So. 2d 527 (Fla. 2d Dist. Ct. App. 1993); *R.G.S. v. State*, 597 So. 2d 816 (Fla. 2d Dist. Ct. App. 1992); *H.L.L. v. State*, 595 So. 2d 223 (Fla. 2d Dist. Ct. App. 1992); *T.S.J. v. State*, 439 So. 2d 966 (Fla. 1st Dist. Ct. App. 1983)).

84. 668 So. 2d 284 (Fla. 1st Dist. Ct. App. 1996).

85. *Id.* at 285.

86. *Id.* at 286.

87. *Id.*; *see also* *Bridgewater v. State*, 21 Fla. L. Weekly D584 (1st Dist. Ct. App. March 5, 1996).

88. 667 So. 2d 994 (Fla. 3d Dist. Ct. App. 1996).

89. *Id.* at 995.

90. *See* FLA. STAT. § 39.01(59)(c) (1995).

91. *A.S.*, 667 So. 2d at 995.

cence to the charge.⁹² The appellate court reversed on the basis of the 1968 United States Supreme Court opinion in *United States v. Jackson*,⁹³ which held that a judicially imposed penalty which needlessly discourages the articulation of one's Fifth Amendment right not to plead guilty, and which deters exercise of the Sixth Amendment right to demand a jury trial, is patently unconstitutional.⁹⁴ The court also relied upon *Holton v. State*,⁹⁵ a Supreme Court of Florida case which held that a trial court violated a defendant's due process rights by using the protestation of innocence against the defendant at the trial, as well as during the penalty phase of a criminal proceeding.⁹⁶ The appellate court in *A.S.* reversed, finding that the choice of plea should never have been a factor in the dispositional decision.⁹⁷

Of course, the trial court has the power to enter a dispositional order which is at odds with the predisposition report prepared by DJJ.⁹⁸ The issue before the Third District Court of Appeal in *J.M. v. State*,⁹⁹ was first, whether a child had a right to appeal from a disposition committing him to the DJJ's custody and second, what is the standard of review of a court's departure from an agency recommendation.¹⁰⁰ On the first question, despite a long dissent by Judge Cope,¹⁰¹ the majority held that both on the basis of statutory construction and constitutional interpretation, the child had a right of appeal.¹⁰² The problem which gave rise to the dissent was language in the dispositional statute which stated that it was the intent of the legislature that the criteria set forth in the general guideline section are to be followed at the discretion of the court and are not mandatory procedural requirements in a dispositional hearing.¹⁰³ The majority read the section narrowly to the effect that the legislature had not intended to create an appealable issue out of the fact that the trial court considered only certain criteria and not others in the list of the factors to be used to determine suitability or non-suitability for

92. *Id.*

93. 390 U.S. 570 (1968).

94. *Id.* at 581.

95. 573 So. 2d 284 (Fla. 1990), *cert. denied sub nom.* *Holton v. Florida*, 500 U.S. 960 (1991).

96. *Id.* at 292.

97. *A.S.*, 667 So. 2d at 996.

98. See FLA. STAT. § 39.052(4)(e)3.

99. 677 So. 2d 890 (Fla. 3d Dist. Ct. App. 1996).

100. *Id.* at 891-92.

101. *Id.* at 893-903 (Cope, J., dissenting).

102. *Id.* at 892.

103. *Id.* at 891 (citing FLA. STAT. § 39.052(3)(k) (1993)). This subsection was later renumbered as (4)(k). See FLA. STAT. § 39.052(4)(k).

adjudication and commitment of the child to the DJJ.¹⁰⁴ More significantly, the court held that if the child did not have a right to appeal the disposition, serious state and federal constitutional rights would be implicated.¹⁰⁵ The court quite properly noted that “[t]he commitment of a child to HRS is a deprivation of liberty which triggers significant due process protection under both the federal and Florida constitutions.”¹⁰⁶ The court concluded that if juveniles had no right to appeal dispositions then the child in this case would have been forced to serve an increased sentence as a result of the exercise of a fundamental constitutional right.¹⁰⁷ The court concluded this was “unfathomable.”¹⁰⁸

Another dispositional area that has given the trial courts a great deal of trouble has been the procedure by which the criminal court decides whether to treat a juvenile convicted as an adult, a juvenile, or a youthful offender for purposes of imposition of sanctions.¹⁰⁹ Prior survey articles have discussed the case law in this area in depth.¹¹⁰

In *Ritchie v. State*,¹¹¹ the Supreme Court of Florida was asked to decide the following certified question:

WHETHER A CHILD, CHARGED WITH AN OFFENSE PUNISHABLE BY DEATH OR LIFE IMPRISONMENT, BUT FOUND GUILTY OF A LESSER INCLUDED OFFENSE, PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE, MUST BE SENTENCED AS AN ADULT WITHOUT THE PROCEDURAL SAFEGUARDS AFFORDED BY SECTION 39.059(7)(c), FLORIDA STATUTES?¹¹²

The court held that under the facts of the case the child was indicted for one offense but convicted of a lesser included offense, which was also punish-

104. *J.M.*, 677 So. 2d at 891–92; see also FLA. STAT. § 39.052(4)(d).

105. *J.M.*, 677 So. 2d at 892.

106. *Id.* (citing *In re Gault*, 387 U.S. 1 (1967)).

107. *Id.*

108. *Id.*

109. FLA. STAT. § 39.059(7)(a) (1995). The juvenile may waive the right to challenge the trial court’s decision to sentence him as an adult. See *Norris v. State*, 659 So. 2d 1352, 1354 (Fla. 5th Dist. Ct. App. 1995).

110. See, e.g., Dale, *supra* note 1.

111. 670 So. 2d 924 (Fla. 1996).

112. *Id.* at 925.

able by death or life imprisonment, and therefore, the child was properly sentenced as an adult without the procedures afforded in chapter 39.¹¹³

Justice Anstead dissented as a matter of statutory construction.¹¹⁴ The controversy concerned the interpretation of the then existing section 39.022(5)(c)3 of the *Florida Statutes*.¹¹⁵ This statute provides that:

If the child is found to have committed the offense punishable by death or life imprisonment, the child shall be sentenced as an adult. If the child is not found to have committed the indictable offense but is found to have committed a lesser included offense or any other offense for which he was indicated as a part of the criminal episode, the court may sentence [the child as a juvenile.]¹¹⁶

Justice Anstead argued that the statute must be read as written and that the word “the” in the statute does not mean “an.”¹¹⁷ Thus, “[t]he statute clearly states that a child is not to be automatically sentenced as an adult when the child is not found to have committed *the indictable offense*,” according to Justice Anstead.¹¹⁸ He concluded that, while there is a disparity in treatment possible by providing greater procedural protections to a person indicted for a more severe offense and convicted of a lesser charge than a person indicted and convicted of a less severe offense, the court is not in a position to rewrite the statute “as the majority has done here.”¹¹⁹

By statute, effective October 1, 1994, the Florida Legislature relieved the trial courts of the burden of making specific written findings for the imposition of an adult sentence as opposed to a juvenile sentence when the juvenile is tried as an adult.¹²⁰ Prior to that date, the courts were required to make detailed specific written findings justifying the imposition of the adult sentence.¹²¹ Under the new law, the court does not need to articulate specific findings or enumerate criteria.¹²² In two recent cases, the Florida appellate

113. *Id.* at 928; *see also* FLA. STAT. § 39.059(7).

114. *Ritchie*, 670 So. 2d at 928–29 (Anstead, J., dissenting).

115. FLA. STAT. § 39.022(5)(c)3 (1993).

116. *Id.*

117. *Ritchie*, 670 So. 2d at 928 (Anstead, J., dissenting).

118. *Id.*

119. *Id.*

120. *See* FLA. STAT. § 39.059(7)(d).

121. *See Dale, supra* note 1, at 201–02 (discussing the changes in the law).

122. *See id.* at 202 (criticizing this change).

courts were asked to decide whether post-October 1994 orders complied with the new statute.¹²³

In *Grayson v. State*,¹²⁴ the Fourth District Court of Appeal reversed a juvenile's sentence as an adult because the trial court did not comply with the recently amended section 39.059(7)(d).¹²⁵ In that case, a sixteen-year-old at the time of the crime, was tried as an adult and found guilty of manslaughter with a firearm and sentenced as an adult to twenty years of incarceration.¹²⁶ Before the sentence, the amendment to section 39.059(7) went into effect. Based upon decisions in *Lutz v. State*¹²⁷ and *Thomas v. State*,¹²⁸ the trial court was correct to retroactively apply the amended statute. However, the State conceded that the trial court did not sentence the youngster in accordance with the amended statute. The amended statute retains most of the provisions of earlier law including the receipt and consideration of a pre-sentence investigation report from the DJJ which evaluates the suitability of the youngster for disposition as an adult, a juvenile, or a youthful offender,¹²⁹ and a written order.¹³⁰ The appellate court held that, while the current statute does not require the trial court to make specific findings in writing, the trial court must nonetheless consider the statutory criteria to determine what kind of sanctions should be imposed.¹³¹ While the statute contains a presumption that the court's decision to sentence a juvenile as an adult is appropriate,¹³² there must be a writing imposing the adult sanctions. Here there was none. The court reversed.¹³³

In *Roberts v. State*,¹³⁴ the appellate court reversed the lower court's decision on the grounds that no order of any kind was prepared or filed under the new statute.¹³⁵ Judge Sharp concurred, agreeing that the absence of any written order imposing adult sanctions required reversal and re-

123. *Roberts v. State*, 677 So. 2d 1 (Fla. 5th Dist. Ct. App. 1996); *Grayson v. State*, 671 So. 2d 855 (Fla. 4th Dist. Ct. App. 1996).

124. 671 So. 2d 855 (Fla. 4th Dist. Ct. App. 1996).

125. *Id.* at 856.

126. *Id.* at 855.

127. 664 So. 2d 1060, 1061 (Fla. 4th Dist. Ct. App. 1995).

128. 662 So. 2d 1334, 1336 (Fla. 1st Dist. Ct. App. 1995).

129. FLA. STAT. § 39.059(7)(a).

130. *See Collins v. State*, 21 Fla. L. Weekly D1400 (2d Dist. Ct. App. June 12, 1996).

131. *Grayson*, 671 So. 2d at 856.

132. FLA. STAT. § 39.059(7)(d).

133. *Grayson*, 671 So. 2d at 856.

134. 677 So. 2d 1 (Fla. 5th Dist. Ct. App. 1996).

135. *Id.* at 2.

mand.¹³⁶ He also raised the important issue of whether the court was obligated to consider a pre-sentence report.¹³⁷ Agreeing with the court in *Grayson*, he would have found that the imposition of adult sanctions nonetheless obligates the trial court to consider the relevant statutory criteria even if it is not written into the order.¹³⁸ Further, in Sharp's view, an order incorporating at least some of the considerations under the statute and the recommendations is reviewable by the appellate court.¹³⁹ Finally, Judge Sharp addressed the trial court's primary complaint which dealt with the "inefficacy" of the juvenile justice system, wherein the trial court apparently decided on adult sanctions because of its view that the juvenile system was bankrupt.¹⁴⁰ Judge Sharp responded by stating:

Query whether the inadequacy of the juvenile justice system is an appropriate reason to impose adult sanctions on a fourteen-year-old, and query whether society will be made safer by having Roberts locked up in an adult prison, only to be released, untreated and uncounseled, but older and wiser, in less than (probably) four years. It is a scary thought.¹⁴¹

Under Florida law, once a juvenile has been transferred for adult prosecution by means of voluntary waiver, involuntary waiver, or criminal information in the adult court and after the child has been found to have committed the adult offense, the child is to be treated as an adult for any subsequent offenses.¹⁴² In *T.L.P. v. State*,¹⁴³ the appellate court ruled that a juvenile, who had committed the acts upon which the juvenile charges were based *before* she was found to have committed unrelated offenses for which she was tried as an adult, could not be sentenced under the adult sentencing statute, and therefore, the court reversed.¹⁴⁴ The juvenile offenses were not subsequent violations for the purposes of the statute.¹⁴⁵

Another requirement of section 39.059 governing juveniles who are before adult court is the provision that juveniles must be notified that they

136. *Id.* (Sharp, J., concurring).

137. *Id.* See FLA. STAT. § 39.059(7)(a).

138. *Roberts*, 677 So. 2d at 2 (Sharp, J., concurring).

139. *Id.*

140. *Id.*

141. *Id.* at 3.

142. *Thomas v. State*, 657 So. 2d 51 (Fla. 2d Dist. Ct. App. 1995).

143. 657 So. 2d 49 (Fla. 2d Dist. Ct. App. 1995).

144. *Id.* at 50.

145. *Id.* (citing FLA. STAT. § 39.022(5)(d) (1993)).

have the right to a trial court determination of the suitability of imposing adult sanctions by considering the criteria enumerated in this section.¹⁴⁶ In *Figueroa v. State*,¹⁴⁷ a child appealed his conviction after the trial court accepted his plea without informing him of his rights under section 39.059(7).¹⁴⁸ By failing to advise the child of the rights that were waived by the plea, the youngster did not have a full understanding of the plea, and the waiver of the rights was not knowing, voluntary, or intelligent.¹⁴⁹ The appellate court therefore reversed, granting the child's subsequent motions to withdraw his pleas.¹⁵⁰

Interpreting the rules by which the courts may change dispositional orders in delinquency cases has also proved difficult for the courts. An opinion by the Supreme Court of Florida has recently clarified matters. The issue in *State v. M.C.*,¹⁵¹ was whether Rule 3.800(b)(2) of the *Florida Rules of Criminal Procedure* which provides the trial court with authority to modify a sentence within sixty days of its imposition applies in juvenile delinquency cases.¹⁵² The supreme court held that it did not.¹⁵³ The court found that the purpose of the juvenile and adult rules were different.¹⁵⁴ However, the court held that although a juvenile in Florida is not considered a criminal defendant, and thus, the *Rules of Criminal Procedure* do not apply to juveniles, juveniles ought to be accorded the same basic rights to finality and certainty in sentencing as adults.¹⁵⁵ Therefore, the court upheld the proposition that a modification to a sentence, including the imposition of restitution, should occur within sixty days of sentencing as provided by the *Rules of Criminal Procedure*.¹⁵⁶

More recently in *T.R. v. State*,¹⁵⁷ the supreme court was presented with a similar question of the authority to modify juvenile sentences.¹⁵⁸ In *T.R.*, the trial court committed the juvenile to HRS' low risk residential program. The State subsequently moved to modify the commitment, stating that the

146. See *Dunnivant v. State*, 665 So. 2d 354 (Fla. 1st Dist. Ct. App. 1995).

147. 657 So. 2d 1225 (Fla. 2d Dist. Ct. App. 1995).

148. *Id.* at 1226.

149. *Id.*

150. *Id.*

151. 666 So. 2d 877 (Fla. 1995).

152. *Id.* at 878; see also FLA. R. CRIM. P. 3.800(b).

153. *M.C.*, 666 So. 2d at 878.

154. *Id.*

155. *Id.*

156. *Id.* See also *L.N.H. v. State*, 670 So. 2d 1013 (Fla. 2d Dist. Ct. App. 1996).

157. 677 So. 2d 270 (Fla. 1996).

158. *Id.* at 270-71.

low risk level was not available for juveniles convicted of aggravated battery. The juvenile claimed on appeal that the court was without jurisdiction to modify the order, relying on a 1981 case, *D.W.J. v. State*.¹⁵⁹ The supreme court held that the statutory provision at issue¹⁶⁰ allowed trial courts to modify or set aside orders without reference to any time limit.¹⁶¹ The juvenile claimed that a separate section of the *Florida Statutes* set a sixty-day window after an order was entered within which to suspend a commitment order and place a child on probation or in community control and that the applicable section of the *Florida Statutes* should apply to this case.¹⁶² The court distinguished *M.C.*, holding that in *M.C.*, the issue was whether a trial court could enter an order more than sixty days after the sentence was imposed which, for the first time would require the juvenile to pay restitution.¹⁶³ In *T.R.*, the supreme court recognized that the trial court was not imposing a sentence for the first time, but was modifying a sentence already imposed.¹⁶⁴ Therefore, the court disapproved the holding in *D.W.J.* and upheld the modification of the commitment order.¹⁶⁵

In *W.E. v. State*,¹⁶⁶ a child challenged a trial court amendment of an original sentence to include community control in the form of restitution.¹⁶⁷ Initially, the trial court withheld adjudication and ordered counseling, enrollment in a particular school program, all costs, and a public defender lien.¹⁶⁸ There was no order regarding restitution. Twenty days later a hearing was held on the State's motion to amend the sentence. The trial court granted the motion amending the sentence to include community control so that the victim's seventy-five dollars unreimbursed medical bill could be ordered as part of community control.¹⁶⁹ The appellate court ruled explicitly that the trial court had no authority to amend the sentence to include additional sanctions when the original sentence was a legal one.¹⁷⁰

159. 397 So. 2d 722 (Fla. 1st Dist. Ct. App. 1981).

160. See FLA. STAT. § 39.054(1), (3).

161. *T.R.*, 677 So. 2d at 271.

162. *Id.* See also FLA. STAT. § 39.054(3).

163. *T.R.*, 677 So. 2d at 272.

164. *Id.*

165. *Id.*

166. 658 So. 2d 1177 (Fla. 2d Dist. Ct. App. 1995).

167. *Id.* at 1178.

168. *Id.*

169. *Id.*

170. *Id.*

*C.M. v. State*¹⁷¹ is a similar case. Here, a trial court ordered an increase in the original sentence from a juvenile service program to community control.¹⁷² The appellate court held that the trial court could not increase an otherwise legal sentence.¹⁷³ In *C.M.*, the court withheld adjudication and ordered the child to enter and successfully complete the Juvenile Alternative Services Program ("JASP") and to pay reasonable restitution.¹⁷⁴ Several days later the State filed a motion for re-determination of sentence arguing that the sentence was illegal because restitution could only be ordered when the child was committed to HRS or placed on community control. The trial court agreed, increasing the sentence and the child appealed.¹⁷⁵ The appellate court held that under Florida law the trial court has the authority to impose restitution as a part of a community based sanction when adjudication has been withheld.¹⁷⁶ Thus, the original disposition made by the court ordering completion of community-based JASP and restitution was proper.¹⁷⁷ Because the original sentence was legal, the court did not have authority to increase that legal sentence.¹⁷⁸

Another possible condition of community control is the imposition of a curfew. In *A.B.C. v. State*,¹⁷⁹ a juvenile appealed from an order imposing a 7:00 p.m. curfew on the technical grounds that the curfew was contained in the written order but was not orally pronounced at the adjudicatory hearing.¹⁸⁰ There is a conflict in the case law between the *A.B.C.* decision and the decision in *S.W. v. State*.¹⁸¹ In the latter case, the appellate court struck down the condition of a juvenile's community control which required sixty hours of community service because that general condition was not orally pronounced although the community service is an allowable condition by statute.¹⁸²

Many municipalities around the country have recently enacted juvenile curfew ordinances in an effort to control juvenile behavior and reduce

171. 658 So. 2d 1178 (Fla. 2d Dist. Ct. App. 1995).

172. *Id.* at 1179.

173. *Id.*

174. *Id.*

175. *Id.*

176. *C.M.*, 658 So. 2d at 1179.

177. *Id.* (citing FLA. STAT. § 39.052(3) (1993)).

178. *Id.*

179. 673 So. 2d 966 (Fla. 1st Dist. Ct. App. 1996).

180. *Id.* at 966.

181. 666 So. 2d 600 (Fla. 4th Dist. Ct. App. 1996).

182. *Id.* at 600.

crime.¹⁸³ In January 1994, the Dade County Commission enacted a juvenile curfew ordinance.¹⁸⁴ In *Metropolitan Dade County v. Pred*,¹⁸⁵ the appellate court heard an appeal from a circuit court decision which found the ordinance unconstitutional in violation of the *Florida Constitution*.¹⁸⁶ The appellate court reversed, finding none of the challenges to the ordinance meritorious.¹⁸⁷ The court found that juveniles are always subject to some form of custody and the state has the constitutional power to regulate matters for the well being of children.¹⁸⁸ The appellate court, without any detailed discussion, concluded that because children due to their special nature and vulnerabilities “do not enjoy the same quantum or quality of rights as adults,” the ordinance did not violate any of their rights under the *Florida Constitution*.¹⁸⁹

A child and his parent have the right to speak at a dispositional hearing. In *A.P. v. State*,¹⁹⁰ the Second District Court of Appeal analyzed the trial court’s refusal to allow the child or his mother to address the court and the lower court’s placement of the youngster on community control.¹⁹¹ The appellate court recognized that given the serious nature of the charges, nothing either the parent or the child would have said would have affected the disposition.¹⁹² However, the *Florida Statutes* provide that prior to determining and announcing the disposition the trial court shall give the parties an opportunity to comment on the issue of disposition and rehabilitation.¹⁹³ The court further recognized that the proceeding may be one which will “create a lasting impression of fair and impartial justice” and that this may be best effectuated by allowing the parties to be heard.¹⁹⁴

183. See SOLER ET AL., *supra* note 69, at 3-41.

184. Metropolitan Dade County, Fla., Ordinance 94-1 (Jan. 18, 1994).

185. 665 So. 2d 252 (Fla. 3d Dist. Ct. App. 1995).

186. *Id.* at 253.

187. *Id.*

188. *Id.* See Schall v. Martin, 467 U.S. 253, 265 (1984); Griffin v. State, 396 So. 2d 152, 155 (Fla. 1981).

189. *Metropolitan Dade County*, 665 So. 2d at 253. See also *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), *cert. denied sub nom.* *Qutb v. Bartlett*, 114 S. Ct. 2134 (1994); *In re Maricopa County, Juvenile Action No. JT9065297*, 887 P.2d 599 (Ariz. Ct. App. 1994) (containing detailed analysis).

190. 666 So. 2d 211 (Fla. 2d Dist. Ct. App. 1995).

191. *Id.* at 211.

192. *Id.*

193. See FLA. STAT. § 39.052(3)(c)4 (1993).

194. *A.P.*, 666 So. 2d at 211.

E. Appellate Issues

The *Florida Juvenile Code* allows the trial courts to use contempt as a means of enforcing disposition orders. In *A.L.B. v. State*,¹⁹⁵ a child appealed from a contempt finding which was based upon the trial court's issuance of an order to show cause, *sua sponte*, as to why the child should not be held in contempt for failure to abide by a court order placing him on community control.¹⁹⁶ Among the issues raised on appeal was whether the court had authority to enter the order to show cause, *sua sponte*, under the facts of the case.¹⁹⁷ Rule 8.150(b)(1) of the *Florida Rules of Juvenile Procedure* provides that the court on its own motion or upon affidavit of any person having knowledge of the facts may issue and sign an order to show cause in a contempt proceeding.¹⁹⁸ Without any analysis, the court simply concluded that the record in the case reflected the statement of the trial judge that the basis of the order to show cause was upon his own motion and the sworn petition alleging violation of community control.¹⁹⁹ Judge Webster dissented.²⁰⁰ He concluded that the record showed that the order to show cause was issued at the request of the child's community control counselor.²⁰¹ Judge Webster could find nothing in the *Florida Rules of Juvenile Procedure* to explain what it meant for a judge on his or her own motion to issue the order to show cause.²⁰² Therefore, Judge Webster looked to the analogous rules of criminal procedure and case law and concluded that the order to show cause was based upon statements by a person who was not under oath who lacked personal knowledge of the matters about which he was commenting, and thus, were hearsay statements.²⁰³ In Judge Webster's view, the *Florida Rules of Juvenile Procedure* require an affidavit from a person having knowledge of the facts, and here there was none.²⁰⁴ Nor did he see how the order to show cause could have been issued on the court's own motion.²⁰⁵ Although research disclosed no case on point, research on the language of the analogous criminal procedure rule disclosed that a judge

195. 675 So. 2d 668 (Fla. 1st Dist. Ct. App. 1996).

196. *Id.* at 669.

197. *Id.*

198. FLA. R. JUV. P. 8.150(b)(1).

199. *A.L.B.*, 675 So. 2d at 670.

200. *Id.* (Webster, J., dissenting).

201. *Id.*

202. *Id.* at 671.

203. *Id.*

204. *A.L.B.*, 675 So. 2d at 671.

205. *Id.* at 672.

may issue an order to show cause on the judge's own motion provided that he or she has heard sworn testimony which, if true, would support an adjudication of indirect criminal contempt.²⁰⁶ Here the alleged contempt occurred outside the presence of the judge, and the judge had no independent knowledge regarding the facts. Finally, to allow the court on its own motion to issue an order to show cause for a criminal contempt without supporting evidence under oath would "permit the courts to engage in star chamber proceedings, in complete disregard of the due process requirements implicated by such serious charges."²⁰⁷

An interesting question of how much restitution may be ordered in light of the order of adjudication was before the First District Court of Appeal in *J.O.S. v. State*.²⁰⁸ In that case, a child was ordered to pay restitution of \$1,092 after an adjudication that he committed what would have been an offense of second degree misdemeanor criminal mischief for which as an adult the maximum amount of restitution was \$200. The State had filed a petition alleging a first degree misdemeanor where the damage of the property was greater than \$200 but less than \$1,000. At the adjudicatory hearing, the State offered no evidence regarding the dollar value of the damage and as a result the court made a finding of criminal mischief, a second degree misdemeanor.²⁰⁹ At the restitution hearing, the court heard testimony and issued an order in the amount of \$1,092 from which the child appealed.²¹⁰ The appellate court held that the purpose of the restitution hearing is to restore to the victims of crime the value of what they lost rather than to punish the wrongdoer.²¹¹ The evidentiary standard is the greater weight of the evidence rather than the exclusion of all reasonable doubt.²¹² There is no requirement that the amount of the loss first be proven in the criminal case at the misdemeanor level. Furthermore, the Supreme Court of Florida held in *Hebert v. State*,²¹³ that when an individual entered into a plea agreement which left the trial court discretion as to the amount of restitution the defendant waived any objection to the amount of the restitution absent

206. *Id.*

207. *Id.*

208. 668 So. 2d 1082 (Fla. 1st Dist. Ct. App.), *review granted*, 677 So. 2d 840 (Fla. 1996).

209. *Id.* at 1083.

210. *Id.*

211. *Id.* at 1085.

212. *Id.*

213. 614 So. 2d 493 (Fla. 1993).

abuse of discretion.²¹⁴ The court in *J.O.S.* recognized that the issue before the court was unanswered in *Hebert*, and therefore, it certified the question to the Supreme Court of Florida.²¹⁵

The technical question of whether an order of adjudication is a final order in a juvenile delinquency case and thus appealable was recently before the Third District Court of Appeal in *A.N. v. State*.²¹⁶ In that case, the child sought to appeal from an adjudication of delinquency in the circuit court in Dade County when the case was transferred for disposition to Broward County.²¹⁷ The third district held that the adjudication order was a non-appealable, non-final order, and that there was no appealable final order in a delinquency case until a disposition order was entered.²¹⁸ The appellate court recognized that the right of the child to appeal a final order in a delinquency case was created by statute but that the statute did not itself define a final order.²¹⁹ The court in *A.N.* relied upon an earlier appellate opinion of *T.L.W. v. Soud*,²²⁰ which held that judicial “labor” ends upon entry of an order of disposition in a delinquency case and that this point in time establishes the test of finality for purposes of determining an appealable final order.²²¹ The appeal in *A.N.* was thus dismissed.²²²

The Fourth District Court of Appeal has ruled in a very brief opinion on the limit of the ability of the State to appeal from a dispositional order. In *State v. C.W.*,²²³ the court held that the State may not appeal from a juvenile court order denying restitution.²²⁴ Under the *Florida Juvenile Code*, there is no provision comparable to that existing in the adult criminal code, which allows the State to appeal.²²⁵ Thus, the failure to order restitution is not on a list of orders from which the State may appeal in a juvenile proceeding, and the failure to order restitution does not constitute an illegal sentence.²²⁶

214. *Id.* at 494.

215. *J.O.S.*, 668 So. 2d at 1085.

216. 666 So. 2d 928 (Fla. 3d Dist. Ct. App. 1995).

217. *Id.* at 929.

218. *Id.* at 930.

219. *Id.*

220. 645 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1994).

221. *Id.* at 1104–05.

222. *A.N.*, 666 So. 2d at 930.

223. 662 So. 2d 768 (Fla. 4th Dist. Ct. App. 1995).

224. *Id.* at 769.

225. *Id.* See FLA. STAT. §§ 39.069(1)(b), 39.0711, 775.09, 924.07(1)(k) (1995).

226. *C.W.*, 662 So. 2d at 769 (citing *State v. Maclead*, 600 So. 2d 1096, 1098 (Fla. 1992)).

Therefore, the appellate court had no jurisdiction to consider the appeal by the State.²²⁷

F. *Legislation and Rule Changes*

The Florida Legislature did not make many changes in the juvenile code this year relating to juvenile justice. However, one important change is in the area of the transfer of a child for prosecution as an adult at section 39.052.²²⁸ A new subsection (f) requires the State Attorney to file an information if a child, regardless of age at the time of the alleged offense, is alleged to have committed a theft of a motor vehicle which, while the child is in possession of the stolen vehicle, causes serious bodily injury or death to a person who is not involved in the underlying offense.²²⁹ In other words, the legislature has decided that a child of any age shall be treated as an adult for criminal trial purposes whenever there is a vehicular theft resulting in serious bodily injury or death. This continues the clear trend in the Florida Legislature to deal with juveniles as adults rejecting either the medical model or the restorative justice model of the juvenile court. The statute became law without the Governor's approval on May 25, 1996, to become effective on October 1, 1996.²³⁰

A second change in the criminal law makes it unlawful for any student under eighteen in any school to smoke tobacco in, on, or within 1000 feet of school property between 6:00 a.m. and midnight.²³¹ The maximum penalty is twenty-five dollars or fifty hours of community service or completion of an anti-tobacco program.²³²

In *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*,²³³ the Supreme Court of Florida recently ruled on a proposed amendment to the *Florida Rules of Juvenile Procedure*.²³⁴ The amendment was to allow a pilot project, which would utilize electronic audio-visual devices during juvenile detention hearings, as is done in adult criminal cases.²³⁵ Over the dissents of

227. *Id.*

228. Ch. 96-234, § 1, 1996 Fla. Laws 627, 627 (amending FLA. STAT. § 39.052(3)).

229. *Id.* § 1, 1996 Fla. Laws at 629 (creating FLA. STAT. § 39.052(3)(a)5f).

230. *Id.* §§ 1, 2, 1996 Fla. Laws at 630.

231. Ch. 96-217, § 1, 1996 Fla. Laws 588, 588 (to be codified at FLA. STAT. § 386.212(1)).

232. *Id.* § 1, 1996 Fla. Laws at 588 (to be codified at FLA. STAT. § 386.212(3)).

233. 667 So. 2d 195 (Fla. 1996).

234. *Id.* at 197.

235. *Id.* at 196.

Justices Anstead and Kogan,²³⁶ the court approved a one year pilot program to allow juveniles to attend detention hearings via audio-video devices authorized by the chief judge in each of the petitioning circuits.²³⁷ Justice Anstead objected, explaining that the juvenile court's role is unique in that the focus is on helping children and not on the adversarial system's usual fixation on winning.²³⁸ Justice Anstead also cited to the comments and recommendations of the Florida Bar Juvenile Court Rules Committee which opposed the change in the rule on grounds of due process and evidentiary entitlements.²³⁹ In sum, Justice Anstead argued in favor of in-person hearings contending that both good public policy and constitutional and statutory protections mitigated against audio-visual detention hearings.²⁴⁰

III. DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS

A. *Criminal Child Abuse and Neglect*

In 1993, the Florida Legislature introduced section 827.05 which created a misdemeanor criminal offense proscribing negligent treatment of children.²⁴¹ In *State v. Mincey*,²⁴² the Supreme Court of Florida held that the statute was unconstitutional.²⁴³ The court relied upon its 1977 decision in *State v. Winters*,²⁴⁴ in which it had ruled that a similar negligent treatment of children statute was unconstitutionally vague, indefinite, and overbroad.²⁴⁵ The *Mincey* court found that the new statute made several changes by adding some language to the old law but that it did not clarify the kind of conduct to be prohibited.²⁴⁶ As a result, the changes did not correct the vagueness problem recognized in the *Winters* decision which was the failure to give parents and others susceptible to child abuse charges fair notice of the type of behavior which would subject them to criminal sanctions.²⁴⁷

236. *Id.* at 197–98 (Anstead & Kogan, JJ., dissenting).

237. *Id.* at 197.

238. *Amendment*, 667 So. 2d at 198 (Anstead, J., dissenting).

239. *Id.* at 197 n.3.

240. *Id.* at 197–98 nn. 3–4.

241. FLA. STAT. § 827.05 (1993).

242. 672 So. 2d 524 (Fla. 1996).

243. *Id.* at 526.

244. 346 So. 2d 991 (Fla. 1977).

245. *Id.* at 994.

246. *Mincey*, 672 So. 2d at 526.

247. *Id.*

B. *Dependency Issues*

The Florida courts have held that a finding of dependency can be made against one parent and not the other. The question before the appellate court in *Department of Health and Rehabilitative Services v. P.H.*,²⁴⁸ was whether a finding of dependency can be predicated upon proof of neglect by only one parent.²⁴⁹ The court of appeal held that it could²⁵⁰ although the opinion is unclear in several respects. The trial court had found that a prima facie case of present neglect had been proved as to the mother but not as to the father.²⁵¹ The trial court then decided that an adjudication of dependency required proof of current or prospective abuse, neglect, or abandonment, as to both parents.²⁵² Thus, the court dismissed the petition for dependency.²⁵³ The appellate court quite properly said that this was error.²⁵⁴ The *Florida Statutes* can be read to allow a finding of dependency by one parent. For example, the juvenile code provides six different grounds for a finding of dependency including: 1) abandonment, abuse, or neglect; 2) surrender for adoption; 3) voluntary placement and failure to comply with a case plan; 4) voluntary placement for the purpose of subsequent adoption; 5) lack of a parent, legal custodian, or responsible adult relative to provide supervision and care; and 6) a substantial risk of imminent abuse or neglect by the parent, parents, or custodian.²⁵⁵ The statute speaks in the singular and plural. At several points in the section of the law defining dependent children, reference is made to parents in the plural. Furthermore, at another section of chapter 39 regarding the filing of petitions for dependency, the statute currently provides that the petition need not contain allegations of acts or omissions by both parents.²⁵⁶ However, what seems to have happened in the *P.H.* case is that the non-custodial father failed to accept responsibility for the protection, maintenance, and care of his children and failed to request custody of the children despite being apprised of the mother's neglect. Thus, the appellate court concluded that HRS presented a prima facie case with

248. 659 So. 2d 1375 (Fla. 1st Dist. Ct. App. 1995).

249. *Id.* at 1377.

250. *Id.* at 1379.

251. *Id.* at 1377.

252. *Id.*

253. *P.H.*, 659 So. 2d at 1377.

254. *Id.* at 1379.

255. *See* FLA. STAT. § 39.01(14).

256. *See id.* § 39.404(3)(c) (1995).

respect to the father's neglect and prospective neglect of the children.²⁵⁷ Thus, there appears to have been neglect by both parents in the opinion of the appellate court.²⁵⁸ Then and it is unclear why, the court concluded that a finding of dependency as to a second parent can be predicated upon proof of neglect by one parent.²⁵⁹ If all the appellate court meant by this statement is that there can be a finding of dependency as to one parent and there need not be a finding of dependency as to both parents, then the opinion makes sense. The prior case law cited in the *P.H.* opinion supports the proposition that a finding of neglect can be made against one parent but not the other.²⁶⁰ But what if the court is saying that a finding of dependency as to one parent can be transferred to a second parent without an independent basis of dependency being found as to the second parent. Then, clearly, such a holding constitutes a denial of due process. Here the dependency petition alleged that the father was unable to protect the children, and neither parent provided emotionally or financially for the children. This would give adequate notice to the father and could allow the trial court, as well as the appellate court, to conclude that there was a prima facie case with respect to the father's neglect and prospective neglect of the children.

In an analogous situation, a mother brought a writ of certiorari challenging a circuit court order approving a performance agreement which included tasks related to a child who had not been adjudicated dependent. The appellate court in *J.V. v. Department of Health and Rehabilitative Services*,²⁶¹ held that it was error to include obligations related to a new baby who had not been the subject of the dependency proceeding in a performance agreement.²⁶² The court noted that the *Florida Statutes* require that the problems or conditions which are the basis for the adjudication of dependency are to be included in the performance agreement²⁶³ referred to as a plan under current law. The court further noted that the agreement must be designed to address the facts and circumstances upon which the court based

257. *P.H.*, 659 So. 2d at 1379.

258. *Id.*

259. *Id.*

260. *See* *C.F. v. Department of Health and Rehabilitative Servs.*, 649 So. 2d 295, 296 (Fla. 1st Dist. Ct. App. 1995) (holding that dependency can be found as to independent acts by each parent); *In re L.S.*, 592 So. 2d 802, 802 (Fla. 4th Dist. Ct. App. 1992) (recognizing that a dependency adjudication can be against one parent based upon the amendment to section 39.01(10) of the *Florida Statutes* in 1990 to include the single parent).

261. 661 So. 2d 1263 (Fla. 1st Dist. Ct. App. 1995).

262. *Id.* at 1265.

263. *Id.* at 1264 (citing FLA. STAT. § 39.451(3)(d) (1993)).

the finding of dependency in involuntary placements.²⁶⁴ In *J.V.*, the appellate court concluded that the problems which gave rise to the dependency were in no way related to the new baby.²⁶⁵ In addition, the court appears to have concluded that the new baby had not been declared dependent. Thus, *Padgett v. Department of Health and Rehabilitative Services*,²⁶⁶ the Supreme Court of Florida case which held that proof of abuse or neglect as to one child may form the basis for an adjudication as to the parents' rights to another child, was inapposite.²⁶⁷ In *J.V.*, there had been no effort to declare the new baby dependent. Thus, for both reasons, the appellate court quashed the order approving the performance agreement in part to the extent that the tasks included those related solely to the unadjudicated child.²⁶⁸

Since the Supreme Court of Florida opinion in *Padgett*, cases have regularly come to the appellate courts on the issue of the proper interpretation of the doctrine of "prospective neglect."²⁶⁹ The test for prospective neglect was recently employed by the appellate court in *Denson v. Department of Health and Rehabilitative Services*²⁷⁰ over a dissent demonstrating the factual difficulties inherent in the test.²⁷¹ In *Denson*, the father had been adjudicated as having sexually abused a child. Based on that finding, a dependency adjudication was made as to three other stepchildren. The appellate court in *Denson* held that under *Padgett* there must be a two-part finding that first, there was proof of neglect or abuse of another child and second, the child who was the subject of the current proceeding is at "substantial risk" of suffering imminent abuse or neglect if left in the custody of the parent.²⁷² The showing is based on proof that the parent suffers from a condition that makes the prospect of future abuse or neglect of the other child highly probable.²⁷³ The dissent simply stated that the respon-

264. *Id.* (citing FLA. STAT. § 39.451(6)(b)5).

265. *Id.* at 1265.

266. 577 So. 2d 565 (Fla. 1991).

267. *J.V.*, 661 So. 2d at 1265 (explaining why *Padgett* does not apply).

268. *Id.*

269. See Dale, *supra* note 1, at 211-12; Michael J. Dale, *Juvenile Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 333, 368-73 (1991).

270. 661 So. 2d 934 (Fla. 5th Dist. Ct. App. 1995).

271. *Id.* at 936 (Dauksch, J., dissenting).

272. *Id.* at 935.

273. *Id.* See also *Richmond v. Department of Health and Rehabilitative Servs.*, 658 So. 2d 176 (Fla. 5th Dist. Ct. App. 1995); *Palmer v. Department of Health and Rehabilitative Servs.*, 547 So. 2d 981 (Fla. 5th Dist. Ct. App.), *cause dismissed*, 553 So. 2d 1166 (Fla. 1989).

dent father was a proven molester and the evidence was sufficient to support the determination of the trial court.²⁷⁴

The Florida courts have held on a number of occasions that the trial court's ability to order HRS to pay for various services in dependency proceedings is quite limited. The issue came up again this year in *Department of Health and Rehabilitative Services v. Platt*.²⁷⁵ In *Platt*, as part of a dependency proceeding the court on its own motion ordered each of the parents to submit to a psychological evaluation within thirty days but failed to articulate who was to pay for such evaluations.²⁷⁶ When the psychologist's bill remained unpaid the court ordered HRS to make payment. Relying upon earlier case law which appeared to have been on point,²⁷⁷ and its further findings of an absence of specific statutory authority, and a constitutional right on the part of the parent to such services, the court held that the parent, and not HRS, is responsible for the payment of the services.²⁷⁸ The court did not answer the question of whether HRS is responsible for the obligation if a parent is found to be indigent following a hearing on that issue.

Another dependency related issue going to the limits of authority of the court involves the question of whether the court may require a mother who had given birth to three cocaine dependent children to undergo bi-monthly pregnancy testing. In *T.H. v. Department of Health and Rehabilitative Services*,²⁷⁹ the appellate court held that, while it shared the concern of the trial court about the impact of drug use during pregnancy, and that, while it agreed that exposure to drugs is of great public and legal concern, the court could find nothing in chapter 39 giving the court the authority to enter such an order.²⁸⁰

An interesting issue of the jurisdiction of the juvenile division of the circuit court in dependency matters came up recently in *Friedland v. De-*

274. *Denson*, 661 So. 2d at 936 (Dauksch, J., dissenting). For a detailed analysis of the doctrine of prospective neglect, as applied in *Padgett*, and the two-part test that has been developed by the trial court subsequent thereto, see *Smith v. Department of Health and Rehabilitative Servs.*, 665 So. 2d 1153 (Fla. 5th Dist. Ct. App. 1996) (Sharp, J., dissenting).

275. 675 So. 2d 141 (Fla. 5th Dist. Ct. App. 1996).

276. *Id.* at 141.

277. See *Department of Health and Rehabilitative Servs. v. Ortiz*, 627 So. 2d 124 (Fla. 5th Dist. Ct. App. 1993). See also *In re J.W.*, 591 So. 2d 1048 (Fla. 1st Dist. Ct. App. 1991); Michael J. Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 143 (1994) (discussing *Ortiz*).

278. *Platt*, 675 So. 2d at 142.

279. 661 So. 2d 403 (Fla. 1st Dist. Ct. App. 1995).

280. *Id.* at 404.

partment of Health and Rehabilitative Services.²⁸¹ In that case, upon the dismissal of a dependency petition with prejudice, the trial court did not order the children to be returned home.²⁸² One child traveled to Massachusetts to reside with his maternal aunt while the other returned home. The parents brought a habeas corpus petition seeking enforcement of the dismissal and the trial court concluded it had no jurisdiction. HRS argued that the court lacked jurisdiction to order return of the child because of the dismissal. The appellate court held that the trial court had inherent jurisdiction to impose its own orders, that the trial court failed to provide for terminating its jurisdiction in the order, and that the order could have no other purpose but to authorize return of the child to the parents.²⁸³ Accordingly, the appellate court reversed.²⁸⁴

C. Right to Counsel Issues

In prior surveys, this author has urged that Florida's statute limiting the right to counsel for parents in dependency proceedings be amended to provide free counsel to indigent parents in all dependency proceedings as is done in other states.²⁸⁵ The right to counsel section of the *Florida Statutes* provides that a poor parent is not entitled to a lawyer free of cost in a dependency case, although he or she must be notified of the right to counsel, and if termination is likely, a lawyer at no cost shall then be appointed.²⁸⁶ Florida does provide an absolute right to counsel, including counsel for an indigent parent in all termination of parental rights cases, by statute.²⁸⁷ This non-absolute right to counsel system in dependency proceedings was adopted by the Supreme Court of Florida in *In re D.B.*²⁸⁸ in 1980, when the court held that counsel shall be provided in a dependency case only "where permanent termination or child abuse charges might result."²⁸⁹ For the past

281. 661 So. 2d 1286 (Fla. 4th Dist. Ct. App. 1995).

282. *Id.* at 1287.

283. *Id.*

284. *Id.*

285. See Dale, *supra* note 277, at 144.

286. See FLA. STAT. § 39.406 (1995); FLA. R. JUV. P. 8.320; Davis v. Page, 714 F.2d 512, 515-18 (5th Cir. 1983), *cert. denied sub nom.* Davis v. Gladstone, 464 U.S. 1052 (1984); *In re D.B.*, 385 So. 2d 83 (Fla. 1980).

287. See FLA. STAT. § 39.465(1)(a) (1995).

288. 385 So. 2d 83 (Fla. 1980).

289. *Id.* at 91.

fifteen years, the trial courts have had ongoing and repeated problems complying with this imprecise test.²⁹⁰

*Wofford v. Eid*²⁹¹ is a recent example of this problem. In that case, HRS filed a petition for adjudication of dependency and several hearings were held, culminating in a dispositional order adjudicating the child dependent. At all these hearings, the court advised the mother of the right to seek counsel. At a subsequent hearing approving a case plan, the court did not advise the mother of her right to counsel. Nor did it do so at several subsequent hearings. Ultimately, HRS filed a petition for termination of parental rights. At an initial hearing on termination, the trial court conducted the hearing without appointing counsel and without advising the mother of her right to counsel but thereafter did appoint counsel. The trial court subsequently became concerned that the mother had not received adequate notice of her right to counsel at prior hearings and entered an order dismissing HRS' petition for termination of parental rights on the basis of lack of advice of her right to counsel.²⁹² The appellate court affirmed the trial court's ruling that the mother had not been afforded an appropriate level of due process protection regarding the right to counsel and on that basis affirmed the dismissal of the petition.²⁹³ However, to the extent that the termination of parental rights petition was premised upon grounds wholly independent of the constitutionally flawed dependency proceeding, in which there was no counsel, the appellate court reversed, thus allowing the proceeding to continue.²⁹⁴

The appellate court's discussion of the failure to appoint counsel in *Wofford* is significant. The court held that whenever a dependency petition states a ground for a finding of dependency contained in section 39.464(1)(d) involving "egregious" conduct by the parent that endangers the life, health, or safety of the child or the child's sibling, such an allegation generates potential for the ultimate termination of parental rights.²⁹⁵ Therefore, counsel must be appointed and the failure to do so is reversible error.²⁹⁶ Similarly, the court held that in a separate situation, where the act of a parent entering into a case plan and then failing to substantially comply with the

290. See *Dale*, *supra* note 277, at 144.

291. 671 So. 2d 859 (Fla. 4th Dist. Ct. App. 1996).

292. *Id.* at 861.

293. *Id.* at 863.

294. *Id.*

295. *Id.* at 862.

296. *Wofford*, 671 So. 2d at 862.

terms within twelve months generates a termination proceeding, the consequences are the same as a dependency adjudication containing findings of egregious abuse.²⁹⁷ Here, too, counsel must be appointed. Thus, the holding in *Wofford* conveys that pursuant to two of the chapter 39 grounds for termination of parental rights, counsel must be appointed at the dependency stage.²⁹⁸ It remains to be seen whether other district courts of appeal or trial courts will follow this holding. As noted previously, another simpler and more expedient resolution of this entire matter is to have an absolute right to counsel established statutorily in Florida. Asking the appellate courts to parse the statute for entitlements and evaluate diverse cases on their facts at a later date is hardly an efficient way to protect the constitutional rights of parents.

Even when the court properly notifies the parent about the right to counsel in a dependency proceeding the parents' waiver of counsel must be made knowingly, intelligently, and voluntarily.²⁹⁹ The issue of how to evaluate waiver of counsel came up recently in *McKenzie v. Department of Health and Rehabilitative Services*.³⁰⁰ In that case, at arraignment, the mother initially consented to the petition. But when questioned by the court to determine if she understood that she was giving up the right to an attorney, she then requested an attorney. At the end of the arraignment, she requested that an attorney be appointed and one indeed was appointed to represent her at future hearings. The appellate court noted that the mother displayed hesitation and confusion when entering her plea of consent.³⁰¹ She requested counsel twice during the arraignment because she did not understand the nature of the dependency hearings, and specifically, she did not understand the right that she was relinquishing. The court concluded that once the mother stated that she did not understand the proceedings and that she was confused, the inquiry as to consent should have stopped and an attorney should have been appointed immediately to represent her.³⁰²

An important question in termination cases is whether the parent ought to have the right to counsel on appeal. Termination cases are civil in nature, not criminal. Therefore, the right to counsel in a criminal appeal, as enunciated

297. *Id.*

298. *Id.*

299. *See Courtney v. Department of Health and Rehabilitative Servs.*, 667 So. 2d 504 (Fla. 5th Dist. Ct. App. 1996).

300. 663 So. 2d 682 (Fla. 5th Dist. Ct. App. 1995).

301. *Id.* at 683.

302. *Id.*

ated by the United States Supreme Court in *Anders v. California*,³⁰³ would not appear to apply. In *Ostrum v. Department of Health and Rehabilitative Services*,³⁰⁴ the attorney for an appellant father whose parental rights had been terminated, filed a motion on appeal to withdraw accompanied by an *Anders* brief.³⁰⁵ The father had been convicted of two counts of capital sexual battery of his own minor children and sentenced to two life terms with minimum mandatory terms of twenty-five years on each count to run consecutively. Thus, he would not be released from prison until after his children reached the age of majority. HRS brought a termination proceeding and counsel was appointed for the father. The attorney presented no evidence, and the appellant father declined an opportunity to be present at the hearing. In ruling on the withdrawal motion, the appellate court held first that while parents are entitled to appointed counsel at the public's expense in termination cases, the right is generated by the Due Process Clause of the Fourteenth Amendment and not the Sixth Amendment.³⁰⁶ Therefore, *Anders* does not apply because it only applies in criminal cases.³⁰⁷ The court held that on a practical level the *Anders* protection, which involved the filing of a brief by counsel, detailing the proceedings below with a discussion of where error might be suggested and why none actually appears, is unnecessary in light of the need for the children to have finality as soon as possible.³⁰⁸ Thus, the court held that all that will be necessary in a termination case is for appellant's counsel to file a motion seeking leave to withdraw as counsel for the parent whose rights had been terminated.³⁰⁹ The appellant parent will then be given time in which to argue the case without an attorney.³¹⁰ If the parent then fails to file a brief in a timely fashion, the court will conclude that the parent does not wish to prosecute the appeal and the court will dismiss for failure to prosecute.³¹¹ If a brief is filed, the court will review it and if it finds no preliminary basis for reversal, the court will summarily

303. 386 U.S. 738 (1967).

304. 663 So. 2d 1359 (Fla. 4th Dist. Ct. App. 1995).

305. *Id.* at 1361.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Ostrum*, 663 So. 2d at 1361.

310. *Id.* The parent could obtain new counsel although the court does not mention this alternative.

311. *Id.*

affirm pursuant to rule 9.315.³¹² Otherwise, the case will proceed as any ordinary appeal.³¹³

D. *Guardian Ad Litem Issues*

Previous surveys have discussed the fact that a child does not have an absolute right to counsel in a dependency proceeding in Florida.³¹⁴ However, because Florida participates in the Federal Child Abuse Prevention and Treatment Act of 1974 ("CAPTA"), the State must provide a guardian ad litem on behalf of children in dependency proceedings.³¹⁵ The precise role of the guardian ad litem and the procedures under which one operates have been the subject of substantial appellate court analysis in recent years.³¹⁶ The duties of the guardian ad litem are governed by an amalgam of statutes,³¹⁷ court rules,³¹⁸ unpublished supreme court orders,³¹⁹ and case law.

In a significant and rather startling opinion, the Fifth District Court of Appeal in *Fisher v. Department of Health and Rehabilitative Services*,³²⁰ recently held that the trial court did not commit fundamental error when the guardian ad litem appointed for the child failed to serve the entirety of the case.³²¹ The appellate court found that after the voluntary guardian resigned, the trial court had entered repeated orders attempting to have a guardian ad litem appointed by the Guardian Ad Litem Program; however, no guardian was ever appointed.³²² Furthermore, the court noted that the former guardian

312. *Id.*

313. *Id.*

314. See Michael J. Dale, *Juvenile Law: 1992 Survey of Florida*, 17 NOVA L. REV. 335, 369-70 (1992).

315. See 42 U.S.C. § 5105 (1988).

316. See *In re D.B.*, 385 So. 2d 83, 91 (Fla. 1980); *Simms v. State*, 641 So. 2d 957 (Fla. 3d Dist. Ct. App. 1994); *In re Adoption of T.G.L.*, 606 So. 2d 730 (Fla. 4th Dist. Ct. App. 1992); *Department of Health and Rehabilitative Servs. v. Coskey*, 599 So. 2d 153, 157 (Fla. 5th Dist. Ct. App. 1992); *Brevard County v. Department of Health and Rehabilitative Servs.*, 589 So. 2d 398 (Fla. 5th Dist. Ct. App. 1991); *Brevard County v. Lanford*, 588 So. 2d 669 (Fla. 5th Dist. Ct. App. 1991); *Marion County v. Johnson*, 586 So. 2d 1163 (Fla. 5th Dist. Ct. App. 1991); *Department of Health and Rehabilitative Servs. v. Cole*, 574 So. 2d 160 (Fla. 5th Dist. Ct. App. 1990).

317. See FLA. STAT. § § 39.461, .465, 61.401, .403, 415.508 (1995).

318. See FLA. R. JUV. P. 8.215.

319. See *Guardian Ad Litem Program Standards of Operation*, Fla. S. Ct. Amended Admin. Order (November 27, 1995); *Guardian Ad Litem Program Minimal Standards of Operation*, Fla. S. Ct. Admin. Order (Feb. 7, 1995).

320. 674 So. 2d 207 (Fla. 5th Dist. Ct. App. 1996).

321. *Id.* at 208.

322. *Id.*

ad litem did testify at the termination hearing between six and seven months after resigning, and the court recommended that parental rights be terminated.³²³ The court found no fundamental error.³²⁴ The court reasoned that there was an absence of a showing that the child's rights were not adequately protected by the court, HRS, or the foster parents, and that the guardian ad litem had represented the interests of the child through a substantial portion of the case.³²⁵ The appellate court concluded that the continued service of the guardian would not have changed the outcome of the case.³²⁶

The court in *Fisher* relied heavily on a 1994 opinion from the Second District Court of Appeal in *In re E.F.*,³²⁷ in which the court held that a trial court does not commit fundamental error if it attempts but is unable to locate a volunteer guardian ad litem.³²⁸ In *E.F.*, a mother appealed from an order terminating parental rights since the child never received the assistance of a guardian ad litem.³²⁹ The appellate court upheld the termination in the absence of a guardian ad litem because, as it explained:

Although both the legislature and the supreme court have mandated the use of guardians ad litem in parental termination proceedings, our state has never implemented a program to provide an adequate supply of guardians. The program is primarily staffed by volunteers. At a time when the supply of [guardians] is exceeded by the demands of children who would benefit from guardians, we cannot hold that a trial court commits fundamental error if it attempts, but is unable, to locate a volunteer guardian ad litem.³³⁰

There are several problems with the holdings in *Fisher* and *E.F.* First, the federal statute under which Florida is obligated to provide a Guardian Ad Litem Program is not a discretionary statute.³³¹ It *requires* appointment of guardians ad litem. Furthermore, while the Florida courts have not held that a child has a right to counsel in a dependency or termination proceeding,

323. *Id.*

324. *Id.*

325. *Fisher*, 674 So. 2d at 208.

326. *Id.*

327. 639 So. 2d 639 (Fla. 2d Dist. Ct. App. 1994).

328. *Id.* at 640.

329. *Id.* at 642.

330. *Id.* at 640.

331. *See* 42 U.S.C. § 5105 (1988).

they have recognized the significance of advocacy on behalf of the child.³³² In addition, the *Florida Statutes* do not render the appointment and involvement of the guardian ad litem discretionary, but rather, they mandate appointment.³³³ The court's rejection of federal and state mandatory statutory provisions is without explanation other than that no harm resulted. This rejection of the mandatory obligation does not square with other case law, where mandatory obligations have been enforced even though their enforcement would not affect the outcome of the case.³³⁴

In addition, the holding in *Fisher* is hard to apply in practice. The opinion suggests that if the trial court concludes that a guardian ad litem will not be of any benefit to the child and the result in all likelihood will be appropriate in any event, it need not worry about a guardian ad litem appointment. This is a very difficult test for the appellate court to evaluate, after the fact, on appeal. There is no standard of review. Furthermore, the absence of information in the record which the guardian ad litem would generate cannot be opined by the appellate court because there will rarely be anything in front of it in the record on appeal.

Finally, in *Gordon v. Department of Health and Rehabilitative Services* ("*Gordon II*"),³³⁵ the appellate court approved the trial court's entry of a "cost judgment"³³⁶ in favor of the guardian ad litem as prevailing party and against the parents in a dependency and termination of parental rights case.³³⁷ The Third District Court of Appeal had previously held in the same case in an earlier reported decision, *Gordon v. Department of Health and Rehabilitative Services* ("*Gordon I*"),³³⁸ that Florida law did not require the court to assess costs in such cases against HRS.³³⁹ The court held in *Gordon II* that the trial court did have discretion to enter such an order against the parents on the basis of the prior ruling in *Gordon I*, and that it had the discretion to enter such an order against HRS.³⁴⁰ The court noted that by

332. See *In re D.B.*, 385 So. 2d 83 (Fla. 1980); *Simms v. State*, 641 So. 2d 957 (Fla. 3d Dist. Ct. App. 1994) (recognizing that the significance of the guardian ad litem's position may differ from that of HRS).

333. See FLA. STAT. § 39.465(2)(a).

334. See discussion *supra* p. 208 (concerning *A.P. v. State*, 666 So. 2d 211 (Fla. 2d Dist. Ct. App. 1995)).

335. 674 So. 2d 840 (Fla. 3d Dist. Ct. App. 1996).

336. FLA. STAT. § 57.031 (1995).

337. *Gordon*, 674 So. 2d at 841.

338. 637 So. 2d 948 (Fla. 3d Dist. Ct. App. 1994).

339. *Id.* at 948-49 (citing FLA. STAT. § 57.041 (1993)).

340. *Gordon*, 674 So. 2d at 841 (citing *Department of Health and Rehabilitative Servs. v. A.F.*, 528 So. 2d 87 (Fla. 5th Dist. Ct. App. 1988)).

statute Florida provides that financially able parents shall pay the costs of guardian ad litem services.³⁴¹

E. *Termination of Parental Rights*

The Fifth District Court of Appeal recently ruled that adjudicatory hearings, even in the context of termination of parental rights, must comply with the rules of evidence applicable in civil cases. In *Lewis v. Department of Health and Rehabilitative Services*,³⁴² the actions of the trial court were startling. At the end of an evidentiary hearing for termination of parental rights, the court, unbeknownst to the mother, ordered the guardian ad litem and HRS to make unannounced visits to the home where the mother had been staying.³⁴³ The mother led a nomadic life style, and the court was concerned about her residence and employment. The guardian ad litem and HRS made the visit, took photographs, and filed supplemental reports which concluded that the home was not a good environment for the mother and child. The reports were not provided to the mother or her attorney until the day of the final adjudicatory hearing. Incredibly, the court did not allow the mother to offer testimony to refute the contents of the report or to cross examine the guardian ad litem or the HRS counselor because, as the appellate court described it, the trial court did not want to reopen the case.³⁴⁴ The trial court then entered a detailed order terminating parental rights, relying upon the supplemental report.³⁴⁵

The mother appealed, arguing among other things that the adjudication and disposition should be reversed because the trial court took into consideration supplemental reports and photographs and did not allow her an opportunity to cross examine.³⁴⁶ The appellate court reversed first on the basis of the statute which requires a written guardian ad litem report to be provided to all parties and the court at least forty-eight hours before the dispositional hearing.³⁴⁷ The appellate court noted the obvious purpose is to allow the parents to contest the report.³⁴⁸ Second, the use of hearsay evidence to terminate parental rights denied the mother due process.³⁴⁹ Under

341. *Id.*; see FLA. STAT. § 415.508(2) (1995).

342. 670 So. 2d 1191 (Fla. 5th Dist. Ct. App. 1996).

343. *Id.* at 1193.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Lewis*, 670 So. 2d at 1193; see FLA. STAT. § 39.465(2)(b)(1).

348. *Lewis*, 670 So. 2d at 1193.

349. *Id.*

Florida law during the adjudicatory hearing, a trial court is required to apply the “rules of evidence used in civil cases.”³⁵⁰ The evidence has to be admissible.³⁵¹ This evidence was rank hearsay.³⁵² Furthermore, it is a denial of due process to prohibit the right to cross examine.³⁵³ The mother’s second argument on appeal, which the appellate court did not have to reach, was the denial of the right to counsel.³⁵⁴ It turns out that at the dispositional hearing the mother’s lawyer telephoned the court to say she was unavoidably detained and asked that the hearing be continued until she could arrive. The trial court had conducted the hearing without the mother’s attorney and entered an order of disposition.³⁵⁵ Enough said.

In a recent opinion from the Second District Court of Appeal, the question was whether the *Florida Statutes* allow for termination of parental rights of either parent where only one of the parents commits abuse.³⁵⁶ Conceptually, the issue is the same as that raised in *Department of Health and Rehabilitative Services v. P.H.*³⁵⁷ In *In re A.C.*,³⁵⁸ a termination proceeding against two parents was based upon allegations that the mother had shaken the child and caused significant head injuries to the youngster.³⁵⁹ The trial court found that the father was at work at the time and thus, the termination petition as to him was denied. The trial court then held that it could not terminate parental rights when the severe and continuing abuse or neglect and/or egregious abuse or neglect was found to be committed by only one parent.³⁶⁰ The appellate court held that chapter 39 does not preclude institution of a termination proceeding against one parent where the other parent would be a satisfactory replacement.³⁶¹ The language of the statute provides for termination where “[t]he parent or parents” have engaged in severe or continuing abuse or neglect or egregious abuse.³⁶² The court therefore reversed.³⁶³

350. *Id.* (quoting FLA. STAT. § 39.467(5) (1993)).

351. *Id.*

352. *Id.*

353. *Lewis*, 670 So. 2d at 1194.

354. *Id.*

355. *Id.*

356. *In re A.C.*, 660 So. 2d 330 (Fla. Dist. Ct. App. 1995).

357. 659 So. 2d 1375 (Fla. 1st Dist. Ct. App. 1995). See discussion *supra* pp. 214–19.

358. 660 So. 2d 330 (Fla. 2d Dist. Ct. App. 1995).

359. *Id.* at 331.

360. *Id.*

361. *Id.* at 332.

362. *Id.* at 331 (quoting FLA. STAT. § 39.464(3) (Supp. 1992)).

363. *A.C.*, 660 So. 2d at 332.

The Florida termination of parental rights statute contains five items which must be established by clear and convincing evidence before there can be an adjudication that parental rights should be terminated.³⁶⁴ These items are: 1) the child was adjudicated dependent; 2) a dispositional order was entered; 3) the parent was informed of his right to counsel in the dependency proceeding; 4) the best interests of the child would be served by granting the petition; and 5) at least one of the grounds in section 39.464 of the *Florida Statutes* has been met.³⁶⁵

The issue before the court in *Department of Health and Rehabilitative Services v. N.T.*,³⁶⁶ was whether the failure to incorporate findings of fact in the dependency adjudication requires the court to dismiss the subsequent termination proceeding.³⁶⁷ The appellate court held that the technical insufficiency of a dependency order to set forth findings of fact is not reversible error in a termination case.³⁶⁸ The court held that the adjudication of dependency requirement is satisfied by the mere fact of adjudication.³⁶⁹ There is nothing in the statutory language that precludes termination of parental rights when the dependency order fails to set forth factual findings as to the basis for dependency.³⁷⁰

F. *Appellate Issues*

The Florida courts have held that an adjudicatory order in a dependency proceeding is not appealable. It is premature, and an appeal in a dependency case must come from a dispositional order.³⁷¹ In a recent decision from the Fifth District Court of Appeal in *Moore v. Department of Health and Rehabilitative Services*,³⁷² the court held that because the statutory scheme for termination of parental rights contemplates entry of two orders, the second or dispositional order is the final order for purposes of appeal.³⁷³

364. FLA. STAT. § 39.4611 (1995).

365. *Id.*

366. 670 So. 2d 1147 (Fla. 1st Dist. Ct. App. 1996).

367. *Id.* at 1148.

368. *Id.*

369. *Id.*

370. *Id.*

371. *See In re T.M.*, 622 So. 2d 589 (Fla. 1st Dist. Ct. App.), *review granted*, 630 So. 2d 1103 (Fla. 1993); *see also In re T.M.*, 614 So. 2d 561 (Fla. 1st Dist. Ct. App. 1993).

372. 664 So. 2d 1137 (Fla. 5th Dist. Ct. App. 1995).

373. *Id.* at 1139.

G. *Legislation and Rule Changes*

The Supreme Court of Florida amended the *Florida Rules of Juvenile Procedure* in the fall of 1995 to make changes that comply with language in the statutes governing performance agreements in dependency cases. The statute, and now the court rules, provide for the development and implementation of "case plans" previously known as "performance agreements."³⁷⁴ The court also changed the procedure for initiating petitions for termination of parental rights so that they may be filed in time and that the guardian ad litem is listed among the entities and persons who may file a petition.³⁷⁵ The court rules also contain a new provision providing that in termination of parental rights cases, the parties may stipulate, or the court may order that parties or relatives of the parent whose rights have been terminated may maintain contact with the child.³⁷⁶

IV. CONCLUSION

Extensive changes to the *Florida Juvenile Code* in both the juvenile delinquency and child dependency areas, which have been the norm in the Florida Legislature until last year, did not take place this year. Thus, the courts will have an opportunity to analyze statutes which have been on the books for two years without dramatic change. This should be helpful.

Unfortunately, the appellate courts have had to spend much of their time correcting simple, yet repeated errors by the trial courts. However, the appellate courts have also rendered valuable services interpreting sections of chapter 39 with specific emphasis on the dispositional stage of delinquency cases and termination of parental rights. A particularly difficult area, as yet not fully developed by the appellate courts, involves questions of the right to counsel for parents in dependency and termination proceedings and the role of the guardian ad litem in the same proceedings.

Finally, although the Florida Legislature was busy restructuring Part IV of chapter 39 dealing with families in need of services and children in need

374. See FLA. R. Juv. P. 8.400-.410.

375. *Id.* at 8.500(b)(1).

376. *Id.* at 8.530(d).

of services,³⁷⁷ there has been virtually no reported appellate case law in the field. Indeed, there was nothing to report this past year.

377. See 1996 Fla. Laws ch. 96-369 (amending FLA. STAT. § 39.426(2)); 1996 Fla. Laws ch. 96-398 (amending FLA. STAT. § 39.42(1), (5), (7)). The changes in chapter 96-369 of the *Laws of Florida* deals with subsection two of section 39.426 of the *Florida Statutes* entitled "Case staffing; services and treatment to a family in need of services." The changes amended the composition of the case staffing committee and provided that the committee may include a supervisor of the Department's contracted provider, a representative from the area of substance abuse, the alternative sanctions coordinator, and a representative from the child's school. See ch. 96-369, § 4, 1996 Fla. Laws 2128, 2133.

Additionally, chapter 96-398 of the *Laws of Florida* restructured the children in need of services and families in need of services section of chapter 39 by identifying the roles of the DJJ and HRS (effective January 1997, the Department of Children and Family Services) as they apply to preserving the unity and integrity of the family and in serving this country's youth population. See ch. 96-398, §§ 19-34, 1996 Fla. Laws 2505, 2539-53.

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I. INTRODUCTION

The prudent practitioner will note a number of changes, some of them quite substantial, to Florida's professional responsibility landscape in 1996.¹ Courts and ethics committees rendered decisions affecting obligations that Florida lawyers assume as they interact with prospective clients, clients, judges, other lawyers, nonlawyer assistants, third parties, and disciplinary authorities. This article examines significant cases and ethics opinions in the

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1. This article surveys professional responsibility developments in Florida from July 15, 1995, through July 14, 1996.

context of the different roles which lawyers assume during the course of their relationships with these individuals and entities.²

Part II explores the traditional role of the lawyer as a zealous advocate for the client. This section reviews developments of the past year as they relate to: 1) formation of a lawyer-client relationship; 2) conflicts of interest and other grounds for a lawyer's disqualification from a matter; 3) restrictions on a lawyer's ability to communicate with represented parties; 4) trial conduct, including the permissible scope of argument; and 5) proper termination of a lawyer-client relationship. Part III addresses the lawyer's role as fiduciary, especially with regard to safekeeping of client property. Part IV looks at decisions affecting the lawyer's role as an officer of the court. Part V explores various aspects of a lawyer's role as a businessperson. Included in this section are developments concerning attorney's fees, organization and operation of law firms, a lawyer's relationship with nonlawyers who assist the lawyer in the practice of law, and law firm marketing activities. Finally, Part VI considers the lawyer's role as a member of The Florida Bar, and surveys disciplinary actions taken against Florida lawyers for widely varying conduct.³

II. THE LAWYER AS AN ADVOCATE

Probably the most important role played by a lawyer in our adversary system of justice is that of an advocate who diligently⁴ and competently,⁵—in a word zealously⁶—advances the client's cause. Because of the many roles and responsibilities of a lawyer, there are limits placed on the extent of

2. Cases and ethics opinions are discussed in the section to which they have the most significant connection, rather than in every section where they might apply.

3. Important disciplinary cases are analyzed where appropriate throughout the article, but most are collected in Part VI for the convenience of the reader.

4. FLA. RULES OF PROFESSIONAL CONDUCT (hereinafter "RPC") Rule 4-1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." RPC 4-1.3 (1987). The RPC are found in chapter 4 of the Rules Regulating The Florida Bar.

5. Rule 4-1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." RPC 4-1.1 (1987).

6. Canon 7 of the former Florida Code of Professional Responsibility ("CPR") provided that a lawyer "is to represent a client zealously within the bounds of the law." Effective January 1, 1987, the CPR was superseded by the current RPC. See Florida Bar re Rules Regulating The Florida Bar, 494 So. 2d 977 (Fla.), opinion corrected by 507 So. 2d 1366 (Fla. 1986). The RPC mention "zealous" advocacy only in the Preamble.

a lawyer's advocacy.⁷ Sometimes it is difficult to discern the exact point at which one crosses from proper and zealous advocacy, to unethical and over-zealous, advocacy. The Supreme Court of Florida had no such difficulty deciding this issue in *Florida Bar v. Charnock*.⁸ There a lawyer represented a Dutch client who owned real property in Florida.⁹ A \$3,000 mechanic's lien was filed against one of the client's parcels, which was valued at over \$100,000.¹⁰ The lien holder brought a foreclosure action against the property, but neither the lawyer nor his client were aware of this action because service was effected using the "long arm statute."¹¹ Judgment was rendered for the lien holder and the property was auctioned at judicial sale.¹² When the lawyer inadvertently learned of this, he filed several motions in an attempt to have the sale set aside.¹³ The court denied the motions and issued a writ of possession.¹⁴

Refusing to give up, the lawyer hastily procured a tenant for the property through an oral agreement.¹⁵ He then had the tenant complete an affidavit averring that the tenant was entitled to have possession of the property, despite the fact that the "tenant" never took possession of the property.¹⁶ The lawyer did this in an effort to take advantage of the protections afforded tenants under Rule 1.580 of the *Florida Rules of Civil Procedure*.¹⁷ The supreme court viewed the lawyer's delaying tactics as an

7. For example, one of the most obvious limits on zealous advocacy is the prohibition against knowingly using false evidence. Included in this prohibition is perjured testimony, even when such evidence would be extremely helpful to the client's case. See RPC 4-3.3(a) (1987).

8. 661 So. 2d 1207 (Fla. 1995).

9. *Id.* at 1207.

10. *Id.* at 1210.

11. *Id.* at 1208. See also FLA. STAT. § 48.181 (1991). This section is entitled "Service on nonresident engaging in business in state."

12. *Charnock*, 661 So. 2d at 1208.

13. *Id.*

14. *Id.* at 1210.

15. *Id.* at 1208.

16. *Id.*

17. *Charnock*, 661 So. 2d at 1208. The *Florida Rules of Civil Procedure* provide, in relevant part:

Third Party Claims. If a person other than the party against whom the writ of possession is issued is in possession of the property, that person may retain possession of the property by filing with the sheriff an affidavit that the person is entitled to possession of the property, specifying the nature of the claim. Thereupon the sheriff shall desist from enforcing the writ and shall serve a copy of the affidavit on the party causing issuance of the writ of possession. The party causing issuance of the writ may apply to the court for an order directing the

unethical “fraud on the court in an effort to frustrate the transfer of possession of the property” and found that they “went beyond the boundaries of zealous advocacy.”¹⁸ The court suspended the lawyer from the practice of law for thirty days.¹⁹

A. *Conflicts of Interest and Disqualification*

Although disputes in both the disciplinary and disqualification arenas can turn on the nature of the lawyer’s conduct, quite often the determining factor is whether a lawyer-client relationship existed between the lawyer and the allegedly aggrieved party. This issue can be crucial, especially where the facts are otherwise uncontested. For example, in *Florida Bar v. King*²⁰ the lawyer defended himself against charges of neglect by asserting that a lawyer-client relationship did not exist.²¹ He based this on the fact that he was not paid a retainer by the complainant.²² Rejecting this argument, the supreme court flatly stated that “[a] fee is not necessary to form an attorney-client relationship.”²³

Sometimes actions *not* taken by a lawyer can lead to the conclusion that a lawyer-client relationship exists. In *Florida Bar v. Flowers*,²⁴ a lawyer who shared office space with a nonlawyer immigration consultant was disciplined for allowing conditions to exist such that persons consulting with the nonlawyer “could reasonably expect and believe that they were receiving legal representation” from the lawyer.²⁵ It appeared that the lawyer made no effort to distinguish his offices from those of his nonlawyer tenant. This conclusion was supported by the fact that the sign for the office building contained the name and telephone number of only the lawyer.²⁶

sheriff to complete execution of the writ. The court shall determine the right of possession in the property and shall order the sheriff to continue to execute the writ or shall stay execution of the writ, if appropriate.

FLA. R. CIV. P. 1.580(b).

18. *Charnock*, 661 So. 2d at 1209.

19. *Id.* at 1210.

20. 664 So. 2d 925 (Fla. 1995).

21. *Id.* at 926.

22. *Id.*

23. *Id.* at 927 (citing *Dean v. Dean*, 607 So. 2d 494, 500 (Fla. 4th Dist. Ct. App. 1992)).

24. 672 So. 2d 526 (Fla. 1996).

25. *Id.* at 528.

26. *Id.* at 527. Several opinions have been issued for situations where lawyers and non-lawyers share office space. See, e.g., Fla. Bar Comm. on Professional Ethics, Op. 88-15 (1988); Fla. Bar Comm. on Professional Ethics, Op. 78-14 (1978).

The Third District Court of Appeal, in *Garner v. Somberg*,²⁷ recently decided a highly relevant case concerning the establishment of the lawyer-client relationship. This decision will likely result in changes to the procedures lawyers use to screen potential clients. After Garner's wife was injured in an auto accident, Garner contacted several lawyers about pursuing a personal injury action, and eventually retained a South Florida law firm.²⁸ The mother of Garner's injured wife, however, hired attorney Somberg.²⁹ Mr. Somberg then filed a petition to have the wife's competency determined and to have the mother appointed emergency temporary guardian of the wife.³⁰ Garner moved to disqualify Somberg, alleging that he had previously communicated with Somberg regarding the personal injury action.³¹ As a result of these communications, Garner claimed to have given Somberg relevant confidential information.³² Responding to the motion, sole practitioner Somberg asserted that neither he nor anyone in his office had ever spoken to Garner.³³ Garner, however, produced telephone records showing that he had made three telephone calls to Somberg's office, one lasting thirteen minutes.³⁴

Faced with these facts, the trial court denied the motion to disqualify, because Garner failed to demonstrate that he gave confidential information to Somberg during the calls.³⁵ The appellate court reversed on certiorari review, ruling that the trial court departed from the essential requirements of the law.³⁶ Citing the supreme court's decision in *State Farm Mutual Automobile Insurance Co. v. K.A.W.*,³⁷ the court stated, "[i]n conflict-of-interest cases, once an attorney-client relationship is shown to have existed, that relationship gives 'rise to an irrefutable presumption that confidences were disclosed during that relationship . . .'"³⁸ This statement of law is correct, provided an attorney-client relationship has been shown. The problem in this case was that the court simply assumed, without analysis, the existence

27. 672 So. 2d 852 (Fla. 3d Dist Ct. App. 1996).

28. *Id.* at 853.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Garner*, 672 So. 2d at 853.

33. *Id.*

34. *Id.*

35. *Id.* at 853-54.

36. *Id.* at 854.

37. 575 So. 2d 630, 633 (Fla. 1991).

38. *Garner*, 672 So. 2d at 854.

of an attorney-client relationship. The court based its decision on telephone records of three apparently short telephone calls. The court's assumption should be disturbing to practicing lawyers. Its holding seems to suggest that anyone who calls a lawyer's office, even if the caller does not speak to a lawyer, or just listens to music while on hold for thirteen minutes, will later be able to disqualify that lawyer. This disqualification will be based on the claim that an attorney-client relationship was formed. Lawyers may be able to guard against disqualification by establishing and following written office procedures for initial client contacts. This can be especially important in areas of law, such as domestic relations, where lawyer-shopping is common. A model procedure would provide that a prospective client first speaks with a nonlawyer, which is usually a secretary or receptionist. Generally, this person takes enough information to run a check for conflicts, but does not discuss details of the matter that would be considered confidences under the ethics rules. Only after the new matter has been cleared by the conflicts check would the lawyer engage in a discussion with the prospective client. If attorney Somberg had been able to show that he routinely followed this type of procedure, perhaps disqualification would have been avoided. While some may consider this type of procedure unduly burdensome, it appears, after *Garner*, that practitioners are left with little or no alternative if they want to avoid being disqualified for a "confidential" conversation that may or may not have taken place.³⁹

Turning to more typical matters involving conflicts of interest, the events in *Florida Bar v. Sofo*⁴⁰ provide an example of how conflict problems can arise when a lawyer becomes involved in a business transaction with his client.⁴¹ The lawyer was both a shareholder in, and general counsel for Micro Environmental, Inc.⁴² The company was subsequently bought by another company.⁴³ The lawyer then became general counsel for the buyer.⁴⁴ The buyer later failed to perform as required under the purchase agreement.⁴⁵

39. *Id.* Another troubling prospect is the heightened risk of malpractice liability that lawyers face when it becomes so easy for a would-be client to establish the existence of a lawyer-client relationship and its attendant legal duties. *See, e.g., Blackhawk Tennessee, L.P. v. Waltemyer*, 900 F. Supp. 414 (M.D. Fla. 1995).

40. 673 So. 2d 1 (Fla. 1996).

41. *Id.* at 1. *See* cases cited *infra* notes 317 and 322 and accompanying text (providing other disciplinary cases in which conflicts of interest rules were violated).

42. *Sofo*, 673 So. 2d at 1.

43. *Id.*

44. *Id.*

45. *Id.*

Consequently, Mr. Sofo sent a demand letter to the principals of the buyer, on the buyer's letterhead, and signed as general counsel.⁴⁶ After receiving an unsatisfactory response, the lawyer wrote to the principals purporting to terminate the purchase agreement.⁴⁷ The supreme court suspended the lawyer from practice for ninety-one days, concluding that he violated several conflict rules.⁴⁸ The lawyer's simultaneous representation of buyer and seller violated Rule 4-7.1(b) of the *Florida Rules of Professional Conduct*.⁴⁹ This conflict infraction "was exacerbated by [the lawyer's] ownership of stock in both companies."⁵⁰ Also violated were rule 4-1.9(a),⁵¹ concerning a lawyer's duty of loyalty to a former client, as well as rules 4-1.9(b),⁵² and 4-1.8(b),⁵³ regarding a lawyer's duty not to misuse client confidences.⁵⁴

46. *Id.*

47. *Sofa*, 673 So. 2d at 1.

48. *Id.* at 2.

49. Rule 4-1.7(b)(1) provides:

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

RPC 4-1.7(b)(1) (1993).

50. *Sofa*, 673 So. 2d at 2.

51. Rule 4-1.9(a), (b) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

RPC 4-1.9(a)(b) (1993).

52. *Sofa*, 673 So. 2d at 2.

53. *Id.* Rule 4-1.8 (b) provides:

(b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by rule 4-1.6.

RPC 4-1.8(b) (1987).

54. *Sofa*, 673 So. 2d at 2.

*Lane v. Sarfati*⁵⁵ was a case in which a lawyer was disqualified from representation because he violated the duty of loyalty owed to his former client. The lawyer met with an individual who was in the theatrical management business.⁵⁶ The lawyer reviewed the standard form contract used by the client and provided her with an addendum to be appended to the standard contract.⁵⁷ Sometime later, the lawyer's former client was embroiled in a suit filed against her by one of her actor clients.⁵⁸ The suit involved construction of the former client's contract, including the addendum.⁵⁹ The lawyer attempted to appear as counsel for the actor in the suit.⁶⁰ The trial court denied the former client's motion to disqualify the lawyer, but the appellate court reversed and disqualified the lawyer for breaching rule 4-1.9.⁶¹ The court was of the view that the comment to rule 4-1.9 squarely addressed the situation presented: "[A] lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client."⁶²

An interesting issue concerning disqualification of the co-counsel of a client's former law firm was addressed in *Zarco Supply Co. v. Bonnell*.⁶³ *Zarco* was the latest case to rely on the supreme court's decision in *State Farm Mutual Automobile Insurance Co. v. K.A.W.*⁶⁴ to decide the question of standing to raise a lawyer's disqualification motion.⁶⁵ In *Zarco*, Stephen Bonnell was involved in an automobile accident.⁶⁶ As an employee of the company, he hired a law firm ("Firm I") to pursue a personal injury action against the employer company for himself and several of his family members.⁶⁷ Firm I later withdrew from representing all of the family members,

55. 676 So. 2d 475 (Fla. 3d Dist. Ct. App. 1996).

56. *Id.* at 475.

57. *Id.*

58. *Id.* at 476.

59. *Id.*

60. *Lane*, 676 So. 2d at 476.

61. *Id.*; see *supra* note 51 and accompanying text.

62. *Lane*, 676 So. 2d at 476 (quoting RPC 4-1.9 (1993)).

63. 658 So. 2d 151 (Fla. 1st Dist. Ct. App. 1995).

64. 575 So. 2d 630 (Fla. 1991).

65. *Zarco*, 658 So. 2d at 153. See also *Kenn Air Corp. v. Gainesville-Alachua County Regional Airport Auth.*, 593 So. 2d 1219 (Fla. 1st Dist. Ct. App. 1992). In *Kenn Air*, the court relied on *K.A.W.* in ruling that the successor in interest of a lawyer's former corporate client had standing to raise a motion to disqualify on grounds that the lawyer switched sides in a substantially related matter. *Id.* at 1222.

66. *Zarco*, 658 So. 2d at 152.

67. *Id.*

except the employee's niece, because the employee decided not to sue the employer.⁶⁸ Later, Firm I joined as co-counsel with Firm II to pursue the case, with the employer and the employee named as defendants.⁶⁹ After the employer filed a motion to disqualify both firms, the employee was dismissed as a party, but expressly consented to Firm I's continued representation, and use of confidences, in the matter.⁷⁰ The trial court denied the disqualification motion.⁷¹ Reversing this ruling, the First District Court of Appeal concluded: 1) that the employer had standing to seek disqualification, as a party against whom the confidences could be used; 2) that an unfair informational disadvantage to the detriment of the employer persisted even though Firm I's former client (the employee) was no longer a named party, and thus Firm I was disqualified; and 3) that Firm II was disqualified because the confidential information possessed by Firm I was imputed to Firm II as a result of their co-counsel relationship.⁷² Florida case law now clearly indicates that real parties in interest, such as insurers,⁷³ successors in interest,⁷⁴ and civil litigation co-parties,⁷⁵ and not just a lawyer's clients, have standing to assert conflict issues in motions to disqualify counsel from a civil suit.

In contrast, standing seems to be more narrowly construed in the criminal defense context. In *Terry v. State*,⁷⁶ one of the many issues raised

68. *Id.*

69. *Id.*

70. *Id.*

71. *Zarco*, 658 So. 2d at 153.

72. *Id.* Although the court cited subdivision (b) of RPC 4-1.10 as support for this third conclusion, it really seemed to be treating the two firms as a single "firm" under subdivision (a) of the rule. Rule 4-1.10(a) and (b) provide:

(a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any 1 of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2.

(b) Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.

RPC 4-1.10(a), (b) (1987).

73. *See State Farm Mutual Auto. Ins. Co. v. K.A.W.*, 575 So. 2d 630 (Fla. 1991).

74. *See Kenn Air*, 593 So. 2d at 1219.

75. *See Zarco*, 658 So. 2d at 151.

76. 668 So. 2d 954 (Fla. 1996).

concerned the appellant's claim that he had standing to raise a conflict of interest on behalf of his co-defendant.⁷⁷ Noting that the putative conflict was between the co-defendant and the public defender's office, the Supreme Court of Florida rejected this claim, stating that "[n]o authority supports appellant's position that a third party has standing to raise a conflict of interest argument with regard to a codefendant."⁷⁸

Another conflict decision in the criminal law area was *Colton v. State*,⁷⁹ which dealt with issues that arose after a lawyer changed employers. The lawyer was employed in the trial section of the public defender's office when a defendant was tried and convicted.⁸⁰ The lawyer, however, did not work on the case.⁸¹ The lawyer then moved to the criminal appeals division of the attorney general's office, where he filed an answer brief in the defendant's appeal.⁸² Not surprisingly, the defendant moved to disqualify the lawyer, alleging that the lawyer had access to confidential information.⁸³ The First District Court of Appeal denied the motion to disqualify, stating:

We note that there is no Rule of Professional Conduct which applies to this fact situation. Rule 4-1.10 applies to lawyers moving from one firm to another. Rule 4-1.11 covers successive government and private employment. There is no rule which specifically addresses successive government to government employment when those interests are adverse, as is the case here.⁸⁴

The court reached the correct conclusion, but its statement above is not entirely correct. Although the rules cited by the court do not directly address the matter, the comment to rule 4-1.11 specifically notes that rule 4-1.11 is to

77. *Id.* at 961. Interestingly, the appellant contended that, in multiple defendant capital cases, it was the policy of the public defender's office to allow the *state attorney's office* to determine which of the defendants would be represented by the public defender and which would be represented by outside conflict counsel. *Id.* at 961 n.7.

78. *Id.* at 961. The supreme court expressly rejected appellant's reliance on the comment to RPC 4-1.7 (1993). "In a criminal case . . . [w]here the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question." *Id.* at 961 n.8.

79. 667 So. 2d 341 (Fla. 1st Dist. Ct. App. 1995).

80. *Id.* at 342.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Colton*, 667 So. 2d at 342-43.

govern this type of situation.⁸⁵ The court then concluded that there was no appearance of impropriety in the situation presented because the defendant merely alleged access to confidential information, rather than possession of it.⁸⁶ The lawyer had never represented the defendant and trial and appellate representation are of a significantly different nature.⁸⁷

Reasons other than the usual conflict of interest violations were cited as grounds for disqualification in the civil arena. In *Christensen v. Correa*,⁸⁸ the Fifth District Court of Appeal appeared to assume the existence of a fiduciary relationship between a suspended lawyer and a lawyer who was appointed to act as “inventory attorney” pursuant to rule 1-3.8.⁸⁹ The inventory attorney was appointed to inventory the files of the suspended lawyer, who had misappropriated trust account funds.⁹⁰ The suspended lawyer had practiced in a law firm with his brother.⁹¹ The brother later sued a firm client for fees allegedly owed to the firm, and the client engaged the inventory attorney’s law firm as defense counsel.⁹² Defense counsel asserted counterclaims of negligence and professional malpractice.⁹³ The plaintiff moved to disqualify defense counsel, arguing that a conflict of interest was present on the grounds that the inventory attorney owed a fiduciary duty to

85. The comment to rule 4-1.11 provides: “When the client is an agency of one government, the agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.” RPC 4-1.11 cmt. (1987)

86. *Colton*, 667 So. 2d at 343.

87. *Id.*

88. 673 So. 2d 145 (Fla. 5th Dist. Ct. App. 1996).

89. *Id.* at 146. Rule 1-3.8 provides, in part:

(a) Appointment; Grounds; Authority. Whenever an attorney is suspended, disbarred, becomes a delinquent member, abandons a practice, disappears, or dies, and no partner, personal representative, or other responsible party capable of conducting the attorney’s affairs is known to exist, the appropriate circuit court, upon proper proof of the fact, may appoint an attorney or attorneys to inventory the files of the subject attorney and to take such action as seems indicated to protect the interests of clients of the subject attorney, as well as the interest of that attorney.

(b) Maintenance of Attorney-Client Confidences. Any attorney so appointed shall not disclose any information contained in files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court that appointed the attorney to make the inventory.

RPC 1-3.8 (a)–(b) (1995).

90. *Christensen*, 673 So. 2d at 145.

91. *Id.*

92. *Id.*

93. *Id.*

the suspended attorney.⁹⁴ The trial court granted the motion and the appellate court affirmed per curiam.⁹⁵ A cogent dissent disagreed with the majority's decision, maintaining that the suspended lawyer was not the inventory attorney's "client" and thus, there was no conflict of interest.⁹⁶ The dissenting judge opined that, although an inventory attorney "is in a position of trust as to both the suspended attorney and his former clients, the primary fiduciary duty is owed to the former clients who choose to retain the inventory attorney since that is an attorney-client relationship."⁹⁷

Discovery violations have also resulted in disqualification. In *Henriquez v. Temple*,⁹⁸ a law firm was disqualified after "one of its attorneys deliberately and surreptitiously obtained documents . . . [that] the trial court had previously ordered were not to be produced."⁹⁹

Finally, over-zealous lawyers who persisted in their attempts to continue representing clients, even after the entry of disqualification orders, faced disciplinary problems.¹⁰⁰ In *Birdsong*, the lawyer was disqualified from representing a client in a civil case for conflict of interest reasons.¹⁰¹ Notwithstanding the court's order, the lawyer continued to assist the client in that matter behind the scenes by such actions as discussing the case with the client and preparing pleadings.¹⁰² A thirty-day suspension was the end result.¹⁰³ In *Florida Bar v. Canto*,¹⁰⁴ more egregious misconduct, by a lawyer who blatantly continued to litigate a case from which he was disqualified several years prior to the disciplinary action, netted the lawyer a two-year suspension.¹⁰⁵

B. *Communication With Represented Opponents*

Florida law concerning the permissible scope of a lawyer's contacts with represented persons continued to develop in 1996. For several years it has been increasingly difficult to definitively determine whether opposing

94. *Id.*

95. *Christensen*, 673 So. 2d at 145.

96. *Id.* at 146 (Sharp, J., dissenting).

97. *Christensen*, 673 So. 2d at 146.

98. 668 So. 2d 638 (Fla. 3d Dist. Ct. App. 1996).

99. *Id.* at 638.

100. *Florida Bar v. Birdsong*, 661 So. 2d 1199 (Fla. 1995).

101. *Id.* at 1200.

102. *Id.*

103. *Id.* at 1201.

104. 668 So. 2d 583 (Fla. 1996).

105. *Id.* at 584.

counsel may contact *former* employees of a represented corporation and, if so, exactly which former employees are subject to such contact. Rule 4-4.2 precludes a lawyer from contacting someone who is represented by counsel without that counsel's consent.¹⁰⁶ The rule, however, does not expressly define exactly who within the corporate structure is considered to be represented by a corporation's lawyer.¹⁰⁷ The comment to rule 4-4.2 offers guidance concerning *ex parte* communication with *current* officers and employees, but does not answer the former employee question.¹⁰⁸ In 1989, the Florida Bar Board of Governors approved an advisory ethics opinion, which concluded that it was permissible for a lawyer to contact any former officer or employee of a represented corporation without the consent of the

106. Rule 4-4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

RPC 4-4.2 (1995).

107. *Id.*

108. The comment to rule 4-4.2 provides:

This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two (2) organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

RPC 4-4.2 cmt. (1987).

corporation's counsel, unless the person contacted was in fact represented by the corporation's counsel.¹⁰⁹ Opinion 88-14 cautioned that the communicating lawyer was forbidden to inquire into any attorney-client privileged matters.¹¹⁰

Throughout the intervening years, courts have given varying degrees of acceptance to the reasoning articulated in Opinion 88-14.¹¹¹ While earlier decisions by both Florida and federal courts tended to question the opinion, in 1996 the pendulum seemed to swing the other way. The Third District Court of Appeal heartily endorsed Opinion 88-14 in *Reynoso v. Greynolds Park Manor, Inc.*¹¹² Granting plaintiff's petition for a writ of certiorari to quash a trial court order forbidding plaintiff's counsel from conducting ex parte interviews of the defendant nursing home's former employees, the court held that "the proscription of Rule 4-4.2 does not extend to former corporate employees."¹¹³ The court relied on both Opinion 88-14 and American Bar Association Formal Opinion 91-359, and noted that its decision was in accord with "the great majority of the courts to have considered this issue."¹¹⁴ The court certified that its decision was in direct conflict with a prior second district decision¹¹⁵ in hope that the matter would be finally resolved by the Supreme Court of Florida.¹¹⁶

In another case involving ex parte communication with a nursing home's former employees, the Fourth District Court of Appeal aligned itself

109. Fla. Bar Comm. on Professional Ethics, Op. 88-14 (1989).

110. *Id.* Although not mentioned in the opinion, the communicating lawyer "shall not state or imply that the lawyer is disinterested" and, when appropriate, must take reasonable efforts to correct any misunderstanding of the lawyer's role. RPC 4-4.3 (1987).

111. *See, e.g.,* *Rentclub v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651 (M.D. Fla. 1992), *aff'd*, 43 F.3d 1439 (11th Cir. 1995); *Lang v. Reedy Creek Improvement Dist.*, 888 F. Supp. 1143 (M.D. Fla. 1995); *United States v. Florida Cities Water Co.*, No. 93-281-CIV-FTM-21, 1995 U.S. Dist. LEXIS 7507 (M.D. Fla. Apr. 26, 1995); *Browning v. AT&T Paradyne*, 838 F. Supp. 1564 (M.D. Fla. 1993); *Barfuss v. Diversicare Corp. of Am.*, 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995); *Manor Care of Dunedin, Inc. v. Keiser*, 611 So. 2d 1305 (Fla. 2d Dist. Ct. App. 1992).

112. 659 So. 2d 1156 (Fla. 3d Dist. Ct. App. 1995).

113. *Id.* at 1157.

114. *Id.*

115. *Id.* at 158. *See Barfuss v. Diversicare Corp. of Am.*, 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995).

116. *Reynoso*, 659 So. 2d at 1158. The supreme court's conflict jurisdiction, however, was never invoked pursuant to Rule 9.030(a)(2)(A) of the *Florida Rules of Appellate Procedure*.

with *Reynoso* and approvingly cited Opinion 88-14.¹¹⁷ The appellate court held that the trial court departed from the essential requirements of law in entering an order prohibiting such contacts and requiring the communicating attorney to disclose any notes and statements taken as a result of the contacts.¹¹⁸ The court's decision was also certified by the appellate court as directly conflicting with the Second District's decision.¹¹⁹ Thus, the stage is now set for a supreme court opinion providing guidance in this problematic area.

Reynoso and *Schwartz* were not the only Florida cases facing the issue of contacts with former corporate employees. The First District Court of Appeal had the chance to squarely address the question, but managed to avoid doing so. Once again, *Boyd v. Pheo, Inc.*¹²⁰ involved contacts with a nursing home's current and former employees. The trial court's protective order barred plaintiff's counsel from contacting certain current and former employees of the defendant nursing home.¹²¹ While acknowledging the certiorari jurisdiction that had been granted by the Third District Court of Appeal to decide the question, the First District Court of Appeal concluded that the exercise of its certiorari jurisdiction was not warranted because the likelihood of irreparable harm arising from the trial court's order had not been demonstrated.¹²² The court reasoned:

[T]he order in this case does not prevent petitioner from engaging in discovery. Rather, it merely precludes her use of investigative techniques less formal than those called for in the rules governing discovery. Nothing in the order precludes petitioner from utilizing common discovery techniques to identify respondents' current and former employees (as it appears she has already done), and petitioner is not

117. Estate of Schwartz v. H.B.A. Management, Inc., 673 So. 2d 116 (Fla. 4th Dist. Ct. App. 1996).

118. *Id.* at 118.

119. *Id.* at 119.

120. 664 So. 2d 294 (Fla. 1st Dist. Ct. App. 1995).

121. The order prohibited *ex parte* contact with "present and former employees who directly participated in the care of the decedent," but did not bar such contact with "former employees who did not directly participate in such care." *Id.* at 295.

122. *Id.* at 295-96.

precluded from then deposing any witnesses she so identifies.¹²³

Failure to honor the proscriptions of rule 4-4.2 can lead to adverse disciplinary consequences. Many lawyers do not realize that this rule prohibits them from even copying opposing counsel's client on correspondence directed to opposing counsel.¹²⁴ A lawyer who knowingly communicated with opposing counsel's client in this fashion was suspended from practice for ten days in *Florida Bar v. Nunes*.¹²⁵

C. Trial Conduct

The arena in which a lawyer most vigorously acts as an advocate for the client is in the courtroom during trial. A number of 1996 authorities addressed aspects of a lawyer's trial conduct, with particular attention placed on the proper bounds of jury argument.

Attempting to "judge shop" by hiring co-counsel in order to force a judge's recusal from the case was disapproved in *Robinson v. Boeing Co.*¹²⁶ The Eleventh Circuit Court of Appeals decided that, in order to avoid unnecessary delay in an active case, a federal district court may deny a litigant's request to hire additional counsel that would likely cause the trial judge's recusal.¹²⁷ The court noted that the apparent motivation of the party to create disqualification of the trial judge may be considered in ruling on motions to add or substitute counsel.¹²⁸

All lawyers know that rule 4-3.1 prohibits the filing of frivolous claims or defenses.¹²⁹ Yet cases citing or discussing this rule are rare, especially

123. *Id.*

124. The Florida Bar Professional Ethics Committee has long considered such conduct to be improper. See Fla. Bar Comm. on Professional Ethics, Op. 76-21 (1977).

125. 661 So. 2d 1202, 1204 (Fla. 1995).

126. 79 F.3d 1053, 1056 (11th Cir. 1996). *Accord* Town Centre of Islamorada, Inc. v. Overby, 592 So. 2d 774, 776 (Fla. 3d Dist. Ct. App. 1992) (stating that "[o]rdinarily, a party may not bring an attorney into a case after it has been assigned to a judge, and then move to disqualify the judge on grounds that the judge has a bias against the attorney.").

127. *Robinson*, 79 F.3d at 1056.

128. *Id.* at 1055.

129. Rule 4-3.1 provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a pro-

outside of the disciplinary context. *P.T.S. Trading Corp. v. Habie*¹³⁰ concerned a lawyer who, ironically, filed what was determined to be a baseless abuse of process claim. A husband and wife were engaged in an apparently rancorous dissolution of marriage case.¹³¹ The parties were living in Guatemala when his wife moved to Florida and began dissolution proceedings.¹³² The wife obtained an ex parte injunction freezing assets of a company allegedly controlled by husband.¹³³ The dissolution action subsequently was settled, and the freeze order was lifted.¹³⁴

Despite the husband's failure to honor the settlement agreement, his counsel filed an abuse of process suit against the wife and all lawyers who had worked for her in connection with the dissolution matter.¹³⁵ The suit alleged that the freeze order had been improperly secured for the unlawful purpose of forcing the husband to settle.¹³⁶ The trial court granted the wife's motion for summary judgment.¹³⁷ The Fourth District Court of Appeal affirmed, denouncing the conduct of the husband and his lawyers and awarding attorney's fees to the wife under section 57.105(1) of the *Florida Statutes*.¹³⁸ The court stated that "this lawsuit is utterly without any basis in law or fact and was filed in bad faith."¹³⁹ Quoting rule 4-3.1, the court

ceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 4-3.1 (1987).

130. 673 So. 2d 498 (Fla. 4th Dist. Ct. App. 1996).

131. *Id.* at 499.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Habie*, 673 So. 2d at 500.

136. *Id.*

137. *Id.*

138. *Id.* (applying FLA. STAT. § 57.105(1) (1993)). Section 57.105(1) currently provides:

(1) The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, that the losing party's attorney is not personally responsible if he or she as acted in good faith, based on the representations of his or her client. If the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the defense, the court shall also award pre-judgment interest.

FLA. STAT. § 57.105(1) (1995).

139. *Habie*, 673 So. 2d at 499.

concluded its opinion by calling the lawyer's actions to the attention of The Florida Bar.¹⁴⁰

The use of improper jury arguments was addressed in a number of appellate decisions, with trial court judgments being reversed in several cases. The improper arguments ordinarily violate rule 4-3.4(e),¹⁴¹ but whether reversal is required depends on a variety of factors, including: 1) the severity of the offending remarks; 2) whether objections were made by opposing counsel; and 3) the law of the district in which the remarks occurred.

In *Muhammad v. Toys "R" Us*,¹⁴² the First District Court of Appeal determined that defense counsel's argument violated RPC 4-3.4(e) where counsel: 1) suggested that plaintiff may have already settled with a non-party; 2) gave personal opinions regarding evidence and damages sought; 3) suggested that plaintiff's expert did not testify at trial because his deposition testimony was "ludicrous;" and 4) in attacking plaintiff's credibility, related a personal story about a family incident.¹⁴³ Despite the fact that the trial court had sustained some of plaintiff's objections and issued curative instruction, a new trial was ordered since "the collective import of counsel's personal injections, and irrelevant and inflammatory remarks, was so extensive as to have prejudicially pervaded the entire trial . . ." ¹⁴⁴ This case is noteworthy because the first district urged trial courts to police these matters closely in order to avoid having judgments reversed and to curtail "unseemly conduct that lowers the professional reputation of the Bar and brings disrepute to our judicial system . . ." ¹⁴⁵

*Baptist Hospital v. Rawson*¹⁴⁶ was another reversal by the First District Court of Appeal. The improper arguments in this case so affected the fairness of the proceeding that a new trial was required even in the absence

140. *Id.* at 500.

141. Rule 4-3.4(e) provides that a lawyer shall not:

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.

RPC 4-3.4(e) (1993).

142. 668 So. 2d 254 (Fla. 1st Dist. Ct. App. 1996).

143. *Id.* at 258.

144. *Id.* at 259.

145. *Id.* at 259 n.1.

146. 674 So. 2d 777 (Fla. 1st Dist. Ct. App. 1996).

of objections by defense counsel.¹⁴⁷ Comments by plaintiff's counsel concerning: 1) his personal views of the defendant hospital's actions¹⁴⁸ and the validity of its legal defenses;¹⁴⁹ 2) his perception of the jury's mission;¹⁵⁰ and 3) his personal reaction to the injuries suffered by the plaintiff,¹⁵¹ were deemed to violate rule 4-3.4(e).¹⁵²

The Fourth District Court of Appeal also reversed a case due to improper argument despite the lack of objections. In *Norman v. Gloria Farms*,¹⁵³ the court concluded that the offending remarks constituted fundamental error because of "the nature of the remarks, their collective import and their pervasiveness throughout closing argument"¹⁵⁴ Defense counsel repeatedly made statements that the court believed improperly appealed to the "passions and prejudices of this jury on the critical issues of liability and financial responsibility."¹⁵⁵ Counsel "went far beyond the traditionally impermissible golden rule arguments" by urging the jury to act, in effect, as "the conscience of the community."¹⁵⁶ Specifically, the arguments appealed to the prejudices and self-interest of the jurors by imploring them to make their decision based on how it would affect them personally and others in their community.¹⁵⁷ These arguments, in the court's opinion, went beyond the mere violation of rule 4-3.4(e) due to "their potential impact on the integrity of the fact-finding process"¹⁵⁸ *Norman* is useful for two reasons. First, it describes the fourth district's view on the issue of whether arguments that are improper, but not objected to, can be the basis of a reversal. Second, the opinion reviews the positions taken on this issue by other district courts.¹⁵⁹

147. *Id.* at 779.

148. Plaintiff's counsel stated that the defendant's decision not to take the injured plaintiff to the hospital emergency room "was the most ridiculous decision that anybody has ever made in history." *Id.* at 778.

149. Comments included statements that the hospital's defenses were "unbelievable" and "insulting." *Id.* at 779.

150. "If you let them get away with irresponsible medicine, then you breed irresponsible medicine." *Id.*

151. Counsel stated that he woke up with nightmares after viewing his client's day-in-the-life video. *Rawson*, 674 So. 2d at 779.

152. *Id.*

153. 668 So. 2d 1016 (Fla. 4th Dist. Ct. App. 1996).

154. *Id.* at 1024.

155. *Id.* at 1021.

156. *Id.*

157. *Id.*

158. *Norman*, 668 So. 2d at 1024.

159. *Id.* at 1023 n.7.

The scope of *Norman* was explained by the concurring opinion in another Fourth District Court of Appeal case, *Donahue v. FPA Corp.*¹⁶⁰ In *Donahue*, defense counsel referred to matters not in evidence and offered a personal attack on the credibility of plaintiff's expert.¹⁶¹ No objections, however, were made regarding these comments.¹⁶² The concurring opinion stated that these remarks violated rule 4-3.4(e), but viewed *Norman* as requiring reversal only in extreme cases.¹⁶³ Accordingly, the opinion warned lawyers practicing in the fourth district that "if counsel intend to appeal to this court, they would be well-advised to object" to improper argument at trial.¹⁶⁴

A similar result was reached by the First District Court of Appeal in *Rockman v. Barnes.*¹⁶⁵ At trial, plaintiff's counsel violated rule 4-3.4(e) by expressing his personal beliefs concerning the evidence presented.¹⁶⁶ Defense counsel objected, the objections were sustained, and the judge issued curative instructions.¹⁶⁷ Nevertheless, on appeal the defendant argued that reversal of the judgment in favor of plaintiff was warranted because the improper arguments constituted reversible error.¹⁶⁸ While noting that it "definitely [did] not condone the injection of the personal opinion of plaintiff's counsel into argument before the jury[.]" the appellate court believed that a "fair trial was conducted despite the improprieties of counsel" and declined to reverse the judgment.¹⁶⁹ As in *Norman*, one judge concurred specially to state his view that precedent in the first district did not require reversal merely because arguments violated rule 4-3.4(e), but that the determinative question was whether "the conduct was so egregious as to affect the fairness of [the] proceedings."¹⁷⁰

Yet another judge, this time from the Second District Court of Appeal, concurred specially to comment on the proper standards to be used by appellate courts in determining whether improper arguments warrant the

160. 677 So. 2d 882 (Fla. 4th Dist. Ct. App. 1996) (Klein, J., concurring specially).

161. *Id.* at 883.

162. *Id.*

163. *Id.* at 884.

164. *Id.*

165. 672 So. 2d 890 (Fla. 1st Dist. Ct. App. 1996).

166. *Id.* at 891.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Rockman*, 672 So. 2d at 892 (Wolf, J., concurring specially).

granting of a new trial. In *D'Auria v. Allstate Insurance Co.*,¹⁷¹ the concurring judge expressed the opinion that defense counsel's remarks to the jury violated rule 4-3.4(e).¹⁷² The remarks in question included the injection of counsel's personal opinions, appeals to the jurors as the community's conscience, and "character assassinations" on the plaintiff, her counsel, and her witnesses.¹⁷³ No objections or motions for mistrial, however, were lodged by plaintiff's counsel and the appellate court affirmed the judgment.¹⁷⁴ The concurring opinion cites approvingly to another second district decision, *Hagan v. Sun Bank of Mid-Florida*.¹⁷⁵ *Hagan* contains a detailed analysis of the relationship between improper argument and reversible error that will be useful to both attorneys and judges in the second district.¹⁷⁶

The Third District Court of Appeal found a debatable argument to be permissible in *Forman v. Wallshein*.¹⁷⁷ In this case, the court decided that, in a closing argument in a civil case, it was not improper argument for counsel to call opposing party a "liar" where there was a basis in the evidence to do so.¹⁷⁸ Additionally, the court noted that using the phrase "I think" or "I believe" in closing argument does not always constitute a prohibited expression of personal opinion.¹⁷⁹ Such phraseology is permissible where it is evident from the context that counsel is merely employing a figure of speech.¹⁸⁰

Interestingly, although a significant number of appellate opinions condemned improper jury arguments as an ethical infraction, only one reported disciplinary case dealt with this issue.¹⁸¹ In *Kelner*, a lawyer violated both rule 4-3.4(e) and the court's order by repeatedly referring in trial to matters that he did not reasonably believe to be relevant or supported by admissible evidence.¹⁸² The lawyer's improper argument resulted in a

171. 673 So. 2d 147 (Fla. 2d Dist. Ct. App. 1996).

172. *Id.* at 147 (Antoon, J., concurring specially).

173. *Id.*

174. *Id.*

175. *Id.* at 147-48 (referring to *Hagan v. Sun Bank of Mid-Florida*, 666 So. 2d 580 (Fla. 2d Dist. Ct. App. 1996)).

176. *Hagan*, 666 So. 2d at 587. Although the court in *Hagan* indicated that the arguments in question there were unprofessional, it made no statements regarding whether they violated the RPC. *Id.*

177. 671 So. 2d 872 (Fla. 3d Dist. Ct. App. 1996).

178. *Id.* at 874.

179. *Id.* at 875.

180. *Id.*

181. *Florida Bar v. Kelner*, 670 So. 2d 62 (Fla. 1996).

182. *Id.* at 63.

mistrial.¹⁸³ The supreme court, in publicly reprimanding the lawyer, commented that, while the lawyer “has a duty to zealously represent his client, this duty does not require that he violate a court order and produce a mistrial.”¹⁸⁴

D. Termination of Representation

The point at which an attorney-client relationship may or must be terminated is often not clear to counsel.¹⁸⁵ Nor is it always clear to the

183. *Id.*

184. *Id.*

185. Rule 4-1.16 provides:

(a) When Lawyer Must Decline or Terminate Representation. Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) When Withdrawal Is Allowed. Except as stated in subdivision (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) Compliance With Order of Tribunal. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Protection of Client’s Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

RPC 4-1.16 (1995).

courts, when court approval is required.¹⁸⁶ This uncertainty is exacerbated when counsel is court-appointed. *Roberts v. State*¹⁸⁷ set forth the Fourth District Court of Appeal's helpful analysis of how a court should respond to motions to withdraw. In particular, motions that are filed by court-appointed criminal defense counsel in various factual circumstances.¹⁸⁸ Appointed counsel in *Roberts* represented a criminal defendant on several felony charges.¹⁸⁹ A plea agreement was reached after a jury was selected.¹⁹⁰ Just prior to sentencing, defense counsel moved to withdraw, citing an irretrievably broken attorney-client relationship.¹⁹¹ The motion, however, did not include a request for a hearing on the withdrawal issue prior to the sentencing hearing.¹⁹² At the sentencing hearing, the lawyer informed the court that his client wished to withdraw the guilty plea on the ground that the lawyer misled or coerced the client into agreeing to the plea bargain.¹⁹³ Despite defense counsel's request that the court grant his withdrawal and appoint a special public defender to argue the motion to withdraw the plea for the defendant, the court conducted an inquiry of the defendant regarding the plea withdrawal issue.¹⁹⁴ It then denied both counsel's motion to withdraw from the case and defendant's motion to withdraw the plea.¹⁹⁵

On appeal the fourth district reversed, concluding that the trial court had erred in not hearing, and granting, counsel's motion to withdraw before moving on to the matter of defendant's motion to withdraw the plea.¹⁹⁶ The court's opinion pointed out that "[t]here is a spectrum of reasons for a public defender or court-appointed counsel to file a motion to withdraw, with differing responses required by the trial courts."¹⁹⁷ At one extreme, the trial court is required to grant a motion to withdraw when a public defender certifies to the court that the interests of two clients are so adverse or hostile

186. Court approval is required before counsel may withdraw from a case in litigation. See FLA. R. JUD. ADMIN. 2.060(i).

187. 670 So. 2d 1042 (Fla. 4th Dist. Ct. App. 1996). The fourth district followed its decision in *Martin v. State*, 675 So. 2d 246 (Fla. 4th Dist. Ct. App. 1996).

188. *Roberts*, 670 So. 2d at 1044.

189. *Id.* at 1043.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Roberts*, 670 So. 2d at 1043.

194. *Id.*

195. *Id.*

196. *Id.* at 1045.

197. *Id.* at 1043.

that the attorney faces an irreconcilable conflict of interest.¹⁹⁸ At the other extreme, the court is not required to permit withdrawal on the basis of a general loss of confidence by the client in the attorney, standing alone.¹⁹⁹ In between these two extremes are the difficult situations where the client alleges some degree of incompetence on the part of the attorney.²⁰⁰

The *Roberts* court found that an actual conflict of interest was present because the very basis for the motion to withdraw the guilty plea was the alleged misconduct of the defense lawyer.²⁰¹ Yet, the trial court's refusal to permit the lawyer to withdraw from the representation placed the lawyer "in the impossible position of attempting to argue the motion to withdraw the plea . . ."²⁰² This conflict between the *personal interests* of defense counsel and his obligations to his client was a violation of rule 4-1.7(b).²⁰³ Thus, the trial court erred in not permitting counsel to withdraw.

Additionally, as an ethical matter the steps prescribed in rule 4-1.16²⁰⁴ must be followed when terminating representation of a client—even one who has not paid his or her bill. In *Florida Bar v. King*,²⁰⁵ the Supreme Court of Florida stated that, "while lawyers are entitled to charge for their services, they cannot simply abandon a case once they have provided services without compensation."²⁰⁶ For this and other transgressions, the lawyer was suspended for three years.²⁰⁷

III. THE LAWYER AS A FIDUCIARY

Regrettably, each year lawyers are disciplined for violating their fiduciary duties as holders of funds that belong to others, such as partners, third parties, and especially clients.²⁰⁸ A case that involved several of these

198. *Roberts*, 670 So. 2d at 1043 (citing *Guzman v. State*, 644 So. 2d 996, 999 (Fla. 1994)).

199. *Id.* at 1044 (citing *Johnson v. State*, 497 So. 2d 863, 868 (Fla. 1986)).

200. *Id.*

201. *Id.* at 1045.

202. *Id.*

203. *See supra* note 49.

204. *See supra* note 185.

205. 664 So. 2d 925 (Fla. 1995). *See also supra* note 20 and accompanying text.

206. *Id.* at 924 (citing *Atilus v. United States*, 406 F.2d 694, 696 (5th Cir. 1969)).

207. *Id.*; accord *Florida Bar v. Hooper*, 509 So. 2d 289 (Fla. 1987).

208. In addition to the cases discussed in this section, other cases involving a lawyer's failure to fulfill his or her fiduciary responsibilities are also addressed in this article. *See cases cited supra* p. 234. *See also cases cited infra* pp. 275–81.

aspects was *Florida Bar v. Benchimol*.²⁰⁹ While working for a law firm, the lawyer diverted client fee payments intended for the firm to his own use.²¹⁰ The lawyer's conduct was viewed all the more harshly because of the circumstances surrounding two affected clients: one client resided in Italy and was not conversant in English; the other was imprisoned in another state.²¹¹ Disbarment was ordered.²¹²

An interesting civil case in which the nature of a lawyer's trust fund obligations were discussed is *Kenet v. Bailey*.²¹³ A lawyer and his law firm represented a client in litigation and recovered funds, which were deposited into the firm's trust account pending resolution of related disputes through arbitration. The litigation concerned a business venture in which the lawyer and the client, among others, participated. Various agreements and releases were executed. A few years later, the firm disbursed the trust account funds to itself without notifying the client. At around the same time, the lawyer had the client execute another release. When the client learned that the trust funds had been removed by the firm, he sued the lawyer and the firm. Raising a rather novel defense, the firm asserted that the language of the release freed it from all "debts" owed to the client—including the trust funds. The trial court agreed and rendered summary judgment for the firm. Completely rejecting this defense, the appellate court reversed the judgment. The court colorfully stated that "the characterization of a client's funds held by an attorney in his trust account as constituting a 'debt' is woefully inadequate, akin to describing Dadeland Mall as a shoe store."²¹⁴ Citing Judge Cardozo's famous description of a fiduciary relationship,²¹⁵ the court went on to note that such a relationship is created when a lawyer receives trust funds to be used for a client's purposes and that misuse of such funds "is one of the most serious offenses a lawyer can commit."²¹⁶

Some decisions by the Supreme Court of Florida in response to petitions seeking amendments to the Rules Regulating The Florida Bar directly related to the lawyer's role as fiduciary. In a decision that received little notice but could affect the way many lawyers handle real estate closings, the court amended rule 5-1.1(g) to broaden the list of limited-risk trust account

209. 21 Fla. L. Weekly S226 (May 23, 1996).

210. *Id.* at S226.

211. *Id.*

212. *Id.* at S227.

213. 21 Fla. L. Weekly D982 (3d Dist. Ct. App. Apr. 24, 1996).

214. *Id.* at D983.

215. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

216. *Kenet*, 21 Fla. L. Weekly at D983.

deposits against which a lawyer may disburse before the funds are actually collected to include checks written by title agencies authorized to do business in Florida.²¹⁷

In contrast, other supreme court decisions regarding rules received much greater publicity.²¹⁸ A petition was filed by fifty Florida Bar members, who are also members of the Florida Chapter of the American Academy of Matrimonial Attorneys, seeking to create a new rule that would impose specific regulations and restrictions upon Florida lawyers practicing in "family law matters."²¹⁹ Proposed rule 4-1.18 would have required written fee agreements and a statement of client's rights, strictly prohibited attorney-client sexual relations, and addressed several controversial matters such as nonrefundable retainers and attorney's liens. The supreme court declined to adopt the proposed rule, citing two reasons. First, the court agreed with the position taken by the Florida Bar Board of Governors that no justification was shown to warrant treating family law practitioners differently than other bar members.²²⁰ Second, the court noted that its recent adoption of a rule governing a lawyer's sexual relationships with clients²²¹ addressed some of the concerns raised by the petitioners.²²²

Finally, in *Bankers Trust Realty, Inc. v. Kluger*²²³ the Third District Court of Appeal addressed the proper pleading of a claim for breach of fiduciary duty against a lawyer. Affirming the trial court's dismissal for

217. Florida Bar re Amendments to Rules Regulating The Florida Bar, 658 So. 2d 930, 951 (Fla. 1995). Prior to the amendment to rule 5-1.1(g), a lawyer could disburse against checks written by licensed title insurance agencies, but not "title agencies."

218. See, e.g., Mark D. Killian, *Court Okays New Bar Rules*, FLA. B. NEWS, Aug. 15, 1995, at 1; Mark D. Killian, *Petition Draws Fire*, FLA. B. NEWS, Sept. 1, 1995, at 1.

219. Amendment to Rules Regulating The Florida Bar -- Rule 4-1.18, Client-Lawyer Relationships in Family Law Matters, 662 So. 2d 1246 (Fla. 1995).

220. *Id.* at 1247.

221. Florida Bar re Amendments to Rules Regulating The Florida Bar, 658 So. 2d 930 (Fla. 1995). Subdivision (i) of rule 4-8.4, "Misconduct," provides that a lawyer shall not "engage in sexual conduct with a client that exploits the lawyer-client relationship." RPC 4-8.4(i) (1987). Rule 4-8.4 appears to be somewhat less restrictive than proposed rule 4-1.18, which was rejected by the court. Proposed rule 4-1.18 would have flatly prohibited the commencement of an attorney-client sexual relationship, while rule 4-8.4(i) seems to permit attorney-client sexual conduct unless it "exploits" the attorney-client relationship. Additionally, the comment to rule 4-8.4(i) further restricts the reach of the rule: "For purposes of this subdivision, client means an individual, not a corporate or other nonpersonal entity, and lawyer refers only to the lawyer(s) engaged in the legal representation and not other members of the law firm." RPC 4-4.8(i) cmt.

222. *Id.*

223. 672 So. 2d 897 (Fla. 3d Dist. Ct. App. 1996).

failure to state a cause of action, the appeal's court held that the specifics of the alleged breach must be pleaded. It is not sufficient for a plaintiff to simply allege a legal conclusion such as failure to timely act; rather, the plaintiff must allege facts showing not only the damages allegedly suffered, but the causal relationship between the attorney's allegedly deficient acts and the damages.²²⁴

IV. THE LAWYER AS AN OFFICER OF THE COURT

Lawyers are commonly referred to as "officers of the court."²²⁵ In our three-branch system of government, a lawyer is more than just a client's agent. The Rules of Professional Conduct, as well as case law,²²⁶ impose upon a lawyer obligations to the court (or the "justice system") that sometimes limit—or even conflict with—the lawyer's duties to the client. For example, in an *ex parte* proceeding a lawyer must inform the court of all relevant facts, even when the facts are adverse to the lawyer's client.²²⁷ Although the tension between the lawyer's duties to both the client and the court can create ambiguities regarding a lawyer's proper role in a particular situation, it is clear that a professionally responsible lawyer simply must have a sense of the scope of his or her duties as an officer of the court.²²⁸

224. *Id.* at 898.

225. For example, the very first sentence of the preamble to the *Rules of Professional Conduct* provides: "A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." RPC Preamble (1987) (emphasis added). The preamble mentions this role several other times as well. RPC Preamble (1987). "A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. . . . Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities." *Id.* Additionally, the Comment to rule 4-6.1, which is titled "Pro Bono Public Service," states in part: "As an officer of the court, each member of The Florida Bar in good standing has a professional responsibility to provide pro bono legal service to the poor." RPC 4-6.1 (1995).

226. *See, e.g.*, 84 Lumber Co. v. Cooper, 656 So. 2d 1297, 1300 (Fla. 2d Dist. Ct. App. 1994) (holding that a lawyer has ethical obligation, as an officer of the court, to immediately raise before a trial court the fundamental issue of lack of subject matter jurisdiction, after it becomes apparent, in order to prevent an unnecessary expenditure of precious client and judicial resources).

227. RPC 4-3.3(d) (1987).

228. Awareness of this role as "officer of the court" becomes even more critical when one considers the new "professionalism" initiatives that are springing up. *See, e.g.*, Gary Blankenship, *Bar Panel Seeks Okay For a Center for Professionalism*, FLA. B. NEWS, Apr. 1, 1996, at 1; Gary Blankenship, *Professionalism on Front Burner*, FLA. B. NEWS, July 15, 1996, at 1.

The lawyer appeared to lack this sense in *Florida Bar v. Tobin*²²⁹ and, consequently, was suspended from practice for forty-five days. The lawyer represented a company in an action against an insurer. Judgment was rendered for the company, and the insurer deposited funds into the court registry in satisfaction of the judgment. Some of the funds were disbursed pursuant to court order. The lawyer's associate then hand-delivered a motion to the court requesting release of the remaining funds; the insurer was not timely noticed. In an ex parte proceeding, the associate represented to the court that the motion was unopposed. The court granted the motion. The funds were released and given to the president of the lawyer's corporate client. Needless to say, when the insurer learned of these actions it immediately attempted to recover the improperly withdrawn funds. The court ordered the lawyer and the client to return the funds, but the lawyer never did so.²³⁰ In the subsequent disciplinary proceeding, the supreme court agreed with the referee²³¹ that the lawyer's conduct violated his duty of candor to the court under rule 4-3.3(d)²³² by not providing the court with all of the necessary material facts in the ex parte proceeding.²³³ The lawyer also violated rule 4-3.4(c)²³⁴ by disobeying an obligation under the court's rules.²³⁵

A lawyer was disciplined for what amounted to a lack of professionalism in *Florida Bar v. Uhrig*.²³⁶ While representing a client in a child support matter, the lawyer mailed an "insulting and highly unprofessional"²³⁷ five-page letter to the client's ex-husband. The lawyer acknowledged that the letter caused the recipient to feel "disparaged, humiliated, offended, disap-

229. 674 So. 2d 127 (Fla. 1996).

230. *Id.* at 128.

231. The Supreme Court of Florida appoints a county or circuit judge to preside as "referee" over the trial of disciplinary cases. RPC 3-7.6(a) (1987).

232. Rule 4-3.3(d) provides:

Ex Parte Proceedings. In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RPC 4-3.3(d) (1995).

233. *Tobin*, 674 So. 2d at 128.

234. Rule 4-3.4(c) provides that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." RPC 4-3.4(c) (1987).

235. *Tobin*, 674 So. 2d at 129.

236. 666 So. 2d 887 (Fla. 1996).

237. *Id.* at 887. Among other things, the letter included "an inflammatory simile comparing [the recipient]'s opinions to body odor . . ." *Id.* at 888.

pointed, and angry.”²³⁸ Noting that rule 4-8.4(d)²³⁹ prohibits lawyers from knowingly humiliating litigants on any basis, the supreme court publicly reprimanded the lawyer for violating this rule. *Uhrig* is especially significant because it appears to be the first case in which a lawyer was disciplined solely for violating the anti-disparagement provisions of RPC 4-8.4 since their adoption in 1993.²⁴⁰

As mentioned above, the lawyer’s unique role as an “officer of the court” arises from our three-branch governmental system. The Supreme Court of Florida had occasion in *TGI Friday’s, Inc. v. Dvorak*²⁴¹ to explain the different roles that the judicial branch and the legislative branch play in our legal system. In upholding the constitutionality of the offer of judgment statute²⁴² and its attorney’s fee provision, the court stated:

Article V, section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts of this State. The Legislature, on the other hand, is entrusted with the task of enacting substantive law. In *Leapai v. Milton*, 595 So. 2d 12, 14 (Fla. 1992), we noted that the judiciary and legislature must work together to give effect to laws that combine substantive and procedural provisions in such a manner that neither branch encroaches on the other’s constitutional powers.²⁴³

The Fourth District Court of Appeal ventured into an area that has rarely been mentioned in recent judicial decisions—the common law doctrines of champerty and maintenance. In *Kraft v. Mason*,²⁴⁴ the court

238. *Id.*

239. Rule 4-8.4 (d) provides that a lawyer shall not “‘engage in conduct’ in connection with the practice of law ‘that is prejudicial to the administration of justice,’ including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.” RPC 4-8.4(d) (1987).

240. Florida Bar re Amendments to Rules Regulating The Florida Bar, 624 So. 2d 720 (Fla. 1993).

241. 663 So. 2d 606 (Fla. 1995).

242. FLA. STAT § 768.79 (1987).

243. *Dvorak*, 663 So. 2d at 611.

244. 668 So. 2d 679 (Fla. 4th Dist. Ct. App. 1996).

offered modern definitions of these concepts.²⁴⁵ These doctrines are not terribly relevant to most practitioners, but they may become more so in the wake of the renewed interest in lawyer advertising and solicitation that has followed the United States Supreme Court's 1995 decision in *Florida Bar v. Went For It, Inc.*²⁴⁶

V. THE LAWYER AS A BUSINESSPERSON

Decisions connected with the business aspects of practicing law were plentiful during the survey period. Cases, ethics opinions, and rule amendments were handed down in business-related areas such as attorney's fees, the organization and operation of law firms, a lawyer's relationship with nonlawyers who might assist the lawyer in the practice of law, and marketing activities undertaken by lawyers and law firms.

A. Attorneys' Fees

An extremely important decision addressing attorney's fee agreements in light of public policy was rendered by the Supreme Court of Florida in *Chandris, S.A. v. Yanakakis*.²⁴⁷ *Chandris* should be a wake-up call for those Florida lawyers who have not paid sufficient attention to the details of the rules governing contingent fee contracts and referral fees. The supreme court has served notice that strict compliance with these rules is required in order for these agreements to be enforceable.

Chandris was rendered in response to certified questions of law posed by the Eleventh Circuit Court of Appeals. The federal case concerned a claim of tortious interference with contracts for legal representation.²⁴⁸ An injured foreign seaman was treated in a Florida hospital. There he met with a Florida resident who was licensed to practice law in Massachusetts, but not in Florida. The seaman signed a contingent fee representation agreement

245. *Id.* at 682. The court considered the "modern view" of "maintenance" to be "the act of one improperly, and for the purpose of stirring up litigation and strife, encouraging others either to bring [an] action[] or to . . . [defend a suit] which they have no right to make" *Id.* at 682 (quoting 9 FLA. JUR. 2D *Champerty and Maintenance* § 1 (1979)). The court approved the definition of "champerty" as "a form of maintenance wherein one will carry on a suit in which he has no subject matter interest at his own expense or will aid in doing so in consideration of receiving, if successful, some part of the benefits recovered." *Id.* (citations omitted). "[O]fficious intermeddling is a necessary element of champerty." *Id.*

246. 115 S. Ct. 2371 (1995).

247. 668 So. 2d 180 (Fla. 1996).

248. *Id.* at 181.

with the Massachusetts attorney. The Massachusetts attorney then contacted a local Florida law firm, and the seaman subsequently signed a contingent fee agreement with the Massachusetts attorney and the Florida firm. Although signed by the seaman and the Massachusetts attorney, this second fee agreement was not signed by the Florida law firm and was silent as to any division of fee between the lawyers involved. The seaman ultimately settled his case directly with the defendants and discharged the Massachusetts attorney and the Florida firm, who then sued the defendants for tortious interference.²⁴⁹

The supreme court concluded that, by entering into a contingent fee agreement in Florida with a putative client, an out-of-state lawyer who resides in Florida, but is not admitted to practice in this state, engages in a professional activity without proper authority and thus engages in the unauthorized practice of law as proscribed by *Florida Bar v. Savitt*.²⁵⁰ Consequently, the fee contract executed by the Massachusetts attorney was held to be void as against public policy.²⁵¹ The second fee contract did involve a Florida law firm but did not comply with the applicable requirements of rule 4-1.5.²⁵² Regarding this second fee agreement, the court

249. *Id.* at 181–82.

250. *Id.* at 184 (citing *Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978)).

251. *Id.* at 186. The fee contract was not signed by all participating attorneys; it did not spell out the division of fee between those attorneys; it did not provide that each participating attorney would have joint legal responsibility for the case and that the attorney should be available for consultation with the client. *Chandris*, 668 So. 2d 186.

252. Rule 4-1.5(f) provides:

(f) Contingent Fees. As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the

consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(A) The contract shall contain the following provisions:

(i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

(ii) "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client."

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33-1/3% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million;

plus

3. 20% of any portion of the recovery exceeding \$2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to \$1 million; plus
2. 30% of any portion of the recovery between \$1 million and \$2 million;

plus

3. 20% of any portion of the recovery exceeding \$2 million,

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33-1/3% of any recovery up to \$1 million; plus
2. 20% of any portion of the recovery between \$1 million and \$2 million;

plus

3. 15% of any portion of the recovery exceeding \$2 million.

d. An additional 5% of any recovery after notice of appeal is filed or post-judgment relief or action is required for recovery on the judgment.

(ii) If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in (f)(4)(B)(i), the client may petition the circuit court for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of such a contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) In cases where the client is to receive a recovery that will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall only be calculated on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, then this limitation does not apply. No attorney may separately negotiate with the defendant for that attorney's fee in a structured verdict or settlement where such separate negotiations would place the attorney in a position of conflict.

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply for circuit court authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this as-

stated: “[W]e hold that a contingent fee contract entered into by a member of The Florida Bar must comply with the rule governing contingent fees in order to be enforceable.”²⁵³ The court clearly declared its intent to adopt a bright line rule and appeared to reject any kind of “substantial compliance” standard. The court expressly rejected an existing line of district court of appeal cases “to the extent they may be read to hold that a contingent fee contract which does not comply with the Code of Professional Responsibility or the Rules Regulating The Florida Bar is enforceable by an attorney who claims fees based upon a noncomplying agreement.”²⁵⁴ A lawyer whose

pect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

RPC 4-1.5 (f) (1995).

Regarding the division of fees between lawyers in different firms (which includes referral fee situations), rule 4-1.5(g) provides:

(g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

- (1) the division is in proportion to the services performed by each lawyer; or
- (2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

RPC 4-1.5(g) (1995).

253. *Chandris*, 668 So. 2d at 185–86.

254. *Id.* at 185. Cases mentioned in the court’s opinion were: *Fernandes v. Barrs*, 641 So. 2d 1371 (Fla. 1st Dist. Ct. App. 1994) and *Harvard Farms, Inc. v. National Casualty Co.*, 617 So. 2d 400 (Fla. 3d Dist. Ct. App. 1993). Similar cases whose holdings would appear to be affected by *Chandris* include *Ganson v. Department of Admin.*, 554 So. 2d 522 (Fla. 1st Dist. Ct. App. 1989), *rev’d on other grounds*, 566 So. 2d 792 (Fla. 1990), and *Weaver v.*

contingent fee agreement does not comply with applicable rules is not *completely* foreclosed from collecting a fee; in a footnote, the court pointed out that such a lawyer “would still be entitled to the reasonable value of his or her services on the basis of quantum meruit.”²⁵⁵

The exact parameters of the *Chandris* decision remain to be determined. The case undoubtedly will spawn litigation, as clients seek to evade contingent fee obligations to their lawyers and lawyers attempt to avoid payment of referral fees to one another. In fact, the First District Court of Appeal has already indicated its uncertainty about the scope of the decision by certifying to the supreme court the question of whether the rule established in *Chandris* gives a private party standing to seek an injunction based on a violation of the Rules of Professional Conduct.²⁵⁶

Another bright line fee rule previously announced by the supreme court was relied upon by the Fourth District Court of Appeal in *Kocha & Jones, P.A. v. Greenwald*.²⁵⁷ The appellate court reversed a judgment in favor of a law firm that had withdrawn from a contingent fee case and subsequently sued the client for attorney’s fees.²⁵⁸ The court followed *Faro v. Romani*,²⁵⁹ which held that a lawyer who withdraws from representation prior to occurrence of the contingency upon his or own volition *forfeits all rights to compensation* (unless the client’s conduct made the lawyer’s continued representation either legally impossible or ethically improper).²⁶⁰

Another case that could be relevant to lawyers handling contingent fee cases was *Doremus v. Florida Energy Systems of South Florida, Inc.*²⁶¹ This case concerned the responsibility for attorney’s fees in a case in which a client had employed two or more lawyers in succession. When a client changes lawyers in a contingent fee case, the lawyers involved (i.e., the successor lawyer and the discharged lawyer(s)) often work out an arrangement whereby they agree on a split of the attorney’s fee called for in the client’s contract with the successor lawyer. For example, if the client signed a forty percent contingent fee agreement in a personal injury case with one lawyer, then subsequently discharged that lawyer and signed a similar

School Board of Leon County, 624 So. 2d 761 (Fla. 1st Dist. Ct. App. 1993), *review denied*, 634 So. 2d 629 (Fla.), *cert. denied*, 115 S. Ct. 119 (1994).

255. *Id.* at 186 n.4.

256. *See* Smith v. Bateman Graham, P.A., 21 Fla. L. Weekly D947, D948 (1st Dist. Ct. App. Apr. 19, 1996). *See* discussion *infra* p. 273.

257. 660 So. 2d 1074 (Fla. 4th Dist. Ct. App. 1995).

258. *Id.* at 1075.

259. 641 So. 2d 69 (Fla. 1994).

260. *Id.* at 71 (citations omitted).

261. 676 So. 2d 444 (Fla. 4th Dist. Ct. App. 1996).

contract with another lawyer, the two lawyers would agree²⁶² on an acceptable division of the forty percent fee amount that, per the contract, was due the second lawyer. This practice seems to be common, and some attorneys believe that it is required—especially in cases to which the maximum contingent fee schedule applies, such as personal injury matters.²⁶³

A 1980 First District Court of Appeal case, however, decided that a discharged attorney's quantum meruit fee in a contingent case is to be paid from the client's share of recovery, rather than as a portion of the successor counsel's fee. However, the first district case, *Adams v. Fisher*,²⁶⁴ was decided prior to the supreme court's imposition of a maximum contingent fee schedule in 1986.²⁶⁵ The question occasionally raised is whether the adoption of the fee schedule changes the result reached in *Adams*. Stated another way, the question is whether, in adopting the fee schedule, the supreme court intended to cap the amount that one client would pay in one case or whether the schedule was intended to limit the amount of fee that one attorney (perhaps one of several employed in succession) could charge one client in one case. Although no cases directly address this question, the decisions in *Doremus* and other cases²⁶⁶ indicate that *Adams* remains unaffected by the existence of the fee schedule. This means that the client, rather than the successor counsel, can be called upon to pay any quantum meruit fee²⁶⁷ owed to a discharged lawyer in a contingent fee case.²⁶⁸

262. Presumably with the client's written consent, as required by rule 4-1.5(g)(5). See *supra* note 252 and accompanying text.

263. *Id.*

264. 390 So. 2d 1248 (Fla. 1st Dist. Ct. App. 1980).

265. Florida Bar re Amendment to the Code of Professional Responsibility (Contingent Fees), 494 So. 2d 960 (Fla. 1986).

266. See, e.g., *Law Offices of Theodore Goldberg v. Fazio, Dawson, DiSalvo, Cannon, Abers & Podrecca*, 659 So. 2d 1200 (Fla. 3d Dist. Ct. App. 1995); *Stabinski, Funt & De Oliveira, P.A. v. Alvarez*, 490 So. 2d 159, 160 n.1 (Fla. 3d Dist. Ct. App. 1986).

267. See *Rosenberg v. Levin*, 409 So. 2d 1016 (Fla. 1982).

268. A successor attorney who enters into a contingent fee agreement at the maximum allowed rate and concludes the case with a minimum of work, or primarily as a result of discharged counsel's efforts, could be considered to have acted unethically by charging a clearly excessive fee in violation of rule 4-1.5(a). This rule provides:

(a) **Illegal, Prohibited, or Clearly Excessive Fees.** An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for

A novel argument concerning entitlement to fees was made—and rejected—in *Life Care Centers of America, Inc. v. Chiles*.²⁶⁹ A law firm represented a client in a class action against the state on contingent fee basis. The client withdrew from the class action and received no recovery in that suit. At about the same time, the client settled a preexisting dispute with the state. The trial court found that the preexisting dispute was not related to the class action and that it was not resolved on the strength of the class action, but nevertheless awarded a quantum meruit to the firm. The firm had argued that its efforts in the class action led to resolution of the other dispute. The first district reversed the fee award, ruling that as a matter of law the firm was entitled to no fee under *Rosenberg v. Levin*²⁷⁰ because the contingency (i.e., recovery in the class action initiated by the firm) never occurred.²⁷¹

B. *Organization and Operation of Law Firms*

The key development in this area was the supreme court's approval of rule changes that permit Florida lawyers to practice law in the form of a professional limited liability company or a registered limited liability partnership.²⁷² These forms now join the professional service corporation as corporate forms of practice that have been approved by the court.²⁷³

services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

RPC 4-1.5(a) (1987).

269. 674 So. 2d 873 (Fla. 1st Dist. Ct. App. 1996).

270. *Rosenberg*, 409 So. 2d at 1016.

271. *Chiles*, 674 So. 2d at 874.

272. Amendments to Rules Regulating The Florida Bar, 677 So. 2d 272 (Fla. 1996). As amended, rule 4-8.6 provides:

(a) Authorized business entities. Lawyers may practice law in the form of professional service corporations, professional limited liability companies, or registered limited liability partnerships organized or qualified under applicable law. A professional service corporation, a professional limited liability company, or a registered limited liability partnership is an authorized business entity under these rules.

(b) Practice of Law Limited to Members of The Florida Bar. No authorized business entity may engage in the practice of law in the state of Florida or render advice under or interpretations of Florida law except through officers, directors, partners, managers, agents, or employees who are qualified to render legal services in this state.

(c) Qualifications of Managers, Directors and Officers. No person shall serve as a partner, manager, director or executive officer of an authorized business entity and engaged in the practice of law in Florida unless such person is le-

gally qualified to render legal services in this state. For purposes of this rule the term “executive officer” shall include the president, vice-president, or any other officer who performs a policy-making function.

(d) Violation of Statute or Rule. A lawyer who, while acting as a shareholder, member, officer, director, partner, manager, agent, or employee of an authorized business entity and engaged in the practice of law in Florida, violates or sanctions the violation of the authorized business entity statutes or the Rules Regulating The Florida Bar shall be subject to disciplinary action.

(e) Disqualification of Shareholder, Member, or Partner; Severance of Financial Interests. Whenever a shareholder of a professional service corporation, a member of a professional limited liability company or partner in a registered limited liability partnership becomes legally disqualified to render legal services in this state, said shareholder, member, or partner shall sever all employment with and financial interests in such authorized business entity immediately. For purposes of this rule the term “legally disqualified” shall not include suspension from the practice of law for a period of time less than 91 days. Severance of employment and financial interests required by this rule shall not preclude the shareholder, member, or partner from receiving compensation based on legal fees generated for legal services performed during the time when the shareholder, member, or partner was legally qualified to render legal services in this state. This provision shall not prohibit employment of a legally disqualified shareholder, member, or partner in a position that does not render legal service nor payment to an existing profit sharing or pension plan to the extent permitted in rule 4-5.4(a)(3), or as required by applicable law.

(f) Cessation of Legal Services. Whenever all shareholders of a professional service corporation, or all members of a professional limited liability company, or all partners in a registered limited liability partnership become legally disqualified to render legal services in this state, the authorized business entity shall cease the rendition of legal services in Florida.

(g) Application of Statutory Provisions. Unless otherwise provided in this rule, each shareholder, member, or partner of an authorized business entity shall possess all rights and benefits and shall be subject to all duties applicable to such shareholder, member, or partner provided by the statutes pursuant to which the authorized business entity was organized or qualified.

RPC 4-8.6 (1987).

Rule 4-5.4(e) was amended to conform with the changes to rule 4-8.6 and currently provides:

(e) Nonlawyer Ownership of Authorized Business Entity. A lawyer shall not practice with or in the form of a business entity authorized to practice law for a profit if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RPC 4-5.4(e) (1987).

273. *See In re Florida Bar*, 133 So. 2d 554 (Fla. 1961).

C. Lawyer's Relationship With Nonlawyer Personnel

Several cases explored the permissible parameters of the relationship that a lawyer has with nonlawyers who may assist or participate with the lawyer in the practice of law. In *State v. Foster*,²⁷⁴ a criminal law case concerning the unlicensed practice of law, the First District Court of Appeal emphasized that a nonlawyer may not, on behalf of another person, question witnesses in *depositions* even under the immediate guidance and supervision of a licensed attorney. The only exceptions to this broad prohibition are "those instances in which the Supreme Court of Florida has expressly authorized nonlawyers to engage in practice under the immediate supervision of a licensed attorney," such as the law school third-year practice program.²⁷⁵

In *Florida Bar v. Beach*,²⁷⁶ a lawyer was disciplined because his working relationship with a paralegal firm overstepped permissible bounds. The lawyer purported to act as the paralegals' "supervising attorney" on an independent contractor basis. The lawyer discussed the legal needs of the paralegal firm's customers with the firm, reviewed documents prepared by the paralegal firm for its customers, and offered thirty minute consultations with those customers. The lawyer was paid seventy-five dollars per case by the paralegal firm.²⁷⁷

One of the firm's customers complained to the bar about services that the paralegal rendered to her as a direct result of the lawyer's advice. The supreme court suspended the lawyer from practice for ninety days for violating two Rules of Professional Conduct. First, the lawyer assisted nonlawyers in the unlicensed practice of law.²⁷⁸ The court noted that the

274. 674 So. 2d 747 (Fla. 1st Dist. Ct. App. 1996).

275. *Id.* at 754 (Joanos & Lawrence, JJ., concurring). See, e.g., Chapter 11, R. REGULATING FLA. BAR (law school practice program); Chapter 12, R. REGULATING FLA. BAR (emeritus attorneys pro bono participation program); Chapter 13, R. REGULATING FLA. BAR (authorized legal aid practitioners rule).

276. 675 So. 2d 106 (Fla. 1996).

277. *Id.* at 107.

278. Rule 4-5.4(a) provides:

(a) Sharing Fees with Nonlawyers. A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the

lawyer “improperly allowed [one of the paralegal firm’s owners] to act as his conduit for giving legal advice by obtaining and relaying, without supervision, case-specific information to persons whom [the lawyer] never actually met or consulted.”²⁷⁹ Essentially, this arrangement put the cart before the horse, with the lawyer working for the paralegal instead of vice versa. The court also agreed with the referee’s finding that the lawyer improperly shared legal fees with nonlawyers.²⁸⁰ Finally, despite the existence of “a close question,” the court found support in the record for the referee’s conclusion that no attorney-client relationship was formed between the lawyer and the complaining customer.²⁸¹ The court, however, took care to “caution lawyers that they should be very careful in placing themselves in such difficult positions.”²⁸²

Other working arrangements between lawyers and nonlawyers were condemned as unethical by the Florida Bar Professional Ethics Committee. In Florida Ethics Opinion 95-1, the Committee concluded that a Florida Bar member who maintains a law practice or otherwise holds himself or herself out as a lawyer may not ethically enter into a business arrangement with a nonlawyer to represent claimants in social security disability matters. Fees claimed by or paid to the bar member for such representation would be

total compensation that fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price; and

(4) bonuses may be paid to nonlawyer employees based on their extraordinary efforts on a particular case or over a specified time period, provided that the payment is not based on the generation of clients or business and is not calculated as a percentage of legal fees received by the lawyer or law firm.

RPC 4-5.4(a) (1987).

279. *Beach*, 675 So. 2d at 109.

280. Rule 4-5.5(b) provides that a lawyer shall not “assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law.” RPC 4-5.5(b) (1987).

281. *Beach*, 675 So. 2d at 109. The conclusion that the lawyer did not have an attorney-client relationship with the customer was important, because it had been alleged that the lawyer represented conflicting interests. The referee cited the following factors in concluding that an attorney-client relationship had not been established: The customer specifically sought assistance from the paralegal rather than the lawyer; the customer entered into contract with the paralegal, not the lawyer; the contract specifically disclaimed representation by the lawyer; and the customer never met the lawyer but dealt exclusively with the paralegal. *Id.*

282. *Id.*

considered legal fees, and thus this type of arrangement violates rule 4-5.4, which prohibits a lawyer from sharing legal fees with a nonlawyer.²⁸³

Similarly, in Florida Ethics Opinion 95-2 the Committee criticized a lawyer's proposed involvement with a corporation that represents clients in securities arbitration matters. The plan presented to the committee called for the corporation to somehow obtain clients and pay the inquiring attorney to represent those clients in negotiation and arbitration (if necessary). The corporation would pay the attorney in the form of a retainer and a percentage of the company's contingent fee. The Professional Ethics Committee pointed to problems concerning conflicts of interest, solicitation, fee-splitting, and assisting the unauthorized practice of law.

In the more traditional vein of lawyers' relationships with nonlawyers was *Florida Bar v. Burkich-Burrell*.²⁸⁴ The lawyer represented her husband in a claim arising from an auto accident. The client-husband's response to interrogatories failed to disclose a prior accident and related medical treatment, of which the lawyer-wife had personal knowledge.²⁸⁵ When charged with misrepresentation, the lawyer defended by asserting that the interrogatory answers had been prepared by her paralegal and that she had not reviewed them. Rejecting this defense, the supreme court stated that "an attorney has a duty to review a client's sworn answers to interrogatories for correctness, even when the answers have been prepared by the client and a paralegal."²⁸⁶

Even when an attorney merely shares space with a nonlawyer, the attorney must be careful to adhere to the guidelines set out in Florida Ethics Opinion 88-15. Failing to do so could result in the attorney being held ethically responsible for the nonlawyer's actions, as happened in *Florida Bar v. Flowers*.²⁸⁷

D. Marketing Activities of Lawyers

Rules regulating marketing activities by lawyers and law firms have changed greatly over the years, but one thing has remained constant: in-person solicitation of prospective clients with whom the lawyer has no prior professional relationship is strictly prohibited.²⁸⁸ Following the tragic crash

283. See *supra* note 278.

284. 659 So. 2d 1082 (Fla. 1995).

285. *Id.* at 1083.

286. *Id.* at 1084.

287. See discussion *supra* p. 234.

288. Rule 4-7.4(a) provides:

of a ValuJet airplane in the Florida Everglades, The Florida Bar asked the supreme court to impose emergency suspensions on two lawyers who were accused of engaging in prohibited solicitation of victims' family members. Although the court declined to suspend the lawyers, it enjoined the lawyers from any further contact with family or friends of the crash victims as well as from entering into employment agreements regarding the crash.²⁸⁹ Additionally, the court appointed a senior judge to scrutinize, in light of *Chandris*,²⁹⁰ any ValuJet crash employment agreements already entered into by either of the lawyers.

On the advertising side, the supreme court amended several rules affecting how lawyers may market themselves through direct mail communications and ads in the public media. Three changes were made to rules governing the filing of lawyer ads for review by the Florida Bar's Standing Committee on Advertising:²⁹¹ lawyers who advertise via direct mail are no longer required to file with the bar the names and addresses of persons to whom direct mail letters are sent;²⁹² a more specific definition was provided for "public services announcements," which can be exempt from the filing and review requirement;²⁹³ lawyers who fail to timely submit their ads for

(a) Solicitation. A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule.

RPC 4-7.4(a) (1987).

The long-standing, bright line rule against in-person solicitation could be in jeopardy. In 1993 the United States Supreme Court invalidated a rule barring Florida certified public accountants from in-person solicitation of accounting business. *Edenfield v. Fane*, 507 U.S. 761 (1993). Although the *Edenfield* court clearly distinguished lawyers from accountants, a federal judge in the Northern District of Georgia recently relied on *Edenfield* in striking down the State Bar of Georgia's ethics rule proscribing in-person solicitation of prospective clients. *See Falanga v. State Bar of Georgia*, No. 1:95-cv-2160-GET (N.D. Ga. Jul. 18, 1996).

289. *See Florida Bar v. Perez*, 676 So. 2d 415 (Fla. 1996); *Florida Bar v. Hernandez*, 676 So. 2d 414 (Fla. 1996).

290. *See supra* pp. 260-69.

291. *See generally* RPC 4-7.5.

292. *Florida Bar re Amendments to Rules Regulating The Florida Bar*, 658 So. 2d 930, 943 (Fla. 1995) (amending RPC 4-7.4(b)(2)(B)).

293. *Id.* at 945.

review as required are now subject to a “late fee” of \$250 per ad rather than the usual rate of \$50 per ad.²⁹⁴

One notable change was made to the substantive rules governing lawyer advertising. A new rule provides that all required disclosure statements²⁹⁵ must appear in each language used in the particular ad.²⁹⁶

Although a lawyer’s marketing efforts are usually aimed at acquiring new clients, ethics issues can arise when lawyers leave firms and attempt to take existing firm clients with them. In *Smith v. Bateman Graham, P.A.*,²⁹⁷ a lawyer who was leaving a firm mailed letters urging certain firm clients to come with him to his new practice. Attempting to stop what it viewed as improper solicitation, the firm sought to enjoin the lawyer from further contacts with firm clients on the ground that the lawyer had violated the ethics rules governing direct mail communications to prospective clients.²⁹⁸ The circuit court entered the injunction. On appeal, the first district dissolved the injunction on the grounds that the firm lacked standing to seek private enforcement of a bar ethics rule.²⁹⁹ Without addressing the merits of the firm’s allegations, the court held that violation of the RPC or of a

294. Amendments to Rules Regulating The Florida Bar, 677 So. 2d 272 (Fla. 1996) (amending RPC 4-7.5(d)(4)).

295. The Rules of Professional Conduct mandate that certain disclosure statements or information appear in various lawyer advertisements. For example, many ads must include these sentences: “The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, ask us to send you free written information about our qualifications and experience.” RPC 4-7.2(d). Also, the first sentence of all direct mail communications concerning a specific matter must be: “If you have already retained a lawyer for this matter, please disregard this letter.” RPC 4-7.4(b)(2)(G).

296. Amendments to Rules Regulating The Florida Bar, 677 So. 2d 272, 283 (Fla. 1996) (adding RPC 4-7.2(r)).

297. 21 Fla. L. Weekly D947 (1st Dist. Ct. App. Apr. 19, 1996).

298. The firm alleged that the letters violated subdivision (b)(1)(B) of rule 4-7.4, which provides:

(b) Written Communication.

(1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer’s behalf or on behalf of the lawyer’s firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer’s firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

....

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter[.]

RPC 4-7.4(b)(1)(B) (1987).

299. *Smith*, 21 Fla. L. Weekly at D947.

Professional Ethics Committee advisory opinions does not provide an adequate basis for instituting a private cause of action.³⁰⁰

VI. THE LAWYER AS A FLORIDA BAR MEMBER

Lawyers move in and out of various roles during their practice, but their role as a member of The Florida Bar remains constant. Membership in the bar carries with it a number of duties as spelled out in the *Rules of Professional Conduct*. Lawyers who fail to fulfill these ethical obligations, especially when their actions cause harm to clients or others, face disciplinary sanctions ranging from admonishment to disbarment.³⁰¹

One of the most common allegations appearing in grievance complaints filed with Florida Bar is that a lawyer neglected the client or the client's case. In *Florida Bar v. Rolle*,³⁰² a lawyer with serious problems in these areas received a ninety-one day suspension from the practice of law. Similarly, in *Florida Bar v. Morrison*,³⁰³ a lawyer who neglected client matters and who failed to timely respond to investigative inquiries from the bar³⁰⁴ was suspended for twelve months and thereafter until required restitution was made to an affected client.³⁰⁵ Another case in which restitution was ordered in connection with a disciplinary suspension was *Florida Bar v. Schramm*.³⁰⁶ Here, a lawyer neglected client matters and made false statements to a court in connection with a motion to disqualify a judge.

300. *Id.* at D948. The firm argued that the supreme court's decision in *Chandris* supported its position. See discussion *supra* pp. 260–69. The First District Court of Appeal disagreed, but nevertheless certified the following question to the supreme court as a question of great public importance:

UNDER THE RULE OF LAW ESTABLISHED IN *CHANDRIS, S.A. V. YANAKAKIS*, DOES A PRIVATE PARTY HAVE STANDING TO SEEK AN INJUNCTION BASED UPON AN ALLEGED VIOLATION OF THE RULES REGULATING THE FLORIDA BAR?

Smith, 21 Fla. L. Weekly at D948 (citations omitted).

301. See generally Chapter 3, R. REGULATING FLA. BAR (addressing "Rules of Discipline").

302. 661 So. 2d 301 (Fla. 1995).

303. 669 So. 2d 1040 (Fla. 1996).

304. Rule 4-8.4(g) provides that a lawyer shall not "fail to respond, in writing, to any inquiry by a disciplinary agency when such agency is conducting an investigation into the lawyer's conduct." RPC 4-8.4(g) (1987).

305. *Morrison*, 669 So. 2d at 1042.

306. 668 So. 2d 585 (Fla. 1996).

Other lawyers had disciplinary problems because they made misrepresentations to courts or while under oath. In *Florida Bar v. Inglis*,³⁰⁷ a lawyer was found guilty of, among other things, incompetent representation and lying under oath. This lawyer was subsequently disbarred.³⁰⁸ The misrepresentations at issue in *Florida Bar v. Walker*³⁰⁹ included both overt false statements and omissions. The supreme court rejected the lawyer's defense that confidentiality obligations precluded him from disclosing information in order to correct the misleading impressions under which both the bar and a third party were operating, stating that "[a]n attorney cannot hide behind attorney-client privilege in order to mislead with impunity."³¹⁰ Moreover, the court noted that the attorney-client confidentiality rule contains exceptions permitting the necessary disclosures.³¹¹ A thirty-day suspension was imposed.³¹²

False statements filed with the court in a probate matter netted the lawyer a three-year suspension in *Florida Bar v. Segal*.³¹³ This case is especially interesting because the lawyer attempted to resign from the bar by sending a "resignation" letter to the clerk of the supreme court shortly before the disciplinary hearing on sanctions. The lawyer's resignation letter, of course, was not accepted by the court. In its opinion, the supreme court reminded Florida lawyers that the only method of resignation available to lawyers who are the subjects of pending grievance complaints is a "disciplinary resignation" in compliance with rule 3-7.12.³¹⁴

307. 660 So. 2d 697 (Fla. 1995).

308. *Id.* at 701.

309. 672 So. 2d 21 (Fla. 1996).

310. *Id.* at 23.

311. *Id.* Rule 4-1.6 provides, in pertinent part:

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

....

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

....

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

RPC 4-1.6 (a), (c)(4)-(5) (1987).

312. *Walker*, 672 So. 2d at 23.

313. 663 So. 2d 618 (Fla. 1995).

314. *Id.* at 621.

False statements to a court and other deceitful conduct helped earn disbarment for a lawyer in *Florida Bar v. Maynard*.³¹⁵ In addition to the various misrepresentations, the lawyer violated conflict of interest rules by improperly engaging in business transactions with clients.³¹⁶

A related form of conflict of interest led to a thirty-day suspension in *Florida Bar v. Marke*.³¹⁷ In this case, the attorney allowed his personal interest—which grew out of a business transaction with clients—to affect his representation of clients in related matters. Over time, the lawyer had represented a married couple in forming a corporation and in personal matters. The lawyer prepared an agreement for immediate sale of the corporation, as well as an employment contract between the husband-client and the company (under its new ownership). Later, the lawyer assisted the new owner of the corporation in drafting a letter terminating employment of the husband-client. After formally terminating his professional relationship with the original clients (husband and wife), the lawyer then represented the corporation in disputes arising over agreements that the lawyer had prepared and opposed the original clients in their claims for unemployment compensation.³¹⁸

Lawyers who engage in criminal conduct can expect to receive disciplinary sanctions. This happened to several lawyers in 1996. Disbarment was imposed in cases including *Florida Bar v. Bustamante*³¹⁹ and *Florida Bar v. Kushner*.³²⁰ Disbarment without leave to reapply for ten years was imposed

315. 672 So. 2d 530 (Fla. 1996).

316. Rule 4-1.8(a) provides:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

RPC 4-1.8(a) (1987).

317. 669 So. 2d 247 (Fla. 1996).

318. *Id.* at 248–49. Other cases in which a lawyer's business transactions with clients led to disciplinary problems included *Florida Bar v. Sofu*. See discussion *supra* pp. 236–41, and *Florida Bar v. Clement*. See discussion *infra* p. 277.

319. 662 So. 2d 687 (Fla. 1995).

320. 666 So. 2d 897 (Fla. 1996).

in *Florida Bar v. Lechtner*,³²¹ a case arising out of the “Operation Courtroom” judicial corruption investigation in Dade County.

Other noteworthy cases related to a lawyer’s role as bar member included *Florida Bar v. Clement*,³²² in which the supreme court addressed a lawyer’s contention that the Americans with Disabilities Act (“ADA”) precluded the imposition of disciplinary sanctions in his case. The court concluded that, while the ADA does apply to The Florida Bar, it does not necessarily bar the Supreme Court of Florida from imposing disciplinary sanctions on a bar member with a disability. A case-by-case analysis of the disabled person and the jobs or benefits he or she seeks is required.³²³ *Florida Bar v. Poe*³²⁴ was interesting because of the supreme court’s decision *not* to discipline the lawyer. The lawyer had been sanctioned by a bankruptcy court, and the bar instituted grievance proceedings against him. The supreme court stated that not every court-imposed sanction is the result of an ethical violation.³²⁵ In a concurrence filed in *Landry v. State*,³²⁶ a criminal case, two justices of the Supreme Court of Florida called for increased imposition of professional discipline against lawyers and judges whose lack of sufficient competence causes harm to the judicial system (e.g, through incompetence that results in costly delays in the rendering of justice).

Finally, it was clear that persistence does not always pay. In *Florida Bar v. McAtee*,³²⁷ a lawyer who continued to practice law despite being suspended from practice by the supreme court was disbarred. A lawyer who persisted in practicing after being disbarred was ordered *permanently* disbarred in *Florida Bar v. Neely*.³²⁸

321. 666 So. 2d 892 (Fla. 1996).

322. 662 So. 2d 690 (Fla. 1995).

323. *Id.* at 700.

324. 662 So. 2d 700 (Fla. 1995).

325. The supreme court stated:

[w]e disagree with the Bar’s claim that because [the lawyer] was sanctioned in federal bankruptcy court he must have violated the Bar’s disciplinary rules. The sanction is minor: [the lawyer] and [the lawyer’s client] must pay [the client’s ex-wife]’s fees and costs in defending against the petition. Courts commonly award fees and costs in actions arising from a dissolution of marriage [footnote omitted], but this does not mean that the other party is automatically guilty of committing ethical violations.

Id. at 704.

326. 666 So. 2d 121 (Fla. 1995) (Wells, J., concurring).

327. 674 So. 2d 734 (Fla. 1996).

328. 675 So. 2d 592 (Fla. 1996).

VII. CONCLUSION

Florida lawyers fill many roles as they engage in their daily practice of law. Lawyers act as advocates, fiduciaries, officers of the court, and businesspersons, all within the framework of membership in The Florida Bar. It is imperative that lawyers be aware of the specific ethical obligations that they assume when they step into each of these roles. Failure to understand and honor these professional responsibilities can lead to disciplinary exposure and malpractice liability. This article has summarized important 1996 professional responsibility developments that may affect lawyers as they carry out their diverse duties in an ever-changing legal landscape.

Ronald Benton Brown*
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I. INTRODUCTION

This survey covers the decisions of the Florida courts and Florida legislation produced during the period from July 1, 1995 through June 30, 1996, especially selected for this article as being of potential interest to the real estate practitioner.

II. ATTORNEYS' FEES

*Jakobi v. Kings Creek Village Townhouse Ass'n.*¹ The Third District Court of Appeal reversed the trial court's denial of Jakobi's motion for attorneys' fees as prevailing party in a suit against his townhouse association under section 57.105(2) of the *Florida Statutes*.² The dispute arose from the Association's Architectural Control Committee's denial of Jakobi's request for permission to install screening on the front of his unit. Jakobi filed suit for an injunction against the Association and the parties stipulated to an agreement allowing Jakobi to build the enclosure. Jakobi then moved for attorney's fees, noting that the Association's bylaws contained a provision allowing attorneys' fees to the Association in any litigation with an owner, and arguing that the reciprocity mandated by section 57.105(2) entitled him to fees as the prevailing party.

1. 665 So. 2d 325 (Fla. 3d Dist. Ct. App. 1995).

2. *Id.* at 328. The court also held that the 1992 townhouse deed, through which Jakobi had received title to the townhouse, constituted a novation of the bylaws and declaration of covenants and restriction as between the Kings Creek Village Association, Inc. ("Master Association"), the Kings Creek Village Townhouse Association, Inc. ("Association"), and the owner. Such a finding was crucial to Jakobi's case for fees because of the provision in the section declaring that "[t]his act shall take effect October 1, 1988, and shall apply to contracts entered into on said date or thereafter," while the bylaws and original declaration of restrictions and covenants came into existence prior to 1988. *Id.* at 327.

The appellate court determined “[t]his was an action ‘with respect to the contract’ as contemplated by Section 57.105(2),”³ and cited *Ryan v. Town of Manalapan*⁴ for the proposition that the declaration and bylaws are contractual. In holding that the 1992 townhouse deed, through which Jakobi was conveyed title, constituted a novation,⁵ the appellate court noted that the essential elements were present,⁶ since this requirement may be implied from the circumstances of the transaction and conduct of the parties.⁷ Based on the finding of a novation, the appellate court determined Jakobi was entitled to claim the reciprocity benefits of section 57.105(2).⁸ Thus, Jakobi was entitled to the fee award.⁹

Seminole County v. Clayton.¹⁰ The Fifth District Court of Appeal reversed and remanded an attorneys’ fee award in this eminent domain action. Seminole County took a 2.8 acre tract of land owned by Pauline Arndt, which, at the inception of the action, had no direct access to a public road. Resolution of the case depended on the availability of feasible access. The County obtained three appraisals and based its first offer on the lowest. Arndt’s appraiser assumed availability of access to a highway interchange and, as might be expected, arrived at a higher appraisal. The parties settled without a trial, leaving the attorneys’ fees to Arndt’s attorneys to be decided by the court, which applied section 73.092 of the *Florida Statutes* and found a reasonable fee based on hourly rates to be \$25,425.¹¹ In addition, in what the Fifth District Court of Appeal labeled a “double decker” application of the statute, the trial court added a twenty percent “benefit” fee for the difference between the County’s initial offer and the eventual settlement yield which amounted to \$133,836, bringing the total fee to \$159,261, or \$1,276.64 an hour.¹²

3. *Id.*

4. 414 So. 2d 193, 196 (Fla. 1982).

5. *Jakobi*, 665 So. 2d at 327.

6. *Id.* It decided so, in part because “[w]hen the current owner took title with record notice of [the provisions of the bylaws and declaration] he assumed a new personal contractual obligation with the master and townhouse associations and his seller was discharged of his personal contractual obligations,” thus meeting the requirements of mutual consent to the novation. *Id.* at 328 (citing *Prucha v. Guarantee Reserve Life Ins. Co. of Hammond*, 358 So. 2d 1155, 1157 (Fla. 3d Dist. Ct. App. 1978), *cert. denied*, 370 So. 2d 459 (Fla. 1979)).

7. *Id.* (citing *Sans Souci v. Division of Fla. Land Sales and Condominiums*, 448 So. 2d 1116, 1121 (Fla. 1st Dist. Ct. App. 1984)).

8. *Id.* at 327.

9. *Jakobi*, 665 So. 2d at 327.

10. 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995).

11. *Id.* at 364.

12. *Id.*

In rejecting the trial court's fee computation, the appellate court opined that "[w]hatever section 73.092 may mean, and it admittedly is lacking in specificity, it cannot reasonably have been intended by the Florida Legislature to produce this result."¹³ The appellate court, in assessing attorneys' fees, is not required to abandon its own expertise or common sense, and it should closely scrutinize awards to ensure reasonableness.¹⁴ Here it appeared that the fee had been intended as punishment for perceived low-balling by the County in its initial offer which, even if true, would not warrant "the imposition of exorbitant attorney fees."¹⁵

III. BOUNDARIES

Jones v. Rives.¹⁶ For lack of competent substantial evidence, the First District Court of Appeal reversed the jury finding of a boundary agreement between adjacent property owners.¹⁷ Appellees purchased land adjacent to appellant's and had timber cut from a section south of an old fence on the land. The survey performed by both parties showed that appellant's property ran nearly 100 feet south of the old fence. Appellant filed suit for cutting the timber, alleging damages and trespass. Appellees counterclaimed, asserting several claims of title to the relevant land. Appellant prevailed on a motion for summary judgment on the issue of ownership and right to possession.¹⁸ As to the purported boundary agreement, the jury accepted appellee's claim that the old fence marked the true boundary between the properties.¹⁹

The appellate court reiterated the essential elements of a boundary by agreement:

- (1) an uncertainty or dispute as to the true boundary; (2) an agreement, either oral or implied, between the adjacent landowners that a certain line will be treated by them as the true line; and (3) subsequent occupation by the parties in accordance with that agreement

13. *Id.* at 364.

14. *Id.*

15. *Clayton*, 665 So. 2d at 365. The court also rejected County arguments that section 73.092 of the *Florida Statutes* is an unconstitutional "offensive encroachment" upon the judicial function of regulating attorneys' fees. *Id.*

16. 21 Fla. L. Weekly D236 (1st Dist. Ct. App. Jan. 19, 1996).

17. *Id.* at D237.

18. *Id.* at D236.

19. *Id.*

for a period of time sufficient to show a settled recognition of the line as a permanent boundary.”²⁰

The court found the first element lacking because no testimony had been given that there was uncertainty or a dispute between the parties as to the true boundary until the appellant had the property surveyed.²¹ In addition, the evidence of there being three conversations, only one of which involved the record landowners, regarding an agreement was legally insufficient.²² As to the third element, although there is no set amount of time to show settled recognition of the agreed boundary,²³ evidence here was legally insufficient.²⁴

IV. BROKERS

*Schwey v. Vara.*²⁵ A piece of land was subject to a right of first refusal when the broker contacted the owners with a possible buyer. The owners accepted an offer and signed a contract of sale that provided for a cash sale and the payment of a commission to the broker. However, the contract also provided that it would be void and that the broker would not receive a commission if the right of first refusal was exercised. The right of first refusal was exercised by submitting a contract for exactly the same cash price, but it did not contain a provision for a broker's commission. The broker's potential buyer did not question the validity of the right of first refusal or that it had been validly exercised, but the broker did. She sued for a commission. The trial court ruled in favor of the seller and the district court agreed.²⁶

Apparently, there was no listing agreement with this broker. The only brokerage agreement was the provision for the payment of a commission in the first contract of sale. The district court stated that “[t]he broker has cited no authority to support its argument that it is entitled to complain about the terms or that it is entitled to a commission under these circumstances.”²⁷ What is meant by “under these circumstances” is not completely clear. Perhaps it

20. *Id.* at D237 (citations omitted).

21. *Jones*, 21 Fla. L. Weekly at D237.

22. *Id.*

23. *Id.* (citing *Campbell v. Noel*, 490 So. 2d 1014, 1016 (Fla. 1st Dist. Ct. App. 1986)).

24. *Id.* In making this determination, the appellate court noted the appellees had purchased the land in 1988, appellant had a survey made in June 1989, and appellant filed suit in January of 1990. *Id.*

25. 674 So. 2d 935 (Fla. 4th Dist. Ct. App. 1996). Judge Klein wrote the opinion in which Judges Dell and Stevenson concurred.

26. *Id.* at 936.

27. *Id.*

means that if neither the seller nor the broker's possible buyer challenged the exercise of the right of first refusal, then the broker had no standing to do so either. This seems unlikely. Certainly the broker was either a party to the contract of sale or an intended third party beneficiary of that contract and, as such, had enforceable rights. On the other hand, perhaps the court meant that the broker was in no position to claim that the right of first refusal had not been validly exercised when it obviously had been. This seems more likely since the court pointed out that "[a] right of first refusal exercise need only be identical to the offer terms which are essential."²⁸ Under this interpretation it is apparent that the court thought that the brokerage term was not "essential." Neither interpretation feels entirely satisfying to this author.²⁹

A better justification for the decision would be that this broker produced an unsolicited offer to buy the property. The broker's commission term in that offer was drafted by the broker. Under the general rules of contract interpretation, any ambiguity in a contract should be interpreted against the one who drafted it and in favor of the other party. Applying that rule, a reasonable person would interpret the provision to require the seller to pay a commission only if the broker's prospect purchased the property or was prevented from doing so by the breaching seller, not if the right of first refusal was exercised. If the broker wanted a commission regardless of who was the ultimate purchaser, she should have unambiguously provided for that in the contract.³⁰ The seller might not have accepted an offer with that unambiguous provision.

*South Pacific Enterprises, L.P. v. Cornerstone Realty, Inc.*³¹ A hospital enlisted a real estate broker to help it look for a site on which to develop a medical facility. The broker showed the hospital's agent the land in question. At the request of the hospital, the broker even submitted a development plan for that land, and they entered into a client registration letter that provided the broker would get a commission if any of certain entities bought or leased the land. However, another developer heard about the hospital's interest in this land and submitted its own development to the hospital. They excluded the broker from the negotiations that followed. After reaching agreement, the

28. *Id.*

29. Professor Brown.

30. *See City Nat'l Bank of Miami Beach v. Lundgren*, 307 So. 2d 870 (Fla. 3d Dist. Ct. App.), *cert. denied*, 316 So. 2d 286 (Fla. 1975) (explaining in dicta that a landowner could be required to pay a commission to a broker who had found a prospective purchaser who was ready, willing, and able even though another exercised a right of first refusal because that was what the brokerage agreement provided).

31. 672 So. 2d 568 (Fla. 4th Dist. Ct. App. 1996). Judge Shahood wrote the opinion. Judge Warner and Associate Judge Speiser concurred.

hospital and the developer created a limited partnership that acquired and developed the land. The broker sued for its commission, but the hospital defended on the grounds that the broker had neither introduced the eventual buyer to the seller nor participated in the negotiations that led to the sale. The broker prevailed in the trial court and the district court affirmed on this issue.³²

The district court agreed that the broker was not entitled to recover its commission based upon the client registration letter.³³ Construing the letter against its drafter, the broker, the letter did not provide for a commission upon the sale to this buyer. The court, however, recognized that this was not the only theory under which this broker could recover. A broker who shows properties to a prospective buyer is entitled to a commission when the broker is the procuring cause of the sale.³⁴

The term "procuring cause" has been defined as "one who initiates negotiations by doing any affirmative act to bring buyer and seller together such as placing signs on the property, promoting calls from prospective buyers, or showing the property to prospective purchasers."³⁵ No one specific act is essential. So, this broker's failure to introduce the buyer to the seller or participate in the negotiations did not preclude the court from finding that it was the procuring cause. Moreover, the seller could not rely on the broker's failure to participate in the sales negotiations because the buyer and seller had prevented the broker from participating. The court found ample evidence in the record to support the conclusion that the broker had played a significant role in bringing the parties together.³⁶

The contract of sale had also contained certification by both parties that they had not employed or dealt with a real estate broker. It also provided an indemnity provision regarding any brokerage commission that might arise. The trial court had denied all cross claims for indemnification. On this issue, the district court reversed.³⁷ Under this contract provision, the developer and the buyer were entitled to indemnification from the hospital that had dealt with the broker.³⁸

32. *Id.* at 571. However, the case was reversed and remanded for the proper calculation of damages and on the issue of indemnification.

33. *Id.* at 570.

34. *Id.*

35. *Id.* (quoting *Ehringer v. Brookfield & Assocs.*, 415 So. 2d 774, 775-76 (Fla. 5th Dist. Ct. App. 1982)).

36. *South Pacific*, 672 So. 2d at 570.

37. *Id.*

38. *Id.*

V. BUILDING CODE

*Martin County v. Indiantown Enterprises, Inc.*³⁹ The Fourth District Court of Appeal reversed a judgment against Martin County.⁴⁰ Martin County inspectors found the building in this case to be out of compliance with the building code, and it gave notice to the owner that the building would be demolished by the County if the owner failed to bring the premises into compliance with the provisions of the code. Then, the owner sold the building to a buyer who knew he had only thirty days to obtain a permit and keep the County from demolishing the building.⁴¹

Rather than complying with the County regulations providing for an extension of the time,⁴² the owner had his architect contact County officials by telephone. The County's Building Administrator told the architect that an extension could be obtained by contacting the department and satisfying it "that the renovations would be accomplished within a short period."⁴³ The owner's architect showed a set of renovation plans to a technician at the Building Department, and, later, the owner's attorney was told by a code enforcement officer that "the status on this file is it's on hold."⁴⁴ However, after placing a temporary hold on demolition, the County Administrator told the code enforcement officer to proceed with the demolition since the owner made no progress on the property's renovations and "[t]he buyer made no attempt to appeal to the Board for an extension of the demolition order."⁴⁵ For the County's demolishing the building, the buyer recovered \$32,000 in damages on theories of negligence and promissory estoppel. Although the jury found the buyer thirty-five percent comparatively negligent, the trial court judge refused to reduce the award proportionately.⁴⁶

The appellate court reversed, holding that Martin County was entitled to a directed verdict on both the negligence and promissory estoppel theories.⁴⁷ The court first noted that the buyer's negligence theory was based on his

39. 658 So. 2d 1144 (Fla. 4th Dist. Ct. App. 1995).

40. *Id.* at 1146.

41. *Id.* at 1145.

42. The court noted that § 6-54 of the County regulations provides for such an extension only "for cause by appeal to the board of building adjustments and appeals." *Id.* at 1145 (quoting MARTIN COUNTY, FLA., REGULATIONS § 6-54 (1995)).

43. *Id.*

44. *Indiantown*, 658 So. 2d at 1145.

45. *Id.* at 1145.

46. *Id.*

47. *Id.*

contention that the County's employees supplied him with incorrect information regarding the extension of the demolition deadline.⁴⁸ The court apparently felt that the County was immune from liability for this conduct because the employees' acts were "discretionary functions peculiar to government and there can be no liability imposed upon . . . [the County] because of the manner of performance of those functions."⁴⁹ Furthermore, the buyer's reliance on the oral communications with the County employees was misplaced because "[t]he code of regulations plainly set out the exclusive method for seeking such extensions."⁵⁰

The court also rejected the promissory estoppel theory, relying on *Alachua County v. Cheshire*,⁵¹ stating that such a theory "requires 'affirmative conduct' by the governmental entity, not merely negligence."⁵² Apparently, the County's employees' conduct failed to rise to that level, but the opinion failed to offer any explanation why. The appellate court also determined that the buyer's promissory estoppel theory was untenable because he could not reasonably rely on the actions of the County officials.⁵³ In light of the County's regulations regarding extensions, the court concluded that "[c]ourts usually shrink from finding an estoppel against a government entity where the actions of the official are unauthorized or unlawful."⁵⁴

VI. BUTLER ACT

*Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc.*⁵⁵ Beginning in 1942, Key West Conch Harbor's ("Key West") predecessor in title obtained several permits from the Army Corps of

48. *Id.*

49. *Indiantown*, 658 So. 2d at 1145 (quoting *City of Tarpon Springs v. Garrigan*, 510 So. 2d 1198, 1199-200 (Fla. 2d Dist. Ct. App. 1987)).

50. *Id.* The court went on to declare that the failure of the "informal remedy" which the buyer had sought could not "create any enforceable duties to make out a cause of action in negligence." *Id.* No legal authority was cited by the court for this proposition of law, and it was not clear whether the court was fashioning its own proposition or basing this conclusion as an implication of the proposition quoted earlier in the *City of Tarpon Springs* opinion. See *City of Tarpon Springs*, 510 So. 2d at 1200.

51. 603 So. 2d 1334 (Fla. 1st Dist. Ct. App. 1992).

52. *Indiantown*, 658 So. 2d at 1145 (quoting *Cheshire*, 603 So. 2d at 1334).

53. *Id.* at 1145-46.

54. *Id.* at 1146. See, e.g., *Corona Properties of Fla. v. Monroe County*, 485 So. 2d 1314 (Fla. 3d Dist. Ct. App. 1986); *Enderby v. City of Sunrise*, 376 So. 2d 444 (Fla. 4th Dist. Ct. App. 1979)).

55. 21 Fla. L. Weekly D1430 (3d Dist. Ct. App. June 28, 1996).

Engineers for dredging and improving offshore submerged lands in Garrison Bight. The predecessor bulkheaded and filled a parcel ("Parcel B" of the exhibits), later receiving a 1951 Butler Act⁵⁶ deed. The Act allowed upland riparian owners to obtain title land "bulkheaded or filled in or permanently improved."⁵⁷ The question before the third district was whether the predecessor sufficiently improved another parcel ("Parcel A") contiguous and seaward of Parcel B "and should therefore have obtained title to that land as well."⁵⁸

The predecessor had constructed a 373 foot pier on Parcel A prior to the effective date of the repeal of the Butler Act, May 29, 1951. A 138 foot extension was also added to the pier prior to that critical date. The Trustees produced no evidence to substantiate their claim that the improvements occurred after the date. The trial court held that the dredging of the entire dock was completed before May 29, 1951.⁵⁹ The trial court concluded fee simple title to Parcel A vested in Key West by virtue of those improvements.⁶⁰ The court entered judgment that Key West held fee simple title in the submerged lands within 500 feet of its concrete bulkhead.⁶¹

Affirming, the appellate court noted that "the dredged area is adjacent to the parcel of land that was filled."⁶² The Butler Act would not have transferred title had the landowner dredged submerged lands out of the bight for the sole purpose of filling another parcel of land.⁶³ Noting that what constitutes an improvement under the Butler Act must be determined on a case-by-case basis, the court added that Key West's title was subject to a public navigational easement.⁶⁴

Judge Gersten wrote a lengthy, provocative dissent highly critical of the majority, noting at the outset that he did not feel that the Butler Act confers Florida coastline to a private party.⁶⁵ Gersten eventually characterized the majority's holding as "this Great Land Giveaway."⁶⁶

56. 1921 Fla. Laws ch. 8537.

57. *Key West Conch Harbor*, 21 Fla. L. Weekly at D1430 (citations omitted).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Key West Conch Harbor*, 21 Fla. L. Weekly at D1430.

63. *Id.*

64. *Id.* at D1431.

65. *Id.* (Gersten, J., dissenting).

66. *Id.* at D1432.

VII. CONDOMINIUMS

Oakland East Manors Condominium Ass'n v. La Roza.⁶⁷ The Fourth District Court of Appeal affirmed the trial court's denial of a condominium association's claim for foreclosure.⁶⁸ In doing so, the appellate court relied on the acceptance of benefits doctrine because, since entry of final judgment, the appellee paid the amount.⁶⁹ However, the court reversed the circuit court's refusal to award prejudgment interest of eighteen percent and attorneys' fees since the bylaws provided for unpaid assessments to bear interest at the highest rate permitted under Florida's usury laws, as well as for attorneys' fees.⁷⁰ The trial court simply lacked discretion to refuse these awards.⁷¹

Scudder v. Greenbrier C Condominium Ass'n.⁷² In this case, the Fourth District Court of Appeal took a more current look at condominium associations' assessments for off-site transportation costs.⁷³ The Associations in these consolidated cases began assessing the unit owners for these services on January 1, 1988. The owners objected, claiming the assessment was improper under the court's decision in *Rothenberg v. Plymouth A Condominium Ass'n*⁷⁴ and a 1988 amendment to section 718.115(1) of the *Florida Statutes*, which provided that reasonable transportation services could be billed as a common expense if the services had been provided from the date control of the board of association was transferred from the developer to the unit owners or if the condominium documents or bylaws contained provisions stating as much.⁷⁵ Another point of dispute was the "one-rider rule" under which only one pass

67. 669 So. 2d 1138 (Fla. 4th Dist. Ct. App. 1996).

68. *Id.* at 1139.

69. *Id.*

70. *Id.* at 1139-40 (citing FLA. STAT. § 718.303 (1993); *Sybert v. Combs*, 555 So. 2d 1313, 1314 (Fla. 5th Dist. Ct. App. 1990); *Brickell v. Bay Club Condominium Ass'n v. Forte*, 397 So. 2d 959, 960 (Fla. 3d Dist. Ct. App.), *review denied*, 408 So. 2d 1092 (Fla. 1981)).

71. *Id.*

72. 663 So. 2d 1362 (Fla. 4th Dist. Ct. App. 1996). In this case, the court withdrew its prior opinion at 20 Fla. L. Weekly D2278 (4th Dist. Ct. App. Oct. 11, 1995) in order to correct a misstatement made at page 19 of the earlier slip opinion. This case consisted of two consolidated appeals from the Circuit Court for Palm Beach County. *Scudder*, 663 So. 2d at 1364. The two appellee condominium associations are situated in Century Village in West Palm Beach. *Id.* at 1364. The appellants are unit owners in the communities who objected to the disputed off-site transportation assessments. *Id.*

73. *Scudder*, 663 So. 2d at 1364.

74. 511 So. 2d 651 (Fla. 4th Dist. Ct. App.), *review denied*, 518 So. 2d 1277 (Fla. 1987).

75. *Scudder*, 663 So. 2d at 1365. This amendment became effective July 1, 1988. *Id.* at 1364.

for use of the transportation was issued to unit owners so that only one resident per unit could use the system.⁷⁶

From an earlier decision, the court remanded the case for the trial court⁷⁷ to determine:

(1) whether the transportation services had been continuously provided by the Associations from the date control was turned over to the Unit Owners; (2) whether the transportation service had to have been continuously paid for as a common expense; (3) whether the Associations [sic] “one-rider rule” was valid; and (4) whether Florida Statutes Chapter 88-148 was constitutional.⁷⁸

On remand, the trial court found that the services had been continuously provided by the Associations; that the Associations were not required to prove that the system was specifically paid for as a common expense continuously during the relevant period; that limited seating provided a reasonable basis for the “one-rider rule;” and that chapter 88-148 was not constitutionally vague.⁷⁹

The Fourth District Court of Appeal first addressed the issue of whether, as the unit owners contended, the services must have been provided “*by the Associations*” during the relevant period, and if so, whether the trial court’s determination was supported by competent substantial evidence.⁸⁰ After conceding that, on its face, section 718.115(1) contained no identification of a required provider of services, the court suggested that such an interpretation of the statute would produce an unreasonable or absurd result.⁸¹ The court felt that if services were assessed by associations but provided by an independent entity, condominium associations would somehow receive a windfall.⁸² The court’s interpretation was consistent in light of the 1988 amendment which was passed “in response to this court’s opinion in *Rothenberg*.”⁸³ The court submitted that the amendment was intended “to benefit those associations that

76. *Id.* at 1368.

77. *Id.* at 1364 (citing *Scudder v. Greenbrier C Condominium Ass’n*, 566 So. 2d 359, 361 (Fla. 4th Dist. Ct. App. 1990)).

78. *Id.*

79. *Scudder*, 663 So. 2d at 1364.

80. *Id.* at 1365.

81. *Id.* See *State v. Egan*, 287 So. 2d 1 (Fla. 1973); *City of St. Petersburg v. Seibold*, 48 So. 2d 291 (Fla. 1950).

82. *Id.*

83. *Id.* In *Rothenberg*, the court held that transportation services were not assessable because they did not directly relate to operation, maintenance, repair or replacement of condominium property. 511 So. 2d at 652.

may have provided transportation services to their unit owners in the good faith belief that they were authorized to do so.”⁸⁴ Therefore, it is reasonable to require the Association to be the provider of services.⁸⁵ The appellate court ultimately concluded that the trial court’s finding that the services had been continuously provided by the Associations during the relevant period was supported by substantial competent evidence, and affirmed its decision on this issue.⁸⁶

Next, it declared that section 718.115 does not require that the transportation costs had been continuously assessed as a common expense prior to the 1988 amendment.⁸⁷ The court based this conclusion on the distinction made in the amendment to that section between transportation services continuously provided by the Association and those provided for in the condominium documents or bylaws, noting that prior to 1988, these costs could only be assessed if provided for in the documents or bylaws.⁸⁸ Contrary to its prior interpretation in which the court abandoned a plain and obvious meaning of the statute, the court felt that, on this issue, the distinction required such an interpretation,⁸⁹ and it decided that an interpretation including such a requirement would “obliterate the legislature’s use of the word ‘or’ in the amendment to section 718.115(1)(a).”⁹⁰

The next issue that the appellate court addressed was the constitutionality of section 718.115(1)(a), a portion of which the unit owners contended was unconstitutionally vague and ambiguous.⁹¹ The court opined that any doubts will be resolved in favor of constitutionality;⁹² that the statute provides people

84. *Scudder*, 663 So. 2d at 1366 (citing *Scudder v. Greenbrier C Condominium Ass’n*, 566 So. 2d 359, 361 n.1. (Fla. 4th Dist. Ct. App. 1990)).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1367.

89. *Scudder*, 663 So. 2d at 1367 (citing *Koplowitz v. Imperial Towers Condominium, Inc.*, 478 So. 2d 504, 505 (Fla. 4th Dist. Ct. App. 1985); *Martin v. Ocean Reef Villas Ass’n*, 547 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 1989), *review denied*, 557 So. 2d 35 (Fla. 1990)).

90. *Id.*

91. *Id.* The unit owners objected to the following language:

However, such common expenses must either have been services or items provided from the date the control of the board of administration of the association was transferred from the developer to the unit owners or must be services or items provided for in the condominium documents or bylaws.

Id.

92. *Id.* at 1367–68 (citing *Department of Legal Affairs v. Rogers*, 329 So. 2d 257, 263 (Fla. 1976)).

of common understanding and intelligence with fair warning of its requirements; and that, although it has been subject to conflicting interpretations, it was not unconstitutionally vague.⁹³ Accordingly, the court affirmed the trial court's determination of constitutionality.⁹⁴

As to the "one-rider rule," the court noted that the rule permitted only one rider per unit be permitted to ride pursuant to the common assessment charged to that respective unit. Any additional rider from that unit was required to pay the Associations a surcharge. Section 718.115(2) explicitly requires that the share of common expenses be in the same proportion as their ownership interest in the common elements.⁹⁵ The court felt it was improper that the system was funded in two distinct methods, the common assessment per unit, which was proportional to the ownership interest in the common elements, and the per rider surcharge, which bore no relation to the ownership interest in the common elements.⁹⁶ This method of collection was held contrary to section 718.115(2), and the rule also failed under the reasonableness test provided in *Juno by the Sea North Condominium Ass'n v. Manfredonia*,⁹⁷ because its effect was unreasonable and discriminatory.⁹⁸ Under the rule, multiple resident unit owners were being penalized and were subsidizing the system for the benefit of single resident unit owners, and this was improper as a limited common expense under section 718.103(17).⁹⁹ Thus, the appellate court reversed on this issue.¹⁰⁰ It also ordered a remand on the attorneys' fees issue.¹⁰¹

Winkelman v. Toll.¹⁰² The Fourth District Court of Appeal interpreted section 718.104(2) of the *Florida Statutes* in this quiet title action to determine when the property in question became subject to the declaration of condominium and its amendments.¹⁰³ Mission Lakes Condominium was created in 1980 by the recording of its declaration of condominium pursuant to the 1979 version of chapter 718 of the *Florida Statutes*. The declaration contemplated

93. *Scudder*, 663 So. 2d at 1368 (citing *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 820 (Fla. 1983)).

94. *Id.*

95. *Id.* (quoting FLA. STAT. § 718.115(2) (1993)).

96. *Id.*

97. 397 So. 2d 297, 303 (Fla. 4th Dist. Ct. App. 1980), *review denied*, 402 So. 2d 611 (Fla. 1981) (citing *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181 (Fla. 4th Dist. Ct. App. 1975)).

98. *Scudder*, 663 So. 2d at 1369.

99. *Id.*

100. *Id.*

101. *Id.* at 1370.

102. 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).

103. *See* FLA. STAT. § 718.104(2) (1979).

nine phases, each to be submitted to condominium by amendment to the declaration.¹⁰⁴ Phase II was submitted to condominium upon the recordation of the original declaration. Phases I and III through VII were submitted by the recording of an amendment to the declaration eleven days after the original declaration had been recorded. The amendment stated that construction was not substantially completed and that upon substantial completion of each phase, a certificate of a registered land surveyor would be recorded as an amendment to the declaration in accordance with section 718.104(e).¹⁰⁵

Additional amendments were later recorded, which attached land surveyor certificates evidencing completion of Phases I and II. However, the remaining proposed phases were never completed by the August 30, 1985 deadline contemplated in the declaration. Mission Lakes Condominium Association was involuntarily dissolved on November 1, 1985 by the Secretary of State.¹⁰⁶

Appellant Winkelman purchased Phases I and II in 1985 and 1986, respectively, from the institutional mortgagee on the project, which also conveyed all of Phases III through VII to appellee ICON Development Corporation ("ICON"). The warranty deed through which ICON took title described the property by the description contained in the amendment to the declaration, and the deed was specifically subject to the declaration and amendments. The parties operated their respective units as separate entities. Two years after ICON purchased the remaining phases, Winkelman filed suit to reinstate the condominium association and, thereafter, filed an amended complaint seeking recovery from ICON for its share of the common condominium expenses which Winkelman had been paying. ICON counterclaimed to quiet title and to declare that it received title in fee simple and not subject to the condominium. ICON also raised laches, estoppel, and running of the statute of limitations as affirmative defenses to the Winkelman complaint. The trial court found that ICON took in fee simple, reasoning substantial comple-

104. The court supplied language from the 1979 version of section 718.403. Subsection (1) of that section provides that a developer may develop a condominium in phases, provided that the initial declaration submitting the initial phase provides for and describes in detail the other contemplated phases, any impact which completion of those phases would have upon the initial phase, and the time period within which each phase must be completed. *Id.* at 104 (citing FLA. STAT. § 718.403(1) (1979)). Subsection (4) provides that "[i]f one or more phases are not built, the units which are built are entitled to 100 percent ownership of all common elements within the phases actually developed and added as a part of the condominium." *Id.* (quoting FLA. STAT. § 718.403(4) (1979)).

105. *Id.* at 104-05.

106. *Id.*

tion of the phases was a condition precedent to the phases becoming subject to condominium.¹⁰⁷

The Fourth District Court of Appeal rejected this interpretation.¹⁰⁸ The court noted that, under section 718.104(2), “[i]t is the recording of the declaration in the public records that subjects the property to condominium ownership.”¹⁰⁹ The court also noted that prior to 1978 the statute required the surveyor’s certificate to be filed “in order to have a validly created condominium for conveyancing purposes,”¹¹⁰ and that this provision had been deleted. On this reasoning, the court held that completion of construction was not a condition precedent to the creation of a valid condominium.¹¹¹ Moreover,

[j]ust as the failure to complete the construction prior to recording the declaration does not prevent the formation of the condominium on the subject property, the failure to complete the construction in a phase prior to recording the amendment does not prevent the inclusion of the land in the condominium, because the amendment is *effective* when recorded.¹¹²

Finally, the court noted that its decision made sense in light of the fact that Florida has a notice type recording statute, and that in the present case, an amendment submitting the property to condominium had been recorded, giving notice to the world that the property is subject to the declaration and amendments.¹¹³

107. *Winkelman*, 661 So. 2d at 105.

108. *Id.*

109. *Id.* The court reasoned that although a requirement of a declaration of condominium is that it contain a certificate of substantial completion of improvements, where the property is subject to condominium prior to substantial completion of the construction, the developer may submit the required surveyor’s certificate by amendments to the declaration. *Id.* (citing FLA. STAT. §§ 718.104(4)(e), .105 (1979)).

110. *Id.* at 106 (quoting FLA. STAT. §718.104(4)(e) (1977)).

111. *Winkelman*, 661 So. 2d at 106.

112. *Id.*

113. *Id.* at 107.

VIII. CONSTRUCTION

*Miracle Center Development Corp. v. M.A.D. Construction, Inc.*¹¹⁴ A tenant named Theme leased space in a shopping center for use as a nightclub. Theme hired M.A.D., a contractor, for renovations that were permitted by the lease. However, before the renovations could be completed, the electricity was turned off because Theme failed to pay the electricity bill. Theme vacated the premises. The landlord leased to a new tenant who made only cosmetic improvements before opening the nightclub for business.¹¹⁵

M.A.D. sued Theme for breach of the construction contract and sued the landlord based on quantum meruit.¹¹⁶ The trial court held in favor of the contractor and awarded damages against both defendants, but the district court reversed.¹¹⁷ The court's logic began with the proposition that a plaintiff cannot seek both contract damages and quantum meruit damages against the same defendant because quantum meruit would apply only where no express contract existed.¹¹⁸ The court then reasoned that the principle should also apply to prevent simultaneous actions on these inconsistent theories against these different defendants because that might give M.A.D. a double recovery.¹¹⁹ That result would be unjust enrichment rather than the prevention of unjust enrichment, the proper role of quantum meruit. In addition, the court points out that M.A.D. had already received an adequate remedy at law, its judgment for damages against the tenant.¹²⁰ Probably the unstated point is that quantum meruit is an equitable remedy and an equitable remedy should be available only where the injured party has no adequate remedy at law. But, quantum meruit is a legal remedy, not an equitable one.¹²¹

114. 662 So. 2d 1288 (Fla. 3d Dist. Ct. App. 1995). Judges Hubbard, Gersten, and Goderich concurred in the per curiam opinion.

115. *Id.* at 1290.

116. M.A.D. also claimed a construction lien but that was denied by the trial court. The denial was affirmed by the district court because, under section 713.10 of the *Florida Statutes*, the lease prohibited construction liens against the landlord's property and the lease neither required the improvements nor were the improvements the "pith of the lease." *Id.* at 1291 (relying on FLA. STAT. § 713.10 (1993)).

117. *Id.* at 1290.

118. *Id.*

119. *Miracle Center Dev. Corp.*, 662 So. 2d at 1290.

120. *Id.*

121. The proper common law action to recover in quantum meruit was *indebitatus assumpsit*. Furthermore, quantum meruit was one of the "common counts" pled in a traditional common law complaint alleging money due based upon a transaction. See JOSEPH H. KOFFLER & ALISON

The result may make logical sense, but it has the potential to produce unnecessary injustice. That the electricity was turned off suggests that the tenant was in financial trouble making the judgment against it worthless. Would the contractor have prevailed on the theory of quantum meruit if it had sued only the landlord? If so, then the contractor was harshly penalized for a tactical error by its lawyer. If the landlord reaped a windfall by getting its property so substantially enhanced that a higher rent could be charged without spending any money, there would be an unjust result. Conversely, the rent increase, if one existed, might not have been enough to offset what the tenant owed the landlord. Those are issues of fact that could have been determined on remand rather than adopting an absolute no-recovery rule. There is no justification for a rule that gives one party a windfall while another is left uncompensated for work done unless the court intends to punish the contractor for not getting a construction lien. That remote possibility could have easily been avoided by ruling that any recovery from the landlord would decrease the amount that the contractor could recover from the tenant on the contract judgment.

Stinson-Head, Inc. v. City of Sanibel.¹²² The parties entered into a construction contract that contained an arbitration clause requiring the demand for arbitration be made within a reasonable time after the claim arose but, “in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim . . . would be barred by the applicable statute of limitations.”¹²³ Subsequently, a dispute arose about alleged defects in the roof. When the City sought arbitration, the contractor responded that the statute of limitations had run out so arbitration was time barred. The trial court referred the timeliness issue to arbitration,¹²⁴ and the contractor appealed.

The district court affirmed ordering the case to arbitration, but certified that its decision created a conflict among the districts.¹²⁵ The court based its decision on the fact that the arbitration clause was very broad. Prior cases under the federal arbitration act had interpreted similar language to place the

REPPY, HANDBOOK OF COMMON LAW PLEADING §§ 172–76 (1969). See also JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS §§ 1-11 (1987).

122. 661 So. 2d 119 (Fla. 2d Dist. Ct. of App. 1995). Judge Blue wrote the opinion in which Chief Judge Threadgill and Judge Whatley concurred.

123. *Id.* at 120.

124. *Id.*

125. See *Anstis Ornstein Assocs., Architects & Planners, Inc. v. Palm Beach County*, 554 So. 2d 18 (Fla. 4th Dist. Ct. App. 1989).

question of whether the arbitration was time barred before the arbitrator(s).¹²⁶ This court followed that lead, reasoning that the timeliness issue is very fact-oriented and requires an evidentiary hearing.¹²⁷ Requiring that the court hear these facts to determine this issue and then the arbitrator hear the same facts again to determine other issues would defeat the purpose of an arbitration agreement. Generally, issues are presumed to be the subject of arbitration. It would make no sense to interpret such a broadly worded arbitration clause not to assign this issue to arbitration.

IX. CONTRACTS OF PURCHASE AND SALE

*Taines v. Berenson.*¹²⁸ Dahlia Taines, the seller, appealed from the Amended Final Judgment awarding Dr. Scott Berenson, the buyer, specific performance *and* damages totalling \$371,635. The Fourth District Court of Appeal held that, under the terms of the contract, Berenson could not recover both specific performance and damages and reversed the trial court accordingly.¹²⁹ The parties entered into a contract for the sale of the property. Due to a gap in the chain of title and liens against the property, Taines would be unable to provide clear title. The parties nevertheless entered into a second contract in which the sale price was reduced from \$215,000 to \$190,000. This contract also provided a ninety-day defective title cure provision. Berenson then offered Taines an addendum to the second contract which contained additional terms. Taines, viewing the addendum as an unfavorable modification, declined. Berenson filed a three count complaint alleging breach of contract, misrepresentation, and specific performance.¹³⁰

The appellate court reasoned that "Berenson's remedies were limited by the terms of the contract itself."¹³¹ Either of the remedies contained in Provi-

126. *Wylie v. Investment Management & Research, Inc.* 629 So. 2d 898 (Fla. 4th Dist. Ct. App. 1993); *Marschel v. Dean Witter Reynolds, Inc.*, 609 So. 2d 718 (Fla. 2d Dist. Ct. App. 1992), *review denied*, 617 So. 2d 318 (Fla. 1993).

127. *Stinson-Head*, 661 So. 2d at 121.

128. 659 So. 2d 1276 (Fla. 4th Dist. Ct. App. 1995).

129. *Id.* at 1278.

130. *Id.* at 1277.

131. *Id.* The court quoted the following "pertinent" provision in the contract:

A. EVIDENCE OF TITLE . . . buyer shall have ten (10) days from the date of receiving the evidence [February 15, 1991] to examine same. If title is found to be defective, the buyer shall within said period notify the seller in writing specifying the defects. If the said defects render the title unmarketable, the seller shall have ninety (90) days from the receipt of such notice [February 19, 1991] to cure the defects and *if after said period seller shall not have cured the defects, buyer*

sion A of the contract were available to Berenson. However, Berenson exercised neither remedy. "He neither agreed to accept a deed for title as it existed, nor did he request a refund and cancellation of the contract."¹³²

Instead, Berenson relied upon another paragraph of the contract which provided that if the seller failed to perform any of the contract's covenants, the deposit paid by the buyer, at the buyer's option, would be returned to the buyer or the buyer would have the right to specific performance.¹³³ This paragraph was inapplicable because Berenson filed suit before the expiration of the curative period provided in the contract.¹³⁴ Therefore, the seller did not default by not curing title because the contract already contemplated the seller's inability to cure title and the buyer's remedies for such. Therefore, the trial court erred by awarding Berenson both Provision A remedies.¹³⁵ So, the appellate court remanded the case "for a final determination as to which of the two provisions shall be applied."¹³⁶

X. DEEDS

*Jakobi v. Kings Creek Village Townhouse Ass'n.*¹³⁷ For rationale that a deed constituted a novation of the association's bylaws and the restrictive covenants binding the community, please see the discussion of this case at page 280 of this article.

*Sargent v. Baxter.*¹³⁸ The Fourth District Court of Appeal affirmed a trial court's judgment declaring two quitclaim deeds void.¹³⁹ One deed was from John Smith, now deceased, in favor of his daughter, Connie Sargent. Smith executed the deed but instructed his attorney not to record the deed, saying he would give further instructions later. There was testimony that Smith asked his nephew, Gerald Buscemi, to have the attorney record the deed, but Bus-

shall have the option of (1) accepting title as it then is or (2) demand a refund of all monies paid hereunder which shall forthwith be returned to the buyer, and thereupon the buyer and seller shall be released of all further obligations under this contract.

Id.

132. *Taines*, 659 So. 2d at 1277.

133. *Id.*

134. *Id.* at 1277-78.

135. *Id.* at 1278.

136. *Id.* The court instructed that in making this determination, the trial court could rely on the existing record unless in his discretion determines that further evidence is necessary. *Taines*, 659 So. 2d at 1278.

137. 665 So. 2d 325 (Fla. 3d Dist. Ct. App. 1995).

138. 673 So. 2d 979 (Fla. 4th Dist. Ct. App. 1996).

139. *Id.* at 981.

cemi never complied before Smith's death. After Smith's death, the attorney mailed the unrecorded deed to Sargent who recorded it. Later, Smith's personal representative executed a quitclaim deed to the same property to himself, individually, and recorded it. The trial court found, after a non-jury trial, that the Sargent deed failed for lack of delivery, and it ultimately found both deeds void.¹⁴⁰

The Fourth District Court of Appeal affirmed the trial court's finding of failure of the Sargent deed for lack of delivery, since Smith, by instructing his attorney not to record, had retained the "locus poenitentiae," or opportunity to change his mind.¹⁴¹ The court did not consider whether delivery would have occurred had Buscemi advised the attorney of Smith's desire that the deed should be recorded because that had not occurred, and, further, because "[t]here [was] no indication that Buscemi had any authority other than as a simple messenger."¹⁴²

XI. EASEMENTS

Brewer v. Flankey.¹⁴³ The Fifth District Court of Appeal reversed the trial court's judgment for a prescriptive easement because the plaintiffs failed to produce any evidence that they or their predecessors had made actual, continuous, and uninterrupted use of the contested land for the full twenty-year prescriptive period.¹⁴⁴ Evidence that members of the general public had used the land during the 1970s did not suffice because it did not establish that plaintiffs' predecessors used the land.¹⁴⁵ Thus, the plaintiffs could not make a prima facie case as they had only used defendants' land for nine years.

Farley v. Hiers.¹⁴⁶ The First District Court of Appeal affirmed the trial court's determination that the appellee had a prescriptive easement to continue the use of a well, pump, and pump house on appellant's property.¹⁴⁷ In 1954, the Blounts subdivided this property, installed a well, pump, and pump house on the southeastern corner of Lot 23, and they began providing water service for profit to seventy-three customers, including the various owners of Lot 23,

140. *Id.* at 980.

141. *Id.* at 981 (quoting *Smith v. Owens*, 108 So. 891, 893 (1926)).

142. *Id.*

143. 660 So. 2d 761 (Fla. 5th Dist. Ct. App. 1995).

144. *Id.* at 762 (citing *Supal v. Miller*, 455 So. 2d 593, 595 (Fla. 5th Dist. Ct. App. 1984)).

145. *Id.*

146. 668 So. 2d 248 (Fla. 1st Dist. Ct. App. 1996). Appellee Annie B. Hiers was named in the suit in the capacity of Guardian for Lottie M. Blount. *Id.*

147. *Id.* at 249.

operating the pumping system openly and continuously under lock and key. In 1993, Farley, the current owner of Lot 23, dissatisfied with the quality of water service, sought to obtain a consumptive use permit from the Northwest Florida Water Management District to build a well for his own use. He could not obtain that permit due to the presence of the Blount well on the lot. After obtaining the lot in 1974, Farley fenced in his property except for the corner on which the fifteen by twenty foot pump house was located.¹⁴⁸

The appellate court noted that the elements of continuous use and knowledge were undisputed, but three issues required closer scrutiny: 1) whether the use of the well was adverse rather than permissive; 2) whether the operation of the water service for profit precludes a finding of easement; and 3) whether the exclusiveness of the appellee's use of the southeastern corner precluded finding an easement.¹⁴⁹ Concerning the first issue, the court found that use of the system had been adverse.¹⁵⁰ The appellee continuously maintained the pump house under lock and key, and Farley and his predecessors had, for the same period, paid the Blounts for water service.¹⁵¹ The court rejected the argument that operating the system for profit resulted in a "profit a prendre" and precluded finding an easement.¹⁵² The court noted that a "profit a prendre" is distinguishable from an easement, "since one of the features of an easement is the absence of all rights to participate in the profits of the soil charged with it."¹⁵³ In rejecting Farley's contention, the court merely commented that "[i]t appears, however, that water is not considered a product of the soil in this context."¹⁵⁴ Finally, the court concluded "[c]omplete dominion is inconsistent with a claim of easement,"¹⁵⁵ but the Blounts' use did not completely exclude the Farley from any use of his lot, noting "rather, appellee uses only so much of Lot 23 (a corner 15' x 25' in size) as is required to use the well."¹⁵⁶

*Holloway v. Gargano.*¹⁵⁷ The First District Court of Appeal, in a declaratory decree action, reversed the trial court's conclusion that the appel-

148. *Id.*

149. *Id.* at 250.

150. *Farley*, 668 So. 2d at 250.

151. *Id.*

152. *Id.* at 250–51.

153. *Id.* at 250 (quoting 25 AM. JUR. 2D *Easements and Licenses* § 7 (1966)).

154. *Id.*

155. *Farley*, 668 So. 2d at 251 (quoting *Platt v. Pietras*, 382 So. 2d 414, 416 (Fla. 5th Dist. Ct. App. 1980)).

156. *Farley*, 668 So. 2d at 251.

157. 657 So. 2d 1231 (Fla. 3d Dist. Ct. App. 1995).

lants/plaintiffs, two property owners, were entitled to access to their waterfront mobile home properties in Monroe County through an easement by necessity over the property owned by the appellees, and that reasonable ingress and egress had been provided by way of a road over the appellees' property.¹⁵⁸ The road had been used by appellants and their predecessors in interest since 1962. In 1992, the appellees erected a fence which narrowed the road to a width of eleven feet. The appellate court found that such a width, contrary to the trial court's finding, does not comply with the Monroe County Fire Code which requires a twenty-foot minimum access way.¹⁵⁹ Thus, it precluded access by fire and rescue equipment to plaintiffs' properties.

Further, the court noted access easements created by necessity "must be capable of accommodating traffic incident to the normal requirements of the property served by the easement 'consistent with the [reasonable] needs of the owners of the lands that are hemmed in.'"¹⁶⁰ In this case,

it is uncontradicted that whenever a car is parked in front of one plaintiff's property, access to the other plaintiff's property is totally blocked due to the narrow width of the road. . . . [T]he three decade use of the road by mail carriers, garbage collectors, meter readers and others has been either severely curtailed or prevented.¹⁶¹

The appellate court held the subject road legally insufficient under the above rule and reversed and remanded to the trial court.¹⁶²

Richardson v. Jackson.¹⁶³ The Fifth District Court of Appeal affirmed the trial court's award of summary judgment and a mandatory injunction against

158. *Id.* at 1231.

159. *Id.*

160. *Id.* at 1232 (quoting *Hayes v. Reynolds*, 132 So. 2d 781, 782 (Fla. 1st Dist. Ct. App. 1961)).

161. *Id.* at 1231-32.

162. *Holloway*, 657 So. 2d at 1232.

163. 667 So. 2d 928 (Fla. 5th Dist. Ct. App. 1996). In affirming, the fifth district considered its decisions in *Diefenderfer v. Forest Park Servs.*, 599 So. 2d 1309 (Fla. 5th Dist. Ct. App.), *review denied*, 613 So. 2d 204 (Fla. 1992), and *Hoff v. Scott*, 453 So. 2d 224 (Fla. 5th Dist. Ct. App. 1984), to be controlling. In *Diefenderfer*, it was determined that in these types of cases, the initial inquiry is whether the grant of easement is for the width described or for the description of the property over which there is a right of ingress and egress, "[o]r put another way, is the right of ingress and egress coterminous with the area set aside for the easement or something less than the area." *Richardson*, 667 So. 2d at 929 (quoting *Diefenderfer*, 599 So. 2d at 1312). If coterminous, then there can be no encroachments. The 1986 final judgment contained language found to be consistent with *Diefenderfer*.

appellants to require them to remove improvements constructed on property subject to an easement by prescription which had been confirmed in a 1986 final judgment.¹⁶⁴ The appellants argued that as long as they left an eight foot path for a vehicle to enter and leave the appellee's property, improvements were permissible on the remainder of the property subject to the easement.

*Trammell v. Ward.*¹⁶⁵ The Trammells brought three counts in the trial court seeking access to the Wards' lands in order to obtain access to a land-locked forty acre parcel owned by the Trammells: 1) a prescriptive easement; 2) a statutory way of necessity; and 3) injunctive relief prohibiting the Wards from barring Trammells' use of an unpaved roadway. The Wards counter-claimed for a statutory way of necessity over the Trammells' lands for which the Wards were willing to pay reasonable compensation as determined by the court. The Wards acknowledged the Trammells' need for access to the parcel, but objected to a route through the middle of the Wards' lands, proposing instead an easement across a corner of the Ward property as determined by the court. This was objectionable to the Trammells because "much of the area was wet."¹⁶⁶

The trial court indicated that upon finding a prescriptive easement, it would require that the Trammells hire a registered surveyor to survey the easement claimed.¹⁶⁷ In an effort to avoid survey costs, the Trammells told the trial court they would settle for a route of access proposed by the Wards. The trial court directed, in its final judgment, that the Trammells were to have an easement along the roadways marked E-1, E-2, and E-3, and the parties were directed to negotiate in good faith for another roadway marked E-4.¹⁶⁸ The Trammells moved for rehearing because "the access which the judgment purported to grant [them was] nonexistent, in that item 'E-1' . . . does not grant . . . access to their 40-acre parcel."¹⁶⁹ The trial court denied rehearing, and the First District Court of Appeal reversed on this issue.¹⁷⁰

The district court noted that the Wards' counsel stipulated that, pursuant to section 704.01(2) of the *Florida Statutes*, the Trammells were indeed

In *Hoff*, the language in the grant of easement contained clear language that the entire area had been granted for ingress and egress, and thus no obstructions could be placed in the easement. The final judgment in *Richardson* which confirmed the easement was deemed to be also consistent with the language in *Hoff*. *Richardson*, 667 So. 2d at 929.

164. *Id.*

165. 667 So. 2d 223 (Fla. 1st Dist. Ct. App. 1995).

166. *Id.* at 224.

167. *Id.*

168. *Id.* at 225.

169. *Id.*

170. *Trammell*, 667 So. 2d at 225.

entitled to a statutory way of necessity.¹⁷¹ This section requires a “practicable route of egress or ingress.”¹⁷² According to *Walkup v. Becker*,¹⁷³ “[a] roadway which is impassable after the rainy periods of the year is not practicably usable for egress or ingress within the contemplation of section 704.03.”¹⁷⁴ The only evidence presented on the practicability of E-1 was Mr. Trammell’s uncontradicted statement that the route was sometimes impassable.¹⁷⁵ Finding that on this basis the Trammells raised an appropriate ground for rehearing on the access question, the court concluded that the trial court abused its discretion in failing to grant rehearing, and it reversed “that portion of the final judgment which does not provide the Trammells with practicable access to their 40-acre parcel.”¹⁷⁶

XII. EMINENT DOMAIN

A. Condemnation

Brevard County v. Ramsey.¹⁷⁷ The County filed an action to condemn a portion of property whose owners of record were the Ramseys. They were also the owner of a business, Ramsey Enterprises (“Enterprises”), that operated a business on the property. The Ramseys had signed, but had not acknowledged, witnessed, or recorded a declaration of trust that declared that they held the land in trust for Enterprises. They filed a motion to join Enterprises as an indispensable party so that Enterprises could recover business damages.¹⁷⁸

The district court concluded that the trust declaration was valid.¹⁷⁹ The lack of witnesses was not fatal. Since the grantors were to be the trustees, it did not involve the transfer of title to the property.¹⁸⁰ Furthermore, the trust was not executed by the Statute of Uses even though it appeared to be a passive trust. To so rule would have the effect of vesting legal title in the beneficiary. Although that would be the traditional rule, it would defeat the

171. *Id.*

172. FLA. STAT. § 704.01(2) (1995). Section 704.03 of the *Florida Statutes* defines “practicable” as used in section 704.01. FLA. STAT. § 704.03 (1995).

173. 161 So. 2d 893, 895 (Fla. 1st Dist. Ct. App. 1964).

174. *Trammell*, 667 So. 2d at 225 (citing *Walkup*, 161 So. 2d at 895).

175. *Id.*

176. *Id.* at 226.

177. 658 So. 2d 1190 (Fla. 5th Dist. Ct. App. 1995). Chief Judge Peterson wrote the opinion. Judge Danksch concurred. Judge W. Sharp dissented with a written opinion.

178. *Id.* at 1192.

179. *Id.*

180. *See* FLA. STAT. §§ 689.05–.06 (1993).

statutory scheme which now requires two subscribing witnesses to any inter vivos transfer of title.

Since the trust document did not specify the trustee's powers, the powers were supplied by statute,¹⁸¹ which provided the trustee with all management power. Consequently, the trustee, not the beneficiary, would be the only necessary and proper party to the condemnation. Thus, the court concluded that this land belonged to the Ramseys, not Enterprises.¹⁸² However, Enterprises was the owner of the business. A landowner may recover business damages if a public body takes part of a landowner's land for a right of way which in turn causes injury to that landowner's business located on the adjoining land that is not taken. Consequently, business damages could not be recovered unless Enterprises and the Ramseys were truly the same persons. The Ramseys did not present any convincing reason to pierce the corporate veil. The court reasoned that they chose the trust and the corporate entity for their own reasons.¹⁸³ Thus, they have to accept the disadvantages as well as the advantages of those forms.

Judge Sharp dissented.¹⁸⁴ The execution of passive trusts by the Statute of Uses has long been recognized in Florida as well as other states.¹⁸⁵ The legislature did not mean to subvert that traditional doctrine by requiring witnesses for deeds. The Statute of Uses should execute the passive trust vesting title in the beneficiary.¹⁸⁶ Enterprises, as the owner of the land and the business, should be able to recover business damages.¹⁸⁷

*Broward County v. Conner.*¹⁸⁸ After the County filed an eminent domain action to take the Connors' land, the parties explored the possibility of settling the case by a real estate exchange. The parties met and reached an agreement in principle. The Connors' lawyer sent a letter to the County's private attorney which "confirmed the parameters" of the proposed settlement. The parties subsequently had further meetings, exchanged letters, and exchanged unsigned

181. *Id.* § 737.401 (1993).

182. *Ramsey*, 658 So. 2d at 1197.

183. *Id.*

184. *Id.* at 1197-99 (Sharp, J., dissenting).

185. *Id.* at 1199.

186. *Id.*

187. *Ramsey*, 658 So. 2d at 1199.

188. 660 So. 2d 288 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 250 (Fla. 1996). Judge Klein wrote the opinion in which Chief Judge Gunther concurred. Judge Farmer wrote a special concurrence.

drafts of the settlement. Despite these negotiations, the County decided not to settle according to the proposed terms.¹⁸⁹

The landowners filed a motion in the eminent domain proceeding to enforce the settlement. The trial court granted specific performance because it found that “the agreement had been partly performed; that [the landowners] had relied to their detriment based on the representation of the county’s agents and employees; and, that the county was estopped to deny the settlement.”¹⁹⁰ The district court reversed relying on two alternative grounds, the Statute of Frauds and the Sunshine Law.¹⁹¹

First, the court held that the settlement was a contract for the sale of land.¹⁹² Consequently, the Statute of Frauds¹⁹³ requires that the contract be in writing and signed by the party to be charged; however, the County had not signed the settlement.¹⁹⁴ The landowners had not established sufficient part performance to take the contract out of the Statute of Frauds. The district court summarily dismissed the landowners’ estoppel claim, stating that the landowners “cite[d] no authority which would support specific performance under these circumstances.”¹⁹⁵ That really misses the point. If the County was estopped from denying the validity of the contract and the Statute of Frauds issue, then the landowners, who were to be the “buyers” of the exchanged property, might have been entitled to specific performance even if there was no precedent on all fours to that effect.

The court’s alternative holding makes far more sense. There was no contract. The provisions of the Sunshine Law require that formal governmental action must take place in open meeting unless some specific exception applies.¹⁹⁶ There is an exception for settlement negotiations for pending litigation,¹⁹⁷ but there was no suggestion that it was met here. Consequently, this settlement could not have been entered except by action in an open meeting and that never occurred.

Judge Farmer points out in his concurring opinion that this decision may make the settlement of condemnation proceedings slower and more expen-

189. *Id.* at 289.

190. *Id.* at 290.

191. *Id.* at 289.

192. *Id.* at 290.

193. FLA. STAT. § 725.01 (1993).

194. The Statute of Frauds issue is discussed in part XXV of this survey. *See* discussion *infra* p. 371.

195. *Conner*, 660 So. 2d at 290.

196. FLA. STAT. § 286.011(1) (1993).

197. *Id.* § 286.011(8) (1993).

sive.¹⁹⁸ Perhaps so, but every lawyer should be wary of relying on a settlement until it is actually signed by a person with clear authority to bind the other party.

*Caulk v. Orange County.*¹⁹⁹ Mrs. Caulk and her late husband owned land. In 1978, they conveyed it to R. T. Hibbard by a deed which “reserves and retains all rights, title, and interest in and to any and all proceeds arising out of eminent domain, condemnation, or similar proceedings.”²⁰⁰ Hibbard sold the land to Hibbard Oil Company which in turn sold the land to Amoco Oil Company, but neither of these deeds contained the covenant or anything similar. When Mrs. Caulk learned that the County had filed a condemnation action against Amoco, she intervened. The trial court denied her motion for compensation on the theory that the clause was a personal covenant between the Caulks and their immediate grantee.²⁰¹ The district court affirmed.²⁰²

The court did not explain how it concluded that the clause created a covenant rather than an interest in the land. It jumps right into the discussion of whether this covenant runs with the land, i.e., whether it would bind a remote grantee. But this author²⁰³ agrees that it is a covenant. Nothing about the language used suggests that the grantor intended to retain any interest in the land.²⁰⁴

Not every covenant in a deed runs with the land. First, the covenant must touch and concern the land. That means the covenant must have a relation to the land. The court concluded that this covenant “has no effect whatever on the land.”²⁰⁵ What the covenant really concerned was the money, i.e., intangible personal property. Furthermore, there was no evidence that the covenant was intended to run with the land and that is also a requirement. The language that the parties used in the deed does not even suggest an intent for the covenant to run. It does not state that the covenant would be binding on grantees.²⁰⁶ It refers only to the “grantor” and to the “Grantee herein,”²⁰⁷ and

198. *Conner*, 660 So. 2d at 291 (Farmer, J., concurring specially).

199. 661 So. 2d 932 (Fla. 5th Dist. Ct. App. 1995). Chief Judge Peterson wrote the opinion. Judges Goshorn and Thompson concurred.

200. *Id.* at 933.

201. *Id.*

202. *Id.*

203. Professor Brown.

204. *Caulk*, 661 So. 2d at 934.

205. *Id.*

206. Traditionally that would be expressed by the use of words of limitation and inheritance, e.g., heirs, successors, and assigns.

207. *Caulk*, 661 So. 2d at 933.

the court finds that the language "sounds personal."²⁰⁸ Finally, the court finds that it would be "incongruous" that a subsequent purchaser would have to give a remote grantor the condemnation proceeds.²⁰⁹ Perhaps the court was thinking that land burdened by such a covenant would almost certainly become unmarketable and, in all probability, that courts would find such a covenant void as it would violate the rule against restraints on alienation.

*City of Dania v. Broward County.*²¹⁰ Broward County began condemnation proceedings against several parcels of land for the purpose of airport expansion. The City moved to intervene alleging, *inter alia*, that the condemnation would harm the City by removing the subject properties from its tax base and depriving it of the benefits of money it had expended for infrastructure improvements. The trial court denied intervention and the district court affirmed.²¹¹ In order to intervene, the proceeding must have a direct legal effect upon the intervenor. There was no statutory basis for a city to recover from a county for these losses, so this indirect harm does not satisfy the statutory requirement. Furthermore, the County's alleged failure to comply with the procedural requirements for condemnation would not be a proper basis for intervention.

*City of Ocala v. Red Oak Farm, Inc.*²¹² The landowners' parcels were subject to a power company's 100-foot-wide easement for an electrical transmission facility before this action was commenced. In this case, the City took a fifty-foot-wide perpetual easement for a similar electrical transmission facility adjacent to the power company's easement. The power company had a formal written policy and permitting procedure by which landowners could get permission to make certain uses of the property. The City had no written policy but claimed to have a similar long-standing, unwritten policy. The City wanted to introduce the easement documents on which the power company's preexisting easement was based and the formal written policy into evidence. The landowners objected and the trial court rejected the City's proffer.²¹³ The district court reversed.²¹⁴

208. *Id.* at 934.

209. *Id.*

210. 658 So. 2d 163 (Fla. 4th Dist. Ct. App. 1995). Judges Dell, Farmer, and Stevenson concurred in the per curiam opinion.

211. *Id.* at 166.

212. 673 So. 2d 86 (Fla. 5th Dist. Ct. App.), *review denied*, Gold Land Corp. v. City of Ocala, No. 88,238, 1996 LEXIS 1752, at *1 (Fla. Sept. 27, 1996). Judge Griffin wrote the opinion in which Chief Judge Peterson concurred. Judge Thompson dissented.

213. *Id.* at 86.

214. *Id.* at 87.

The court ruled that this evidence was relevant on the issues of valuation of the property and severance damages.²¹⁵ Surprisingly, the court based its conclusion, in part, on the intensity of the landowners' counsel's efforts to exclude this evidence. The rest of its logic is a little obscure. The court concluded that the jury might have been confused and misled by the fact that they were not informed about the parallels in the City's unwritten policy and the power company's written one.²¹⁶

Judge Thompson's dissent provides some illumination.²¹⁷ Apparently, the jury was informed that the power company had an easement, that it had the written policy, and that the City had an unwritten policy. Part of the power company's written policy was read to the jury. The jurors viewed the land and the power company's transmission facilities. This made introduction of the easement documents and the written policy unnecessary, particularly in light of the prejudicial effect the documents might have since they contained the price the power company had paid for its easement thirty-five years earlier. Judge Thompson pointed out that the trial court had "the superior vantage," and the trial judge's decisions did not fail the reasonableness test.²¹⁸

Hartleb v. Department of Transportation.²¹⁹ The Department of Transportation ("DOT") brought this eminent domain action and made an offer of judgment to the landowner for \$60,000. The jury verdict was \$60,971, but it was apportioned between the landowner, who got \$53,630, and his tenant. The trial judge denied the landowner attorney's fees and costs incurred after the offer of judgment based upon section 73.092(7) of the *Florida Statutes*²²⁰ because he had received less than the offer of judgment.²²¹

The district court disagreed for two reasons. First, the district court found that the offer of judgment was ambiguous.²²² It made no reference to apportionment of the award or compensation of the tenant, nor did it indicate that it

215. *Id.*

216. *Id.*

217. *Red Oak Farm*, 673 So. 2d at 87-88.

218. *Id.* at 88 (Thompson, J., dissenting).

219. 677 So. 2d 336 (Fla. 4th Dist. Ct. App. 1996). Judge Stone wrote the opinion. Judge Polen concurred. Judge Klein concurred specially.

220. FLA. STAT. § 73.092(7) (1987). The statute provides:

Where an offer of judgment made by the petitioner . . . is either rejected or expires and the verdict or judgment is less than or equal to the offer of judgment, no attorney's fees or costs shall be awarded for time spent by the attorney or costs incurred after the time or rejection or expiration of the offer.

Id.

221. *Hartleb*, 677 So. 2d at 336.

222. *Id.* at 337.

would be free of any claim by the tenant for compensation.²²³ In fact, it purported to be a “complete and total settlement.”²²⁴ So, it is unclear if the landlord’s recovery was actually less than the offer of judgment.

Second, the DOT made substantial changes to its construction plans after that offer of judgment had expired.²²⁵ These changes reduced the scope of the taking.²²⁶ Consequently, the jury verdict concerned a taking of a lesser magnitude than the earlier offer of judgment. If it was these subsequent changes that caused the jury verdict to come in under the offer, then “simple equity and the requirements of fair dealing”²²⁷ would prevent the DOT from invoking this statute.

Judge Klein wrote a special concurrence to express his dismay with the DOT’s conduct in pursuing this appeal.²²⁸ Although he did not use the word “frivolous,” it seems clear that was what he was thinking about the DOT’s position. Note that these merely compound the department’s earlier errors in making an ambiguous offer of judgment and failing to make an updated offer of judgment following a substantial change in plans.

*Morr v. Department of Transportation.*²²⁹ Morr operated a salvage yard on land leased from Kreider. Morr had an occupational license from DeSoto County, but the salvage yard was not permitted by the County’s land use regulations. The DOT brought a condemnation action and obtained an order taking the property. Subsequently, the County brought an action to prevent the landlord and tenant from violating the land use regulations by operating the salvage yard there. The stipulated settlement provided that Morr would remove the salvage automobiles, but he could continue the salvage business on adjacent land if he complied with certain conditions.²³⁰

In the condemnation action, the trial judge decided that the above settlement conclusively established that the salvage yard had been operating illegally.²³¹ Consequently, Morr was not entitled to business damages. The district court disagreed and reversed.²³² The settlement had been entered after

223. *Id.* at 336.

224. *Id.*

225. *Id.* at 337.

226. *Hartleb*, 677 So. 2d at 337.

227. *Id.*

228. *Id.* (Klein, J., concurring specially).

229. 667 So. 2d 888 (Fla. 2d Dist. Ct. App. 1996). Judge Blue wrote the opinion. Acting Chief Judge Patterson and Judge Altenbernd concurred.

230. *Id.* at 889.

231. *Id.*

232. *Id.*

the DOT had already taken the land. At that time, Morr no longer had any interest in the property that would enable him to continue operating the business there. At the critical time, the time of the taking, Morr did have an ongoing business. If Morr had a reasonable chance of continuing the business by obtaining rezoning or a variance, then he would be entitled to compensation for its loss. Whether he could have obtained a variance or rezoning would be a jury question unless there was no credible evidence to the contrary. Since the record does not establish that the county would have prevented its continuation if the DOT had not taken the land, the trial court should not have granted summary judgment that he could not recover business damages.²³³

Seminole County v. Clayton,²³⁴ *Seminole County v. Delco Oil, Inc.*,²³⁵ *Seminole County v. Butler*,²³⁶ and *Seminole County v. Rollingwood Apartments, Ltd.*²³⁷ Together, these four cases clarify the fifth district's approach to attorneys' fees in eminent domain cases. The statute provided:

(1) In assessing attorney's fees in eminent domain proceedings, the court shall give greatest weight to the benefits resulting to the client from the services rendered.

(a) As used in this section, the term "benefits" means the difference between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. . . .

(b) The court may also consider nonmonetary benefits which the attorney obtains for the client.

(2) In assessing attorney's fees in eminent domain proceedings, the court shall also give secondary consideration to:

(a) The novelty, difficulty, and importance of the questions involved.

(b) The skill employed by the attorney in conducting the cause.

(c) The amount of money involved.

(d) The responsibility incurred and fulfilled by the attorney.

233. *Id.* at 890.

234. 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995). Judge Cobb wrote the opinion in which Chief Judge Peterson and Judge W. Sharp concurred.

235. 669 So. 2d 1162 (Fla. 5th Dist. Ct. App. 1996) (replacing the original opinion at 21 Fla. L. Weekly D254 (5th Dist. Ct. App. Jan. 26, 1996)). Judges Cobb, Harris, and Griffin concurred in the per curiam opinion.

236. 676 So. 2d 451 (Fla. 5th Dist. Ct. App. 1996). Judge Antoon wrote the opinion. Chief Judge Peterson and Judge Dauksch concurred.

237. 678 So. 2d 370 (Fla. 5th Dist. Ct. App. 1996). Judge W. Sharp wrote the opinion in which Chief Judge Peterson and Judge Harris concurred.

(e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

....

(4) In determining the amount of attorney's fees to be paid by the petitioner, the court shall be guided by the fees the defendant would ordinarily be expected to pay if the petitioner were not responsible for the payment of fees and costs.²³⁸

In *Clayton*, the compensation issue was settled without a trial.²³⁹ The only issue before the circuit court was the amount of attorneys' fees. The court used a two tier approach, first figuring out a reasonable fee based upon an hourly rate and then adding twenty percent of the difference between the final agreed compensation and the initial offer, i.e., the betterment accomplished by the attorney. That produced a total attorney's fee of \$159,261.00, which worked out to \$1,276.64 per hour.²⁴⁰ The district court reversed.²⁴¹

First, the district court rejected the constitutional challenge to the attorneys' fee statute, section 73.092 of the *Florida Statutes*.²⁴² While the court agreed that a statute that mandated an unreasonable attorneys' fee would be unconstitutional, it concluded that the statute could be interpreted to comport with the *Florida Constitution*.²⁴³ Furthermore, an excessive rate could not be justified as a punishment for a condemning authority which had made a bad faith initial offer as a bargaining ploy.²⁴⁴ The case was remanded with an order that the trial court consider the statutory criteria rather than relying on a percentage approach.²⁴⁵

In *Delco*, the landowner had contracted to pay its attorney twenty-five percent of the benefits obtained. The parties quickly reached an agreement on the amount of compensation to be paid for the property, an amount \$270,000 higher than the County's original offer. The landowner's attorney worked 29.3 hours settling the case, and the time increased to 46.2 hours by including the

238. FLA. STAT. § 73.092 (1993).

239. *Clayton*, 665 So. 2d at 364.

240. *Id.*

241. *Id.* at 366.

242. *Id.* at 365 (citing FLA. STAT. § 73.092 (1993)).

243. *Id.*

244. *Clayton*, 665 So. 2d at 365. Note, a low initial offer would already increase the attorney's fees under the statute if the attorney was able to successfully negotiate a fair price because it would increase the amount of "betterment" which the attorney could produce for his or her client.

245. *Id.* at 366.

time involved in recovering attorney's fees. The trial court awarded fees of \$67,500.²⁴⁶ The district court reversed.²⁴⁷

The appellate court reasoned that Florida decisions provided what a reasonable attorneys' fee was and how it was to be calculated in most cases.²⁴⁸ Condemnation is not a contingent fee case. Consequently, an attorneys' fee based upon a percentage of the recovery would be inappropriate. In eminent domain cases, the legislature has provided that the condemning authority pay a reasonable fee except as provided by section 73.092 of the *Florida Statutes*.²⁴⁹ The district court interpreted that to mean that the fee reached by applying the factors in section 73.092 must still fit within the general parameters for a reasonable fee, i.e., the fee would be unreasonable if the effective hourly rate would be excessive after taking into account all relevant factors.²⁵⁰ The fee awarded in this case, over \$2,000 per hour,²⁵¹ was excessive by this standard.

Moreover, applying the factors in section 73.092 would have also led the court to conclude that the attorney's fees had not been correctly calculated. The statute directed courts to give the greatest weight to the benefits resulting from the legal services and, secondarily, to consider a list of other factors.²⁵² Those factors were the same as used in the lodestar approach of *Florida Patient's Compensation Fund v. Rowe*.²⁵³ Thus, the place to begin that calculation was with those statutory factors, using them to figure a lodestar amount. Then, that amount could be adjusted up or down in light of the benefits the attorney had obtained for this client, keeping in mind that the statute provides that the benefits should be the primary factor in the calculation. The recovery should not be controlled by what the condemnee has agreed to pay its attorney or what fees have become customary based upon a misunderstanding of the statutory criteria.

246. *Delco*, 669 So. 2d at 1164.

247. *Id.* at 1163.

248. *Id.* at 1166.

249. FLA. STAT. § 73.092 (1993).

250. *Delco*, 669 So. 2d at 1166.

251. This \$2,000 figure was figured using the 29.3 hours it took to settle the case.

252. The secondary factors are:

- (a) The novelty, difficulty, and importance of the questions involved.
- (b) The skill employed by the attorney in conducting the cause.
- (c) The amount of money involved.
- (d) The responsibility incurred and fulfilled by the attorney.
- (e) The attorney's time and labor reasonably required adequately to represent the client in relation to the benefits resulting to the client.

FLA. STAT. § 73.092(2)(a)–(e) (1993).

253. 472 So. 2d 1145 (Fla. 1985).

The trial court in *Rollingwood Apartments* also used an elaborate, but incorrect formula. In essence, “the court awarded a top hourly rate *plus* a generous percentage award, which resulted in a fee of over \$630 per hour.”²⁵⁴ Because this was not consistent with the interpretations of section 73.092 above, the district court reversed.²⁵⁵ It may, however, be noteworthy, that the district court did not say that \$630 per hour was per se unreasonable.

In *Butler*, the court faced three similar attorneys’ fees calculations and disapproved of them for the same reasons.²⁵⁶ However, this case had an additional wrinkle. The landowner owned two buildings. Each was leased to a tenant. The land that the County was condemning did not include the two buildings; however, because the County admitted that the condemnation would make the buildings valueless, it agreed to compensate the condemnee for the loss. The County also agreed to allow the tenants to stay in the buildings during the eminent domain proceedings. The landowner informed the tenants that he expected them to keep paying rent during that period. They responded by filing successful motions with the court to abate their rent. The landowner filed a motion to set that order aside, but the parties eventually settled the matter. Under the settlement, the landowner received \$139,475. In calculating the attorney’s fees in the eminent domain action, the judge included that amount in the benefits that the attorney had obtained for his client.²⁵⁷ The district court found that to be error.²⁵⁸

“Full compensation within the meaning of our constitution includes the payment of attorney’s fees necessary to enforce the property owner’s rights, including fees incurred in proceedings arising out of, and ancillary to, the original condemnation proceeding.”²⁵⁹ Disputes arising out of the proceeding are such things as apportionment of the damages or enforcement of the condemnation award. Even the statute only provides attorneys’ fees incurred in the defense of the condemnation action.²⁶⁰ That the landowner’s dispute with his tenants was triggered by the condemnation action does not make it a proceeding arising out of the condemnation. It was a private dispute between a landlord and his tenants, and there is no reason that the public should pay his attorney’s fees in resolving that dispute.

254. *Rollingwood Apartments*, 678 So. 2d at 371.

255. *Id.*

256. *Butler*, 676 So. 2d at 455.

257. *Id.* at 454.

258. *Id.* at 455.

259. *Id.* at 454.

260. FLA. STAT. § 73.091 (Supp. 1994).

The County had also claimed the court erred in awarding attorneys' fees for time spent litigating the issue of attorneys' fees. The established rule is that attorneys' fees can be recovered for time spent litigating the issue of whether an attorney is entitled to fees, but they cannot be recovered for time spent litigating the amount of the attorney's fees. The record in this case was silent as to which issue the attorney's time was spent on, so the appellant cannot establish that an error occurred.²⁶¹

Department of Transportation v. Murray.²⁶² The DOT was in the process of condemning part of a restaurant parking lot. On the issue of severance damages, DOT sought unsuccessfully to introduce expert testimony that the injury could be partially cured, arguing that the thirteen parking spaces that would be lost by the taking could be recovered if the landowner added spaces to existing parking bays and striped over a paved area then being used only for overflow parking. That ruling was made in an interlocutory order by the original trial judge.²⁶³ When that judge was removed, his successor felt bound by the interlocutory order.²⁶⁴ The district court held that the proffered testimony should have been excluded but for a different reason.²⁶⁵

The fatal flaw with the expert testimony was that it did not consider the effect the proposed cure would have on the value of the remaining property and business. Converting the overflow parking into regular marked parking would leave the landowner with the same number of striped parking spaces, but it would not make the landowners whole because the landowner would still have a smaller parking area. That would probably reduce the value of the restaurant, a factor which the expert testimony did not address. Therefore, the testimony was inadmissible as a matter of law.²⁶⁶

In addition, the landowners' expert had testified regarding the calculation of business damages. Business damages were, and still are, provided for by statute²⁶⁷ rather than by constitutional authority, but the statute provides little guidance regarding how they are to be calculated. The expert had described his calculation as a "deprivation appraisal,"²⁶⁸ but the court characterized it as

261. *Butler*, 676 So. 2d at 455.

262. 670 So. 2d 977 (Fla. 1st Dist. Ct. App.), *review granted*, 677 So. 2d 840 (Fla. 1996). This was a per curiam opinion in which Judges Ervin and Miner concurred. Judge Benton wrote an opinion concurring in part and dissenting in part.

263. *Id.* at 978.

264. *Id.*

265. *Id.*

266. *Id.* at 980.

267. FLA. STAT. § 73.071(3) (1991).

268. *Murray*, 670 So. 2d at 979.

a lost profit analysis.²⁶⁹ The calculation of business damages should focus on lost profits and lost ability to make profits, but it should also consider business losses caused by the taking. This lost profit analysis must also include consideration of any fixed expenses that will be incurred despite the taking. In this case, the expert purposefully excluded fixed expenses such as advertising, depreciation, insurance, utilities, and the landowners' salaries. Since the expert's analysis here did not account for fixed expenses, it should not have been admitted into evidence.

The district court certified two questions as being of great public importance.²⁷⁰ They are:

[1] IN AN EMINENT DOMAIN CASE IN WHICH AN ESTABLISHED BUSINESS IS NOT TOTALLY DESTROYED BY A TAKING, DOES SECTION 73.071(3)(b), FLORIDA STATUTES, CONTEMPLATE CALCULATION OF BUSINESS DAMAGES BY ANY MEANS OTHER THAN A LOST PROFIT ANALYSIS? [2] IN THE INSTANT CASE IS THE EXPERT'S BUSINESS DAMAGE CALCULATION A LOST PROFIT ANALYSIS REQUIRING THE DEDUCTION OF FIXED EXPENSES, SUCH AS SALARIES, INTEREST, DEPRECIATION, AND UTILITIES, OR AN ALTERNATIVE ANALYSIS, COGNIZABLE UNDER SECTION 73.071(3)(b), BASED ON DEDUCTION OF CERTAIN VARIABLE EXPENSES AND THE EXCLUSION OF FIXED EXPENSES FROM THE ANALYSIS?²⁷¹

Judge Benton disagreed and, therefore, dissented in part.²⁷² The calculation of business damages would be different if the business is forced to shut down as a result of the taking rather than becomes less profitable. If the business shuts down, then the deduction of fixed expenses is appropriate because those expenses will cease. However, if the business continues, then the expenses will also continue as they had before the taking. Judge Benton argues that the majority applied the wrong standard to a business which would

269. *Id.*

270. The same two questions were certified in *Department of Transp. v. Coleman*, 673 So. 2d 874 (Fla. 1st Dist. Ct. App. 1996), a per curiam opinion involving the same three judges as in *Murray*. The Supreme Court of Florida granted review of the certified questions on July 2, 1996. See *Murray v. Department of Transp.*, 677 So. 2d 840 (Fla. 1996).

271. *Murray*, 670 So. 2d at 980.

272. *Id.* (Benton, J., dissenting in part).

continue.²⁷³ Moreover, the expert's testimony was sufficiently supported by the facts so that it could be left to the jury to decide whether to accept it or not.

*Tampa-Hillsborough County Expressway Authority v. Casiano-Torres.*²⁷⁴ The condemnee sought and won severance damages.²⁷⁵ Among the things it apparently claimed was damage to its business, which it could recover if the taking would "damage or destroy an established business of more than 5 years' standing."²⁷⁶ The government appealed, *inter alia*, the trial court's submitting to the jury the question of whether the condemnee's business had been in existence for five years. The government's theory was that court had ignored the provision that: "[t]he jury shall determine solely the amount of compensation to be paid"²⁷⁷ The district court held that the trial court had not erred, stating that "[s]uch an interpretation ignores the remainder of the statute which establishes what 'compensation' shall include and the requirements for arriving at the proper amount of compensation."²⁷⁸ Apparently, the court's point was that whether the business was in existence for the requisite five years was only an element in determining the amount of damages, not whether damages should be paid.

*Weese v. Pinellas County.*²⁷⁹ The sole issue in the case was the amount of business damages. The facts in the case were somewhat unusual. A used car lot occupied the land. The order "taking" part of it was entered on July 2, 1991, but the construction project did not actually get to that vicinity until September of 1993. Cars were displayed on the land until then. The project was completed in February of 1994. The first expert witness testified that the actual damage began in February of 1994, which is the date on which he began calculating the damages. Because the statute²⁸⁰ provided that compensation shall be based on the earlier of the date of the taking or the date of the trial, the trial judge excluded this testimony.²⁸¹

273. *Id.* at 981.

274. 659 So. 2d 1125 (Fla. 2d Dist. Ct. App.), *review denied*, 666 So. 2d 142 (Fla. 1995). Acting Chief Judge Campbell wrote the opinion. Judges Patterson and Fulmer concurred.

275. *Id.* at 1125. See FLA. STAT. § 73.071(3)(b) (1991) (governing the award of severance damages).

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

277. *Id.* § 73.071(3).

278. *Casiano-Torres*, 659 So. 2d at 1126.

279. 668 So. 2d 221 (Fla. 2d Dist. Ct. App. 1996). Acting Chief Judge Ryder wrote the opinion in which Judges Altenbernd and Lazzara concurred.

280. FLA. STAT. § 73.071(2) (1991).

281. *Weese*, 668 So. 2d at 222.

Then the trial court refused to allow the next witness to testify. He was the prior owner of the car business; he had continued to help the current owner; he was the owner of the underlying land; and he had the same last name as the current owner.²⁸² Exactly what it was about this combination of facts that led to the trial court's decision was not specified. Then, because of the lack of testimony on the amount of damages, the court entered a direct verdict in favor of the County.²⁸³ The district court reversed.²⁸⁴

First, the court concluded that the first expert had complied with the statute.²⁸⁵ He had begun his calculations at the correct date, the date of the taking, but had clearly stated that there were no business damages between the date of the taking in 1991 and the date when the project was complete in 1994. He merely continued his calculations from that date. Furthermore, the second expert was qualified to testify. "A witness may testify as an expert if he is qualified to do so by reason of knowledge obtained in his occupation or business."²⁸⁶ He had knowledge of the used car business in general and also of the particular business that had been damaged. Implicit in the court's decision is that there is nothing inherent in this witness' connection to the claimant to disqualify him as an expert.

B. Inverse Condemnation

*City of Riviera Beach v. Shillingsburg*²⁸⁷ and *Taylor v. City of North Palm Beach*²⁸⁸ involve contiguous submerged land, although in different cities. They involve similar facts and were decided by the same panel of judges from the Fourth District Court of Appeal. In *Shillingburg*, the City amended its comprehensive plan to include the following policy: "*It is the expressed policy objective of the City to preclude any development of submerged lands, including but not limited to mangroves, wetlands . . . to the maximum extent permissible by law. It is further the policy of the City to oppose any applications for dredge and fill permits . . .*"²⁸⁹ The landowners claimed this affected a taking

282. The exact relationship, if any, was not mentioned in the decision.

283. *Weese*, 668 So. 2d at 223.

284. *Id.*

285. *Id.* at 222.

286. *Id.* at 223 (relying upon *Harvey v. State*, 129 Fla. 289 (1937) and FLA. STAT. § 90.702 (1991)).

287. 659 So. 2d 1174 (Fla. 4th Dist. Ct. App. 1995). Judge Pariente wrote the opinion in which Judge Warner and Associate Judge Fredericka Smith concurred.

288. 659 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1995). Judge Pariente wrote the opinion in which Judge Warner and Associate Judge Fredericka Smith concurred.

289. 659 So. 2d at 1177.

of their land. The trial court initially rejected the claims as not being ripe because there was no final decision as to what would be ultimately allowed, but stayed the proceedings for four months pending developments.²⁹⁰ During that time, the land use plan was amended to allow a viewing dock, and one landowner's application for a permit to build a viewing dock was approved subject to stringent conditions and limits. The trial court concluded that this proved the highest level of development that would be allowed, but it was not enough.²⁹¹ It violated the landowner's reasonable investment-backed expectations which constituted a taking.²⁹² The district court disagreed and reversed.²⁹³

A land use ordinance that leaves open the possibility of reasonable use should not be found on its face to violate the Takings Clause.²⁹⁴ This plan by its express language contemplated viable uses consistent with the policy objectives. The amendment to allow the viewing dock demonstrated that the plan has some flexibility and that further amendments were possible. So the facial challenge failed.²⁹⁵

The as applied challenge failed because it was not ripe.²⁹⁶ The doctrine is intended to give the land use agency the chance to reach its own well-reasoned conclusion before a court will consider the matter. Getting permission to build a dock did not prove what the land use agency would ultimately allow or deny. While the landowners here asserted that any further applications would be futile, that was not conclusively established from the facts in the record.

In *Taylor*,²⁹⁷ the landowner's family had held title since 1971. Back then the zoning was C-1A which permitted limited commercial uses and high density, multifamily residential uses. That it was in the midst of an environmentally sensitive area was gradually recognized by various levels of government, culminating with the zoning being changed in 1989 to a conservation/open space classification, consistent with the City's comprehensive use plan. Low density single family housing and passive recreation were permissible uses. The landowner sued on the theory that this reclassification affected

290. *Id.* at 1178.

291. *Id.* at 1179.

292. *Id.*

293. *Id.* at 1176.

294. U.S. CONST. amend. V.

295. *Shillingsburg*, 659 So. 2d at 1179.

296. *Id.* at 1180.

297. *Taylor*, 659 So. 2d at 1167.

a taking of the property. The trial court rejected her claims and she appealed.²⁹⁸

The landowner's first claim was that the zoning classification was a per se taking of her property. Where a land use regulation leaves open the possibility of reasonable uses, a claim of a facial taking will fail. The district court found that the record did not preclude all reasonable uses of the land.²⁹⁹ Furthermore, the plan had a mechanism for seeking amendments. So it was possible that the landowner could have gotten an amendment allowing a proposed use.

Any claim that the landowner would be deprived of all economically viable uses would depend on an as applied challenge based upon the facts of the case. However, that challenge failed because the landowner had failed to exhaust her administrative remedies by seeking the amendment.³⁰⁰ She also had not submitted a development plan that had been rejected by the City. Whether there has been a taking depends on the extent to which the landowner will be deprived of her reasonable investment-backed expectations, but that depends on what development the government will allow. Until the government made a final determination, the takings issue could not be decided. Therefore, this case was not yet ripe.³⁰¹

*City of St. Petersburg v. Bowen.*³⁰² The landlord brought this action for inverse condemnation after the City's Nuisance Abatement Board ordered his apartment house closed for a period of one year.³⁰³ The landlord was not accused of any wrongdoing. The order was based upon a finding that there was drug use by tenants and other persons at the property. The trial court first granted a motion to dismiss filed by the City.³⁰⁴ It ruled that the taking was temporary and, at the time, it was the accepted law that an inverse condemnation action could not be brought to recover for a temporary taking.³⁰⁵ Because

298. *Id.* at 1168.

299. *Id.* at 1171.

300. *Id.* at 1172-73.

301. *Id.* at 1174.

302. 675 So. 2d 626 (Fla. 2d Dist. Ct. App.), *review denied*, No. 88,373, 1996 LEXIS 1563, at *1 (Fla. Aug. 29, 1996). Acting Chief Judge Campbell wrote the opinion in which Judges Frank and Blue concurred.

303. The order was based upon the authority of section 893.138 of the *Florida Statutes* and sections 19-66 to 19-71 of the St. Petersburg, Florida, City Code. See FLA. STAT. § 893.138 (1991); ST. PETERSBURG, FLA., CITY CODE §§ 19-66 to -71 (1989). There was no claim that the order was invalid.

304. *Bowen*, 675 So. 2d at 628.

305. *Id.*

the Supreme Court of Florida changed the law³⁰⁶ after the trial court's decision was made, the district court reversed.³⁰⁷ The trial court then granted summary judgment to the landlord.³⁰⁸ The district court affirmed, adopting the opinion of Circuit Court Judge Horace A. Andrews which it found to be "complete, concise, scholarly and well-grounded."³⁰⁹

A regulation that denies all economically beneficial or productive use of the land is compensable without inquiry into the public interest advanced in support of the regulation. Ordering the apartment house closed for one year did deny all economically beneficial or productive use. The taking claim is not avoided by invoking the nuisance exception. The state may legitimately prohibit conduct which would be a common law nuisance, e.g., the use or sale of drugs. But the conduct prohibited goes far beyond that. This order prohibits the use of the premises for human habitation. In essence, the City is trying to force this landowner to disproportionately bear the cost of its war on drugs.

*Sarasota Welfare Home, Inc. v. City of Sarasota.*³¹⁰ The landowner's property was subject to a public easement. When the City buried a sewer and wastewater pipe in 1970, it extended beyond the public easement and encroached on the this landowner's land. The encroachment was discovered in 1988 when the landowner began a construction project. Due to the location of the pipe, the City refused to allow the construction according to the proposed plans. Just under four years after the discovery, the landowner filed this inverse condemnation action against the City. The trial court granted the City's motion for summary judgment on the basis that the action was barred by the statute of limitations, but the district court reversed.³¹¹

There is no specific inverse condemnation statute of limitations, but that does not mean that the action is not subject to a time limit. The district court ruled³¹² that it is subject to the four year statute of limitations applicable to real property actions for which the legislature has not provided a specific limit.³¹³ The critical question in this case is when the four year period began to run.³¹⁴

306. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

307. *Bowen v. City of St. Petersburg*, 642 So. 2d 837 (Fla. 2d Dist. Ct. App. 1994).

308. *Bowen*, 675 So. 2d at 628.

309. *Id.* at 629.

310. 666 So. 2d 171 (Fla. 2d Dist. Ct. App. 1995). Chief Judge Threadgill and Judges Campbell and Fulmer concurred in this per curiam opinion.

311. *Id.* at 173.

312. On this point, the district court affirmed the trial court's ruling. *Id.*

313. *Id.* at 172 (citing FLA. STAT. § 95.11(3)(p) (1991)).

314. *Id.*

The trial court ruled that the four year period began in 1970 when the encroaching pipe was installed, but the district court concluded it was when the City refused to approve the development plan because of location of its own pipe.³¹⁵ The court's logic is that "a 'taking' occurs when an owner is denied substantially all economically beneficial or productive use of the owner's land."³¹⁶ Whether a taking has occurred is determined by a factual inquiry made on a case-by-case basis, so when it occurred must be determined the same way. Here, the court concluded that the landowner was not deprived of the use of the land taken until it was prevented from building according to its plans.³¹⁷

The court also reversed the trial court's denial of the landowner's motion for leave to amend the complaint.³¹⁸ The landowner wanted to add a trespass claim, apparently on the theories that the encroaching pipe was a continuing trespass; damages for the preceding four years of encroachment would not be barred by the statute of limitations; and an injunction should be awarded against the encroachment's continuation. Such motions "shall be given freely when justice so requires."³¹⁹ Apparently nothing in the record justified the trial court's denial of the motion.

*Department of Environmental Protection v. Burgess.*³²⁰ The landowner owned approximately 166 acres in the wetlands. His application for a dredge and fill permit was denied by the Department following an administrative hearing. Rather than appeal the Department's final order, he brought this suit in circuit court claiming that the denial constituted a taking for which compensation must be paid. He filed a motion for partial summary judgment supported only by his own affidavit and the Department's final order denying the permit. The Department responded by filing the landowner's deposition and an affidavit from a county official that the proposed development would require a county building permit. In his deposition, the landowner admitted that the Department had offered to issue the dredge and fill permit if he would give it a conservation easement, an offer he refused. The trial court granted the landowner's motion for partial summary judgment and the Department appealed.³²¹

315. *Sarasota Welfare*, 666 So. 2d at 173.

316. *Id.* (citing *Tampa-Hillsborough County Expressway Auth.*, 640 So. 2d at 58).

317. *Id.*

318. *Id.*

319. FLA. R. CIV. P. 1.190(a).

320. 667 So. 2d 267 (Fla. 1st Dist. Ct. App. 1995). Judge Van Nortwick wrote the opinion. Judges Ervin and Benton concurred.

321. *Id.* at 268.

The district court reversed.³²² A regulatory taking occurs when the landowner is deprived of substantially all economically beneficial or productive use of the property. Could the landowner still use the land productively? Would available uses be economically beneficial in light of his investment-backed expectations? Finally, would the proposed use be a nuisance? No compensation is required if the state prevents a landowner from engaging in nuisance activity. These fact-based questions remained. "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."³²³ So the trial court erred in granting the summary judgment.³²⁴

The district court noted that the case presents an interesting question. The landowner never tested the validity of the Department's order by judicial review.³²⁵ Does the Department's denial of the permit conclusively establish in this case that the landowner could not get a permit? The court declined to answer because the issue had not been raised in or ruled upon by the trial court.³²⁶

XIII. ENVIRONMENTAL LAW

*Department of Community Affairs v. Moorman.*³²⁷ In this case, the Supreme Court of Florida assessed the validity of a land use ordinance affecting Big Pine Key, enacted to protect the endangered Florida Key deer. The court noted, in an opinion authored by Justice Kogan,³²⁸ that human development has "put the deer perilously close to extinction."³²⁹ The respondent property owners were prohibited under the ordinance from erecting fences,³³⁰ representing a threat to the Key deer which must roam freely in

322. *Id.* at 271.

323. *Id.* (citing *Coastal Petroleum Co. v. Chiles*, 656 So. 2d 284, 285 (Fla. 1st Dist. Ct. App. 1995)).

324. *Id.*

325. *Burgess*, 667 So. 2d at 270.

326. *Id.* at 269-70.

327. 664 So. 2d 930 (Fla. 1995), *cert. denied*, No. 95-2035, 1996 WL 337490, at *1 (U.S. Oct. 7, 1996).

328. Justices Overton, Shaw, Harding and Anstead concurred, while Chief Justice Grimes authored an opinion concurring in part and dissenting in part, with which opinion Justice Wells concurred. *Id.*

329. *Id.* at 931.

330. Interestingly, Respondent Charles Moorman not only owned lands affected by the ordinance, but also owns Your Local Fence, a company that was also a respondent in the litigation. *Id.*

search of food and water. The ordinance, a blanket prohibition on fencing, was intended as an interim effort which would “be replaced within a year by a more comprehensive regulation that would better identify where fence restrictions would be proper and where they were unnecessary.”³³¹ However, the ordinance had been in place for five years before the relevant dates in this litigation.³³²

Notwithstanding the ordinance, Monroe County officials granted Moorman a permit to build a six-foot-high, 400-foot-long fence, and Justice Kogan noted that “[t]he record contains evidence that Moorman’s fence is in a location that will adversely affect the Key deer.”³³³ The Department of Community Affairs (“DCA”) appealed the County’s decision under its “authority over areas of critical state concern.”³³⁴ Moorman’s lots are located in an area which was designated as a critical state concern in 1979.³³⁵ Upon referral, a Department of Administrative Hearings’ hearing officer found the permits improper, noting that the permits were issued as a matter of right.³³⁶ The hearing officer recommended that the Cabinet (sitting as the Florida Land & Water Adjudicatory Committee) rescind the permits, which it did.³³⁷ Moorman then appealed to the Third District Court of Appeal, which found the ordinance facially unconstitutional.³³⁸

The Supreme Court of Florida held that such a finding of facial unconstitutionality was improper because it promotes the valid public policy interests in protecting the environment.³³⁹ Zoning ordinances are to be upheld unless they bear no substantial relation to legitimate societal policies.³⁴⁰ Nevertheless, the court questioned whether any valid basis existed for denying the

331. *Id.* at 932.

332. *Moorman*, 664 So. 2d at 932.

333. *Id.*

334. *Id.* (citing FLA. STAT. § 380.07(2) (1993)).

335. *Id.* Justice Kogan added in a footnote that this fact was “crucial to the result in this case, because it identifies an environmental concern unique to Big Pine Key.” *Id.* at 932 n.1.

336. *Moorman*, 664 So. 2d at 932.

337. In a footnote, Justice Kogan noted that “the Cabinet sitting as the Florida Land & Water Adjudicatory Commission may rescind land use permits in the Florida Keys or ‘may attach conditions and restrictions to its decisions.’” *Id.* at 933 n.2 (citing FLA. STAT. § 380.07 (1993)). Justice Kogan further noted that the record was unclear as to why the Cabinet had not attached such conditions or restrictions, instead rescinding the permit altogether. *Id.*

338. *Id.* at 932.

339. *Id.* at 933.

340. *Moorman*, 664 So. 2d at 933. For this proposition, the court cited *Harrell’s Candy Kitchen v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959), one of the cases with which the third district’s opinion was thought to conflict with. *Id.* at 931.

Moormans a permit.³⁴¹ That the blanket prohibition was intended as an interim measure meant that it was never regarded as an essential feature of public policy.³⁴² However, the DCA's expert testified that there were "good fences and bad fences" and that the blanket prohibition extended beyond the expert's "specific recommendations."³⁴³ "[T]he uncontroverted expert evidence clearly indicated that the Moormans' fence—the only one at issue here today—was harmful to Key deer habitat."³⁴⁴ On the basis of this testimony, the supreme court quashed the third district's decision and remanded.³⁴⁵

*Kaplan v. Peterson.*³⁴⁶ The current landowner purchased the land in 1986. In 1989, an environmental site assessment report showed that a leaking underground storage tank had contaminated the land. The current landowner cleaned up the land and sued his seller to recover his costs and expenses.³⁴⁷ The parties agreed that the complaint did not make any claim based on a recognized exception to the doctrine of caveat emptor. It only claimed that the landowner can recover under a new cause of action impliedly created by chapter 376 of the *Florida Statutes* (1989).³⁴⁸ The second district had already decided that such a cause of action was not impliedly created,³⁴⁹ but the fifth district disagreed.³⁵⁰

The court found sufficient reasons to overcome a general judicial reluctance to read a private cause of action into a statute.³⁵¹ The statute requires current owners to clean up a polluted site. If the current owner had failed to do it, the state could have handled the clean up and then recovered from the prior owner who caused the pollution. The state could not, however, have recovered from the current owner who purchased without notice of the pollution.

341. *Id.* at 933.

342. *Id.*

343. *Id.*

344. *Moorman*, 664 So. 2d at 934.

345. *Id.* Justice Wells joined in Chief Justice Grimes' opinion, concurring in part and dissenting in part, failing to agree that the ordinance "was necessarily constitutional as applied." *Id.* These justices would have remanded for a determination of whether the ordinance was constitutionally applied or, alternatively, whether modification of the permit would be proper. *Id.*

346. 674 So. 2d 201 (Fla. 5th Dist. Ct. App. 1996). Judge W. Sharp wrote the majority opinion. Judge Thompson concurred. Judge Griffin wrote an opinion concurring in part and dissenting in part.

347. This action was consolidated with an action against his tenant, but that does not affect the outcome of this decision.

348. *See Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).

349. *Mostoufi v. Presto Food Stores, Inc.*, 618 So. 2d 1372 (Fla. 2d Dist. Ct. App.), *review denied*, 626 So. 2d 207 (Fla. 1993).

350. *Kaplan*, 674 So. 2d at 206.

351. *Id.*

Neighbors injured by the pollution could recover from a prior owner who caused it. A city could recover from a nearby landowner who had caused contamination of its well field. Any person injured by the prior owner's release of hazardous materials could recover for their injury. It would not make sense to hold that the only one who could not recover was the current owner who had obeyed the statute and cleaned up the mess caused by its seller. Consequently, the court concluded that chapter 376 does create a private cause of action against a prior owner who polluted.³⁵²

The court also recognized that the doctrine of caveat emptor had been rejected in residential real estate sales.³⁵³ The Supreme Court of Florida had not yet addressed the question of whether that holding should be expanded to include commercial real estate transactions, and the third district had expressly refused to do so.³⁵⁴ However, this court simply ruled that caveat emptor was not a bar to this cause of action.³⁵⁵ Apparently, the court felt it was clear enough that the cause of action would have little applicability if it could be barred by caveat emptor, so if the legislature had intended to give a buyer the cause of action, it must have also intended to exempt it from the reaches of that doctrine.

The court concluded by certifying the following question to the Supreme Court of Florida:

DOES THE DOCTRINE OF *CAVEAT EMPTOR* BAR A CURRENT LANDOWNER OF COMMERCIAL REAL PROPERTY FROM SUING THE PRIOR LANDOWNER TO RECOVER THE COST AND EXPENSES OF CLEAN UP OF THE PROPERTY, WHICH WAS CAUSED BY THE PRIOR OWNERS UNLAWFUL DISCHARGE OF POLLUTANTS ON THE SITE, CONTRARY TO CHAPTER 376?³⁵⁶

Judge Griffin dissented from the finding that a private cause of action was created for buyers by chapter 376.³⁵⁷ Applying the purpose approach to this problem, the judge points out that "this legislation was not designed to protect subsequent purchasers of polluted property."³⁵⁸ What it was designed to do

352. *Id.* at 203.

353. *Id.*

354. *Id.*

355. *Kaplan*, 674 So. 2d at 205.

356. *Id.* at 205-06.

357. *Id.* at 206 (Griffin, J., dissenting in part).

358. *Id.*

was protect people who had been harmed by a discharge of pollutants, not indirectly harmed by the purchase of polluted property.

XIV. EQUITY

*Bauerle v. Weisman.*³⁵⁹ Landowners sought to rescind the conveyance by which they had acquired their title and the contract of sale which led to the conveyance. Their theory was mutual mistake. Their action was triggered by the failure of the Department of Environmental Resources (“DER”) to approve their application for construction of a house and access road. The trial court granted the relief after concluding that the DER would prevent the property from ever being used as a residence, as was contemplated by the parties to the conveyance.³⁶⁰ The grantors/sellers appealed.

In order to prevail on the merits, the party seeking rescission must prove its right to relief by clear and convincing evidence.³⁶¹ A surveyor had testified that the location of the line established the DER’s wetlands jurisdiction over this land, but that testimony was based upon the surveyor’s assumption that the DER’s jurisdiction had already been established. The uncontradicted testimony of a former DER permit processor was that the DER had never made a jurisdictional determination because the plaintiffs had failed to provide certain essential information. Consequently, there was not competent, substantial evidence that DER had the power to prevent the plaintiffs from building a residence on this property as planned.³⁶²

*Metropolitan Dade County v. O’Brien.*³⁶³ The O’Briens opened a business knowing that they were violating some County ordinances and had not secured the appropriate permits, so the County sued. The trial court denied the County’s motion for a preliminary injunction, allowing the O’Briens ninety days to get a variance.³⁶⁴ When the time was up, the County again moved for a temporary injunction, but the trial court again denied it, giving the O’Briens

359. 664 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995). Judge Dauksch wrote the opinion. Chief Judge Peterson and Judge Antoon concurred.

360. *Id.* at 364.

361. *Id.* at 365. See *Rosique v. Windley Cove, Ltd.*, 542 So. 2d 1014 (Fla. 3d Dist. Ct. App. 1989).

362. *Id.*

363. 660 So. 2d 364 (Fla. 3d Dist. Ct. App. 1995). Judges Hubbard, Jorgenson, and Gersten concurred in the per curiam opinion.

364. *Id.* at 365.

another sixty days.³⁶⁵ This time the County appealed and the Third District Court of Appeal reversed.³⁶⁶

It has long been the settled rule that “[w]here the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed.”³⁶⁷ The O’Briens knowingly violated the ordinances and continued to violate the ordinances. In these “extreme circumstances,” it was an abuse of discretion for the trial court to deny the temporary injunctions.³⁶⁸

*Dorton v. Jensen.*³⁶⁹ The sellers testified that under heavy rains, water would rush from the street, into their yard, and hit the side of the house leaving a water mark on the wall. On three or four occasions water had come under the back door sill. To prevent that, they had caulked the bottom of the door sill with silicone, a fix that had worked, but they never told the buyers about the water problem. In fact, when the buyers asked if they should buy flood insurance, the sellers had answered it was unnecessary as they had never experienced a flooding problem.³⁷⁰

After moving in, the buyers experienced severe flooding after several heavy rainfalls. The buyers eventually stopped making the purchase money mortgage payments to the sellers. This suit followed with the buyers seeking rescission and the sellers seeking foreclosure. After a non-jury trial, the circuit court, applying the principle of *Johnson v. Davis*,³⁷¹ ruled in favor of the sellers because the buyers had experienced only “minor water damage.”³⁷² The district court reversed.³⁷³

Johnson required sellers to disclose any material fact that would materially affect the value of the property and that was not readily observable to the buyers.³⁷⁴ A latent flooding problem might be such a material fact, but the court had not addressed that question. The court focused instead on the amount of damage the buyers suffered when the house flooded.³⁷⁵ There was

365. *Id.*

366. *Id.*

367. *Id.*

368. *O’Brien*, 660 So. 2d at 365.

369. 676 So. 2d 437 (Fla. 2d Dist. Ct. App. 1996). Judge Lazzara wrote the opinion. Acting Chief Judge Parker and Judge Blue concurred.

370. *Id.* at 438.

371. 480 So. 2d 625 (Fla. 1985).

372. *Dorton*, 676 So. 2d at 439.

373. *Id.* at 440 (relying on *Johnson*, 480 So. 2d at 625).

374. *Johnson*, 480 So. 2d at 629.

375. *Dorton*, 676 So. 2d at 439.

evidence that it was a material fact affecting the value in that the buyers had testified that they would not have bought the house if they had known about this flooding problem. Consequently, the case was remanded for a new trial.³⁷⁶

*KCIN, Inc. v. Canpro Investments, Ltd.*³⁷⁷ Canpro Investments filed an action against KCIN for breach of a commercial lease. Canpro filed an answer and a counterclaim. The trial court found all claims to be without merit and refused to award attorney's fees to Canpro on the theory that there was no prevailing party.³⁷⁸ Canpro appealed based on the argument that the trial court is required to name a prevailing party, a position supported by other districts.³⁷⁹ The district court affirmed on this issue, but noted the conflict with the other circuits and certified the conflict to the Supreme Court of Florida.³⁸⁰

*Wiborg v. Eisenberg.*³⁸¹ The buyers brought an action for specific performance of a contract to buy land. The seller refused to convey the land. At issue was whether there was a contract and, if so, whether it failed to satisfy the Statute of Frauds. The trial judge awarded relief to the buyers because it found that the seller had

demonstrated a lack of candor in his dealings with the BUYERS and has testified untruthfully in the course of the trial. This court can not and will not allow the utilization of the Statute of Frauds as a shield to perpetuate unfair dealings, when the party invoking its protection has perjured himself on multiple material points.³⁸²

However, the trial judge refused to award damages to the buyers.³⁸³

The district court affirmed the judgment of specific performance, although on the grounds that there was a valid and enforceable contract under

376. *Id.* at 440.

377. 675 So. 2d 222 (Fla. 2d Dist. Ct. App. 1996). Judge Blue wrote the opinion. Acting Chief Judge Campbell and Judge Fulmer concurred.

378. *Id.* at 223.

379. *Id.* See also *Green Cos. v. Kendall Racquetball Inv. Ltd.*, 658 So. 2d 1119 (Fla. 3d Dist. Ct. App. 1995); *Lucite Ctr., Inc. v. Mercedes*, 606 So. 2d 492 (Fla. 4th Dist. Ct. App. 1992).

380. The case was reversed on the issue of whether attorneys' fees should have been awarded under section 768.79 of the *Florida Statutes* (1991) based upon Canpro's offer of judgment. *KCIN*, 675 So. 2d at 223. The case was remanded so the trial court could reconsider the issue in light of *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995), which was decided after the trial court's decision in this case. *Id.*

381. 671 So. 2d 832 (Fla. 4th Dist. Ct. App. 1996). Associate Judge Patti Englander Henning wrote the opinion. Chief Judge Gunther and Judge Shahood concurred.

382. *Id.* at 834.

383. *Id.*

any of the three possible interpretations of the facts.³⁸⁴ However, the district court reversed on the trial court's failure to award the damages to the buyer.³⁸⁵ It ruled a court of equity may award compensation to parties who have succeeded in a specific performance action when that is necessary "to place them in a position [the parties] would have occupied had the contract been timely performed."³⁸⁶ This is really an adjusting of the equities between the parties rather than the award of damages for breach of contract.³⁸⁷

XV. FORECLOSURE

*Barnes v. Resolution Trust Corp.*³⁸⁸ The Resolution Trust Corporation ("RTC"), as receiver for City Federal Savings Bank ("CFSB"), received a favorable judgment of foreclosure, and the Barneses appealed.³⁸⁹ The Barneses sold the property to James and Florence Marsh who executed a promissory note and first mortgage in favor of CFSB, as well as a second mortgage in favor of the Barneses. After the Marshes defaulted on the second mortgage, the Barneses continued making payments to CFSB and requested that CFSB send appropriate paperwork for assumption of the mortgage by the Barneses. CFSB accepted some payments (totalling about \$15,000), but the RTC refused to accept payments when it took over. Although the RTC returned their payments, the Barneses made expenditures on the property for maintenance, including roof upkeep and painting, as well as taxes and hazard insurance.³⁹⁰ Moreover, the Barneses rented the property and retained income in contradiction of a court order directing them to deposit such income into the court registry. The CFSB loan went into default, and the RTC obtained judgment of foreclosure.³⁹¹

The Barneses contended that, based on CFSB's acceptance of the installment payments, the RTC is estopped from refusing payment and forcing default of an otherwise current mortgage. The Fourth District Court of Appeal held that the RTC had a contractual right to foreclose on the mortgage when the Marshes defaulted, and it was not obligated to the Barneses as they were

384. *Id.*

385. *Id.* at 835.

386. *Wiborg*, 671 So. 2d at 835.

387. *Id.*

388. 664 So. 2d 1171 (Fla. 4th Dist. Ct. App. 1995).

389. *Id.* at 1172.

390. An RTC representative testified that CFSB records indicated that CFSB had responded to the Barneses inquiry, but the Barneses claimed that the bank never responded.

391. *Barnes*, 664 So. 2d at 1172.

not parties to the first mortgage and had never assumed that mortgage.³⁹² Also, there was no evidence that either CFSB or the RTC had induced the Barneses to make payments on the first mortgage.³⁹³ However, although the RTC was not estopped from accelerating the mortgage according to the acceleration clause, it was not entitled to retain the Barneses' earlier payments.³⁹⁴ The court remanded the case for an evidentiary hearing to determine the amount that the Barneses had paid in satisfaction of the first mortgage, which the Barneses would be entitled to receive from the RTC, plus interest.³⁹⁵

XVI. HOMESTEAD

*Miskin v. City of Fort Lauderdale.*³⁹⁶ In this case, the trial court granted the City's motion for summary judgment, and the Fourth District Court of Appeal affirmed.³⁹⁷ The City recorded a favorable final order issued by the Code Enforcement Board as a lien against Miskin's homestead property pursuant to section 162.09 of the *Florida Statutes* (1993). The Board had found for the City for two code violations on the property and gave Miskin until January 26, 1992 to comply; thereafter, he was subject to a \$150.00 fine for each day of noncompliance. Miskin filed for a declaratory judgment that the order did not exist as a lien on the property.³⁹⁸

The court quoted section 162.09(3) and explained that the order underlying the lien was not a "judgment, decree or execution," as prohibited by Article X, section 4 of the *Florida Constitution*.³⁹⁹ The court believed that section 162.09(3) demonstrates legislative recognition of this fact by declaring that these orders not be deemed to be court judgments except for enforcement purposes, and that no lien created under that part of the statute may be enforced against real homestead property.⁴⁰⁰ Although unenforceable, the lien

392. *Id.* at 1173.

393. *Id.* See *Department of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981) (citing *Greenhut Constr. Co. v. Henry A. Knott, Inc.*, 247 So. 2d 517, 524 (Fla. 1st Dist. Ct. App. 1971) (stating that "to prevail under estoppel theory, movant must demonstrate that (1) defendant or an agent made a representation with regard to a material fact; (2) movant relied on the representation; and (3) changed his position to his detriment in reliance on the representation.")).

394. *Id.*

395. *Id.*

396. 661 So. 2d 415 (Fla. 4th Dist. Ct. App. 1995).

397. *Id.*

398. *Id.* at 416.

399. *Id.*

400. *Id.*

was not invalid.⁴⁰¹ The court noted that “the prohibition of the constitutional provision is a prohibition against the use of process to force the sale of homestead property and does not invalidate the debt or lien.”⁴⁰² Thus, if the property lost homestead status in the future, the City would be able to enforce the lien.⁴⁰³

XVII. LAND USE PLANNING

*City of New Smyrna Beach v. Andover Development Corp.*⁴⁰⁴ In 1970, the City passed Ordinance 797 that created a special planned unit development zoning classification. Under it, a developer could submit a plan for a large development that had to satisfy large scale guidelines rather than the traditional zoning rules for each lot or unit. The developer, the plaintiff in this case, did submit such a plan and the City Commission approved it. Pursuant to the plan, the City Commission rezoned the land to an R-R Pud zone that incorporated the project plan into the zoning. The citizens of the City reacted by repealing Ordinance 797 in a referendum vote. However, in earlier litigation, the district court determined that the referendum did not revoke the ordinance as to this development, the R-R Pud zone, or the developer’s approval to develop this land.⁴⁰⁵ It merely prevented the City Commission from approving any more plans.

Eighteen years later, the developer sought to amend its project plans by increasing the height of some buildings from twenty to twenty-nine stories and relocating some buildings. The City Commission rejected the proposed amendments, so the developer sued to enforce the earlier judgment on the theory that Ordinance 797 did not have any fixed height limitations or location limitations. The trial court granted relief, but the district court reversed.⁴⁰⁶

Although Ordinance 797 did not have these limitations, once the details of the project plan were incorporated into the R-R Pud zone, its details became the limits under the zoning classification of this land.⁴⁰⁷ The plan did specify the location and heights of the buildings and provided that all except minor

401. *Miskin*, 661 So. 2d at 416.

402. *Id.*

403. *Id.*

404. 672 So. 2d 618 (Fla. 5th Dist. Ct. App. 1996). Judge Harris wrote the opinion. Judges Dauksch and Sharp concurred.

405. *See Andover Development Corp. v. City of New Smyrna Beach*, 328 So. 2d 231 (Fla. 1st Dist. Ct. App.), *cert. denied*, 341 So. 2d 290 (Fla. 1976).

406. *Andover*, 672 So. 2d at 622.

407. *Id.* at 621.

changes had to be approved by the City Commission. If the developer wanted to modify the plan, it would have to follow the amendment procedures provided by Ordinance 797.⁴⁰⁸

*DSA Marine Sales & Service, Inc. v. County of Manatee.*⁴⁰⁹ DSA Marine Sales & Services, Inc. (“DSA”) wanted to build a marina and dry boat storage facility. The County Commission approved the needed zoning change but disapproved the construction proposal. DSA reacted by filing a petition for a writ of certiorari in the circuit court. Simultaneous with the petition, it moved to supplement the record as the documents became available. A short time later, DSA filed an amended petition with an expanded appendix. Although the appendix was still not complete, the circuit court summarily denied the amended petition on the grounds that the petitioner failed to make a prima facie case.⁴¹⁰ Later, the circuit court also denied DSA’s motion for rehearing.⁴¹¹ On review, the district court determined that DSA had been denied procedural due process.⁴¹²

Procedural due process requires that the litigants have a reasonable opportunity to be heard. To obtain review, DSA had to file its certiorari petition within thirty days of the order’s rendition, but the court noted that, in such circumstances, “it is sometimes impossible to compile and contemporaneously file the entire record as an appendix to the petition.”⁴¹³ Consequently, procedural due process required that DSA be afforded a reasonable opportunity to complete the appendix. On the record, it did not appear that DSA had been given that reasonable opportunity. The court also pointed out that the circuit court order failed to explain in detail why the petition was dismissed.⁴¹⁴ Such detail would have been helpful to the parties and the appellate court.⁴¹⁵ Implicit is the suggestion that the court provide such details in the future.

*Board of County Commissioners v. Karp.*⁴¹⁶ Pursuant to the County’s comprehensive plan, the Board of County Commissioners of Sarasota County (“Board”) adopted a plan for the University Parkway Corridor. Under this

408. *Id.* at 621–22.

409. 661 So. 2d 907 (Fla. 2d Dist. Ct. App. 1996). Acting Chief Judge Ryder and Judges Frank and Parker concurred in the per curiam decision.

410. *Id.* at 908.

411. *Id.*

412. *Id.* at 909.

413. *Id.*

414. *DSA Marine*, 661 So. 2d at 908.

415. *Id.* at 909.

416. 662 So. 2d 718 (Fla. 2d Dist. Ct. App. 1995). Acting Chief Judge Campbell wrote the opinion. Judges Blue and Whatley concurred.

plan, respondents' property was designated for "office" use despite respondents' demands that their land be designated commercial so it could be used more intensely. The circuit court's writ of certiorari ordered, *inter alia*, that the property be designated commercial, but that was reversed by the district court.⁴¹⁷

The critical issue was whether the Board's adoption of the corridor plan was quasi-judicial or quasi-legislative. The circuit court, relying on *Board of County Commissioners v. Snyder*,⁴¹⁸ had concluded that the decision was quasi-judicial, i.e., it involved the application of a general rule or policy to specific facts.⁴¹⁹ The plan applied to only forty-eight parcels of land covering 179 acres, and it conditioned development approvals on the reservation of a waterline easement. The district court, however, pointed out that *Snyder*, unlike this case, involved a rezoning request.⁴²⁰ Adopting the plan was a quasi-legislative action, i.e., it involved the formulation of a general rule or policy, because it involved a plan for a substantial, although finite, number or parcels of land. Moreover, conditioning development approvals on the reservation of a waterline easement did not convert this decision into a quasi-judicial one because that condition was invalid.

A quasi-legislative decision that is "fairly debatable" should not be disturbed by a reviewing court. The Board's decision here met that standard given the evidence before it. The circuit court should not have, in essence, ordered the property rezoned where there has never been a rezoning application. Such a rezoning application would not necessarily be a futile act; even though a property is designated "office" in the plan, rezoning (or a variance) for a particular parcel may be obtainable.⁴²¹

Metropolitan Dade County v. Blumenthal.⁴²² The Third District Court of Appeal, sitting *en banc*, revisited an earlier decision by a three judge panel.⁴²³ A landowner wanted his land rezoned to RU-4L (Residential Limited Apart-

417. *Id.* at 720.

418. 627 So. 2d 469 (Fla. 1993).

419. *Karp*, 662 So. 2d at 719.

420. *Id.*

421. *Id.* at 720.

422. 21 Fla. L. Weekly D464 (3d Dist. Ct. App. Feb. 21, 1996), *review dismissed*, No. 88,405, 1996 LEXIS 1580 (Fla. Aug. 29, 1996). Chief Judge Schwartz and Judges Barkdull, Nesbitt, Cope, Levy, and Gersten concurred in this *per curiam* opinion. Judge Hubbard wrote a lengthy dissent.

423. *Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 1st Dist. Ct. App. 1995). See Ronald B. Brown et al., *Property Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 257, 313-14 (1995).

ment House with a maximum of twenty-three units per acre) so he could develop a 360-unit apartment complex. A neighboring federation of homeowners' associations objected, claiming that a trend had begun to limit density in the area. The only opposition testimony was from neighbors who did not want the apartment complex there. The Dade County Commission denied the rezoning application because the application was inconsistent with the trend. The circuit court granted a petition for a writ of certiorari, finding that the Commission's decision was arbitrary and not based on substantial competent evidence.⁴²⁴

The petition to the district court for a writ of certiorari was denied by the three judge panel which noted that the standard of review in such situations was limited to whether procedural due process was afforded and whether the circuit court applied the correct law.⁴²⁵ There was no claim of a denial of due process. After concluding that the correct law was applied, the decision was affirmed.⁴²⁶ Judge Cope wrote a lengthy dissent stating that the circuit court had applied incorrect law in that: 1) it should have determined whether the commission's resolution was based upon substantial competent evidence rather than whether the comments of an individual commissioner were based upon such evidence;⁴²⁷ 2) the circuit court's inquiry should not have been whether it would have made the same choice as the commission, but whether there was sufficient evidence in the record to support the choice that the commission did make;⁴²⁸ and 3) the circuit court should not have denigrated citizen testimony because it was fact-based and the material facts were not in dispute.⁴²⁹ He argued that the majority was applying the wrong scope of review, i.e., the scope of review for administrative decisions, rather than the review a district court should exercise over circuit court decisions.⁴³⁰ The district court may determine whether the law has been correctly applied to the facts in the record. Upon reconsideration by the court *en banc*, Judge Cope's dissent was adopted as the majority opinion.⁴³¹

Judge Hubbard, author of the original opinion, was the dissenter this time.⁴³² He emphasized that when the circuit court sits as an appellate court,

424. *Blumenthal*, 675 So. 2d at 600–01.

425. *Id.* at 601.

426. *Id.*

427. *Id.* at 604 (Cope, J., dissenting).

428. *Id.* at 605.

429. *Blumenthal*, 675 So. 2d at 607 (Cope, J., dissenting).

430. *Id.*

431. *Blumenthal*, 21 Fla. L. Weekly at D464.

432. *Id.* (Hubbard, J., dissenting).

review of its decisions should be more limited.⁴³³ A petitioner should not be entitled to a second appeal once he has had one before the circuit court except on the issues of denial of due process, lack of jurisdiction, or commission of an error so fundamental as to render the decision a miscarriage of justice. From the standpoint of judicial economy, he has a point, but then from the standpoint of judicial economy, a second appeal to the district court makes no sense at all. In total, the logic of having the circuit court have an appellate function has always escaped this author.⁴³⁴ The mixture of trial and appellate jurisdiction in one court seems certain to result in confusion, as this case proves.

Lee County v. Zemel.⁴³⁵ In 1990, the Lee County Comprehensive Plan was amended to create a category called "Density Reduction/Groundwater Resource." To their extreme displeasure, the plaintiffs' land was included in that category. They claimed that their land did not fit the criteria for that classification. They utilized their remedies under section 163.3213 of the *Florida Statutes*⁴³⁶ which resulted in a hearing before the Division of Administrative Hearings, but the hearing officer concluded that there was adequate data and analysis to support the decision. The Department of Community Affairs adopted the hearing officer's ruling and that decision was affirmed by the First District Court of Appeal.⁴³⁷

The landowners brought this action for a declaratory judgment and injunction in circuit court on the theories that the classification of their land violated their substantive due process rights, their procedural process rights, and constituted a temporary or permanent taking without compensation. The district court interpreted this as a claim that the ordinance had been unconstitutionally applied to their land because their expert testified that land was incorrectly classified.⁴³⁸ However, the proper forum for such a challenge was the district court when it reviewed the agency's action. The circuit court was presented with the same evidence that the hearing officer and the district court had already reviewed. Having lost there, the landowner is not entitled to relitigate the issue. The only proper claim before the circuit court was that the classification had somehow worked a taking entitling this landowner to

433. *Id.*

434. Professor Brown.

435. 675 So. 2d 1378 (Fla. 2d Dist. Ct. App. 1996). Judge Quince wrote the opinion. Acting Chief Judge Parker and Judge Whately concurred.

436. FLA. STAT. § 163.3213 (1989).

437. *Zemel v. Department of Community Affairs*, 642 So. 2d 1367 (Fla. 1st Dist. Ct. App. 1994).

438. *Zemel*, 675 So. 2d at 1380.

compensation, and the case was remanded to the circuit court to consider that issue.⁴³⁹

*Martin County v. Section 28 Partnership, Ltd.*⁴⁴⁰ The landowner wanted to develop its land as a mixed use golf course community, but that would first require a zoning change. However, a zoning change was impossible without first obtaining an amendment to the County's comprehensive land use plan so that the adjoining county could provide utility services. Following a series of hearings, the County refused to take the steps necessary to amend the plan. Therefore, the landowner sued.⁴⁴¹

The developer claimed that the County's action was a violation of its substantive due process rights. The trial court decided that the County's action involved the application of an existing policy, i.e., that it was a quasi-judicial decision.⁴⁴² The court applied the strict scrutiny standard of review and concluded that the County's action was arbitrary and capricious.⁴⁴³ It enjoined the County for enforcing the development restrictions, ordered the County to approve the application for the zoning change, and awarded damages to the landowner.⁴⁴⁴ The district court reversed, reasoning that a decision not to amend a comprehensive plan based upon the large size of the proposed amendment, the pristine state of the land, and the possible impact of the proposed development on the public because of the proximity to a state park and a state preserve was quasi-legislative.⁴⁴⁵ Since the correct standard of review of a quasi-legislative decision is the fairly debatable test,⁴⁴⁶ the circuit court erred. The case was remanded so the trial court could apply the correct test.⁴⁴⁷ The trial court's award of damages and injunctive relief were accordingly vacated, but the court stated that the opinion should not be read to

439. *Id.* at 1381–82.

440. 676 So. 2d 532 (Fla. 4th Dist. Ct. App. 1996). Judge Stevenson wrote the opinion in which Chief Judge Gunther and Judge Dell concurred. This opinion replaced the original opinion at 668 So. 2d 672 (Fla. 4th Dist. Ct. App. 1996) which was withdrawn after the district court granted a motion for rehearing.

441. *Section 28 Partnership*, 676 So. 2d at 535.

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.* at 536.

446. *Section 28 Partnership*, 676 So. 2d at 535. The district court relied upon its earlier decision in *Section 28 Partnership, Ltd. v. Martin*, 642 So. 2d 609 (Fla. 4th Dist. Ct. App. 1994), *review denied*, 654 So. 2d 920 (Fla. 1995), which the court refers to as "*Section 28 Partnership I*," but pointed out that it was issued after the trial court decision in the case being discussed. *Section 28 Partnership*, 676 So. 2d at 536.

447. *Id.* at 535–36.

suggest that the trial court could not reach the same conclusion when it applies the correct test.⁴⁴⁸

Martin County v. Yusem.⁴⁴⁹ A landowner's fifty-four acres were part of a 900-acre tract. Under the Martin County Comprehensive Land Use Plan, the landowner was allowed up to two units per acre. However, under the future land use map, the landowner was allowed only one unit per two acres, i.e., one quarter the density allowed by the plan. The landowner filed an application for an amendment to the map raising the use to match that allowed by the plan, but the application was denied. The landowner sought relief by common law certiorari, but the County moved to dismiss claiming that certiorari was the wrong method of obtaining relief; it is the method for reviewing a quasi-judicial decision and this decision was legislative. The landowner voluntarily dismissed that petition. Then, the landowner filed this action seeking declaratory and injunctive relief. Applying the strict judicial scrutiny standard of review, the circuit court held in favor of the landowner, and the County appealed, arguing that the court had applied the wrong standard of review, i.e., it should have used the fairly debatable standard because the decision was legislative, not quasi-judicial.⁴⁵⁰

The district court clearly framed the issue to be "whether Martin County was making a legislative or quasi-judicial decision when it denied the appellee/landowner's request to amend the county's future use map to allow more residential units on his property."⁴⁵¹ It decided the decision was quasi-judicial.⁴⁵² Because it was quasi-judicial, the only way to get judicial review was by common law certiorari.⁴⁵³ Consequently, the circuit court did not have jurisdiction and this action should be dismissed.⁴⁵⁴ The landowner should have stuck to his guns in his original certiorari action. To avoid injustice, the court noted that the judgment would be without prejudice to the landowner, once again beginning his quest for an amendment to the map.⁴⁵⁵

448. *Id.* at 537. This is the point on which the new opinion differs from the earlier one which has been withdrawn. The earlier opinion concluded that the zoning did not violate substantive due process requirements.

449. 664 So. 2d 976 (Fla. 4th Dist. Ct. App. 1995), *review granted*, 678 So. 2d 339 (Fla. 1996). Judge Kelin wrote the opinion in which Judge Glickstein concurred. Judge Pariente dissented in a written opinion.

450. *Id.* at 977.

451. *Id.* at 976.

452. *Id.*

453. *Id.* at 978.

454. *Yusem*, 664 So. 2d at 978.

455. *Id.*

The court reached its conclusion by following the logic in *Snyder*.⁴⁵⁶ Amending the map to increase the density on this landowner's land was a determination of the appropriate land use designation for a particular piece of property that "will have a limited impact on the public."⁴⁵⁷ Thus, this was not a decision on what should be the policy but how to apply existing policy. Such a decision is quasi-judicial.

Judge Pariente provided an extensive and well-reasoned dissent. Briefly, she argued that amendments to a land use plan should, due to logic and statutory mandate, receive the same careful consideration process as the adoption of the plan received.⁴⁵⁸ Once that process has been followed, the decision to amend or not should get the same judicial deference as the legislative decision to adopt the plan. That amending the plan may be legislative in some cases and quasi-judicial in others creates confusion about what procedure must be followed by a board in making the decision, what method must be followed by a disgruntled applicant in seeking judicial review of the decision, and what standard must be applied by the reviewing court. That confusion has already wasted, and will continue to waste, the time and resources of the courts and the parties. Judge Pariente is correct in arguing that this uncertainty should be eliminated.

XVIII. LANDLORD AND TENANT

City of St. Petersburg v. Bowen.⁴⁵⁹ The City's Nuisance Abatement Board ordered an apartment house closed for a period of one year based upon a finding that there was drug use by tenants and other persons at the property.⁴⁶⁰ The landlord was not accused of any wrongdoing. The landlord did not contest the validity of the order, but brought this action seeking compensation based upon the theory of inverse condemnation, i.e., that his property had been taken for public use. The trial court first granted summary judgment for the City, ruling that because the taking was temporary no recovery was allowed.⁴⁶¹

456. Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

457. *Yusem*, 664 So. 2d at 977.

458. *Id.* at 979 (Pariente, J., dissenting).

459. 675 So. 2d 626 (Fla. 2d Dist. Ct. App. 1996). Acting Chief Judge Campbell wrote the opinion in which Judges Frank and Blue concurred.

460. The order was based upon the authority of section 893.138 of the *Florida Statutes* and sections 19-66 through 19-71 of the St. Petersburg, Florida, City Code. See FLA. STAT. § 893.138 (1991); ST. PETERSBURG, FLA., CITY CODE §§ 19-66 to -71 (1989). There was no claim that the order was invalid.

461. *Bowen*, 675 So. 2d at 628.

Based on a Supreme Court of Florida decision rendered after the trial court's decision,⁴⁶² the district court reversed.⁴⁶³ The trial court then granted summary judgment to the landlord.⁴⁶⁴ The district court affirmed.⁴⁶⁵

The court adopted the trial opinion of Circuit Judge Horace A. Andrews which it found to be "complete, concise, scholarly and well-grounded."⁴⁶⁶ A regulation that denies all economically beneficial or productive use of the land is compensable without inquiry into the public interest advanced in support of the regulation. Ordering the apartment house closed for one year did deny all economically beneficial or productive use. The taking claim could not be avoided by invoking the nuisance exception. The state may legitimately prohibit conduct that would be a common law nuisance, e.g., the illegal use or sale of drugs, but this order prohibits conduct which is clearly not a nuisance, e.g., the use of the premises for human habitation. In essence, the city was trying to force this landowner to disproportionately bear a common expense, the cost of its war on drugs. That is what the Takings Clause prohibits.

*Coastal Fuels Marketing, Inc. v. Leasco Investments.*⁴⁶⁷ In June 1977, the tenant leased real property for an oil terminal. Under the terms of the twenty-year lease, referred to as a "terminalling agreement," the fee for the first three years would be \$54,400 per month. After that, the base fee would be \$30,000 per month, but that fee would be adjusted in the fifth, tenth, and fifteenth years of the lease according to a formula based on the Consumer Price Index ("CPI"). The formula was:

[T]he monthly payment shall be adjusted upward or downward using the percentage change in the Consumer Price Index for urban Wage Earners and Clerical Workers (CPI-W)—U.S. City Average and Selected Areas (Base Period 1967=100) for the previous five (5) year period (for September 7, 1982 [the first adjustment], the monthly payment shall be calculated by multiplying \$30,000 times the resultant of dividing the CPI-W for June 1982 by the Consumer Price Index for June 1977).⁴⁶⁸

462. *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So. 2d 54 (Fla. 1994).

463. *Bowen v. City of St. Petersburg*, 642 So. 2d 837 (Fla. 2d Dist. Ct. App. 1994).

464. *Bowen*, 675 So. 2d at 628.

465. *Id.* at 632.

466. *Id.* at 629.

467. 662 So. 2d 375 (Fla. 5th Dist. Ct. App. 1995). Judge Thompson wrote the opinion in which Chief Judge Peterson and Judge Harris concurred.

468. *Id.* at 376.

The dispute arose at the time of the second adjustment. The landlord claimed that the denominator in the above fraction should be the CPI for June, 1977. The tenant claimed that the denominator should be the CPI for June, 1982. The trial court was convinced by the landlord's arguments and reformed the contract accordingly, but the district court reversed.⁴⁶⁹ It held that reformation could not be granted where the terms of the contract were clear and unambiguous.⁴⁷⁰ The contract here anticipated that the rent would be adjusted every five years according to the changes in the CPI during that five-year period, so the fraction should reflect that change. The adjustment in 1982 should have been based on the CPI for 1977, the adjustment for 1987 on the CPI for 1982, and the adjustment for 1992 on the CPI for 1987.⁴⁷¹

*Inglesia Bautista de "Renovacion Cristiana" v. Tamiami Baptist Church of Miami, Inc.*⁴⁷² Plaintiff's suit for damages on the theory of wrongful eviction included a claim for special damages. The circuit court granted summary judgment to the landlord, ruling that special damages were non-recoverable as a matter of law.⁴⁷³ The district court reversed, holding that if the premature eviction necessitated the rental of a substitute church site, that expense could be recovered as special damages.⁴⁷⁴

*Marquez-Gonzalez v. Perera.*⁴⁷⁵ The commercial lease at issue in this case provided that the tenant would take the premises "as is" and refurbish it. After taking possession, the tenant learned that part of the structure was illegal because it had been built without the necessary permits. When the landlord did nothing to fix that problem, the tenant sued for rescission. The trial court held for the landlord because the tenant had taken the premises "as is," but the district court reversed.⁴⁷⁶ The landlord had not disclosed that the permits were lacking. There was no way that the tenant could have discovered it from an inspection of the premises. There was nothing from which the tenant would get inquiry notice, i.e., there was nothing to make a reasonably prudent person

469. *Id.* at 377.

470. *Id.*

471. *Id.*

472. 678 So. 2d 1 (Fla. 3d Dist. Ct. App. 1996). Judges Jorgenson, Goderich, and Green constituted the panel that issued this per curiam opinion.

473. *Id.* at 2. The circuit court also ruled in the alternative that the tenant had waived its special damages claim, but the district court reversed on this point because the record lacked any evidence of waiver. *Id.*

474. *Id.*

475. 673 So. 2d 502 (Fla. 3d Dist. Ct. App. 1996). Judges Jorgenson, Cope, and Gersten concurred in this per curiam opinion.

476. *Id.* at 503.

suspicious that there was a permit problem. The permit problem was “a matter which the landlord was obliged to correct, not the tenant.”⁴⁷⁷ Under these circumstances, rescission should have been granted.⁴⁷⁸

*Sontag v. Department of Banking and Finance.*⁴⁷⁹ Landlords prevailed in an eviction action and were also awarded very substantial compensatory and punitive damages. A Florida statute provided that the state is entitled to sixty percent of any punitive damage award.⁴⁸⁰ Subsequently, the landlords and tenant reached a settlement agreement which was structured without any punitive damages. By cutting out the State, both the landlords and tenant would come out ahead. The State did not give up this windfall so easily. It sued and received a summary judgment in its favor.⁴⁸¹ The district court affirmed.⁴⁸² Judge Baskin disagreed about the reading of the statute, concluding that since no punitive damages were paid, the State was not entitled to any payment.⁴⁸³ The statute was amended in 1992⁴⁸⁴ to require that the parties provide for the state’s share in any settlement agreement, but that amendment was too late to apply to this case. The case is included primarily to remind parties seeking punitive damages, and their defendants, that the state has an interest and a claim on the outcome.

Statutory Changes. The Florida landlord-tenant statutes were amended during the survey period.⁴⁸⁵ Now, a real estate broker planning to disburse a tenant’s security deposit is not required to follow the notice requirements in chapter 475,⁴⁸⁶ which regulates real estate brokers. He or she need only follow the notice requirements in chapter 83⁴⁸⁷ which governs landlords and tenants. The statute has been clarified to specify that the landlord’s agent may remove the personal property of the tenant after the writ of possession has been served by the sheriff.⁴⁸⁸ Previously, the statute had only specified that the landlord could remove the tenant’s personal property at the time when the writ of possession was served. Finally, the lease may now contain a provision that the

477. *Id.*

478. *Id.*

479. 669 So. 2d 283 (Fla. 3d Dist. Ct. App. 1996). Judges Levy and Goderich concurred in the per curiam opinion. Judge Baskin dissented.

480. FLA. STAT. § 768.73(2) (1991).

481. *Sontag*, 669 So. 2d at 284.

482. *Id.*

483. *Id.* (Baskin, J., dissenting).

484. FLA. STAT. § 768.73(4) (Supp. 1992).

485. 1996 Fla. Laws ch. 96-146.

486. *See* FLA. STAT. § 475.25(1)(d) (1995).

487. Ch. 96-146, § 1, 1996 Fla. Laws at 131 (amending FLA. STAT. § 83.49).

488. *Id.* § 2, 1996 Fla. Laws at 131 (amending FLA. STAT. § 83.62(2)).

landlord is not responsible for storing, or liable for disposing of, the tenant's personal property where the tenant has surrendered or abandoned the premises.⁴⁸⁹ Previously, such an agreement was permissible, but only if it appeared in an agreement separate from the lease.

In addition, a change in the nuisance abatement statute is worth noting. As of October 1, 1996,

[i]n a proceeding abating a public nuisance pursuant to s. 823.10^[490] or s. 823.05,^[491] if a tenant has been convicted of an offense under chapter 893^[492] or s. 796.07,^[493] the court may order the tenant to vacate the property within 72 hours if the tenant and owner of the premises are parties to the nuisance abatement action and the order will lead to the abatement of the nuisance.⁴⁹⁴

Dealing with drugs and prostitution is a landlord's nightmare, but it is a very hot topic between landlords and decent tenants. This act provides a landlord an additional tool to deal with these troublesome tenants. The eviction process may be too cumbersome, particularly if it requires relitigation of issues already decided in a nuisance abatement action. Perhaps it will provide a better alternative if it is interpreted to allow a court to order an offending tenant off the premises while leaving the innocent family members in place. Whether that will be possible under the cryptic words of this statute will have to be determined in the future.

XIX. LIENS

BancFlorida v. Hayward.⁴⁹⁵ In this case, the Third District Court of Appeal affirmed a final summary judgment for the contract purchasers of new homes⁴⁹⁶ and certified the following question as being of great public importance:

489. *Id.* § 3, 1996 Fla. Laws at 131–32 (amending FLA. STAT. § 83.67(3)).

490. "Place where controlled substances are illegally kept, sold, or used."

491. "Places declared a nuisance."

492. "Drug abuse prevention and control."

493. "Prohibiting prostitution."

494. 1996 Fla. Laws ch. 96-237 (amending FLA. STAT. § 60.05).

495. 659 So. 2d 1329 (Fla. 3d Dist. Ct. App. 1995). This per curiam opinion, upon granting a motion for rehearing, revised and substituted the original panel opinion published at 20 Fla. L. Weekly D761 (4th Dist. Ct. App. Mar. 29, 1995).

496. *BancFlorida*, 659 So. 2d at 1333.

Where a lender requires a pre-qualified contract purchaser before it will lend on the construction loan which creates a purchase money mortgage, does the contract purchaser's prior equitable lien against the purchase money mortgagor have priority over the lender's subsequent purchase money mortgage?⁴⁹⁷

In this case the developer, Shores Contractors, Inc., held an interest in undeveloped lots, being an equitable owner under an option contract with American Newlands in some lots and having bought others as inventory for future development. BancFlorida extended Shores a line of credit for use in construction loans. When developed, lots were sold to individual purchasers under purchase and sale agreements, which contained express terms prohibiting recordation. Once in their respective contracts, the purchasers would obtain a mortgage commitment for the home to be built by Shores. Under the contract, the purchasers paid deposits to Shores. On the lots owned by Shores and secured by a mortgage from BancFlorida, each contract purchaser subsequently entered into a separate construction loan agreement with BancFlorida under which the purchasers were required to make four progress payments during construction, a portion being used to pay off BancFlorida's mortgage. On the lots held under the option contract, monies from the construction loan were used to pay the balance owed to American Newlands.⁴⁹⁸

"At some point the developments at issue failed."⁴⁹⁹ Shores and others assigned fault for the failure to alleged breach of the construction loan agreements committed by BancFlorida and filed suit. The contract purchasers intervened as plaintiffs. The parties agreed to sell the properties and create a fund from which damages could be paid, necessitating foreclosure on the lots to extinguish all liens. Final summary judgment of foreclosure was stipulated to by the parties, with the stipulation that "all liens or claims by each party were directed solely to the entire fund and not solely to the specific sales price of an individual lot."⁵⁰⁰ The contract purchasers then proceeded against BancFlorida with motion for final summary judgment, asserting superior equitable liens on their respective lots over BancFlorida's construction loans. The trial court entered final summary judgment and BancFlorida appealed.⁵⁰¹

The trial court, noting that the question of who was a purchase money mortgagee was a question of law, held that BancFlorida could not be a pur-

497. *Id.*

498. *Id.* at 1330.

499. *Id.*

500. *Id.* at 1331.

501. *BancFlorida*, 659 So. 2d at 1331.

chase money mortgagee in this situation.⁵⁰² It found that, before it loaned any money to Shores for construction, BancFlorida had actual notice of the purchase and sale agreements and the deposits paid thereon.⁵⁰³ Such agreements and deposits were prerequisites without which BancFlorida would not make the construction loans.

The Third District Court of Appeal affirmed the orders of the trial court, which it stated “was solely concerned with the equities of the case and, for the trial court, the equities favored the contract purchasers as members of the general public less knowledgeable in these matters over the sophisticated bank and the sophisticated builder.”⁵⁰⁴ These facts “set[] up a clash between two competing theories of real property law. BancFlorida is a purchase money mortgagee but it is also a subsequent creditor with notice of the contract purchasers’ equitable claims against the property.”⁵⁰⁵

According to the court,⁵⁰⁶ the “tension” between these theories is epitomized by *Carteret Savings Bank v. Citibank Mortgage Corp.*⁵⁰⁷ and *Caribank v. Frankel*,⁵⁰⁸ which the court went on to compare. In *Caribank*, the Fourth District Court of Appeal held that actual knowledge of a prior unrecorded conveyance or mortgage is the equivalent to the recording of the instrument.⁵⁰⁹ In *Carteret*, the parties agreed that the purchase money mortgage held by Carteret had priority, but disagreed over the portion of the construction loan constituted the purchase money mortgage.⁵¹⁰ The Supreme Court of Florida affirmed the district court’s holding that “only the portion of the proceeds used to acquire the land constituted a purchase money mortgage. The balance of the loan proceeds were not protected by the purchase money mortgage.”⁵¹¹

BancFlorida relied on *Carteret* for the proposition that it was a purchase money mortgagee and thus “automatically has priority under *Carteret* over the contract purchasers.”⁵¹² The court first assigned error to the trial court, agreeing that BancFlorida was a purchase money mortgagee, at least on those

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

506. See *BancFlorida*, 659 So. 2d at 1331.

507. 632 So. 2d 599 (Fla. 1994).

508. 525 So. 2d 942 (Fla. 4th Dist. Ct. App. 1988).

509. *BancFlorida*, 659 So. 2d at 1332 (citing *Caribank*, 525 So. 2d at 944).

510. *Id.* (citing *Carteret*, 632 So. 2d at 599).

511. *Id.*

512. *Id.* (relying on *Carteret*, 632 So. 2d at 599).

lands which Shores held under the option with American Newlands.⁵¹³ The court determined that whether BancFlorida was a purchase money mortgagee was not dispositive, and it distinguished *Carteret* as involving no dispute over the priority of the liens.⁵¹⁴ The court reasoned that, since “Florida has adopted a notice provision as the benchmark for assessing the priority of liens on real property,”⁵¹⁵ “purchase money mortgage priorities may be subject to the equities of the particular transaction.”⁵¹⁶ The court adopted the reasoning of *Caribank* and held that because BancFlorida had actual notice of the contract purchasers’ prior equitable liens against Shores, those equitable liens were superior in interest to BancFlorida’s purchase money mortgages.⁵¹⁷ The court affirmed the orders of final summary judgment in favor of the contract purchasers.⁵¹⁸

*Beckham v. Rinker Materials Corp.*⁵¹⁹ The Third District Court of Appeal reversed a summary judgment in favor of defendant Rinker in an action brought by trustees in a two count action to quiet title and recover damages for slander of title.⁵²⁰ In 1985, land was conveyed to Michael Edelman and Aaron Podhurst as trustees. Under the unrecorded trust agreement, the property was held in trust for several beneficiaries, with Edelman holding a twenty percent interest, which he assigned to the remaining beneficiaries after resigning. The deed neither named the beneficiaries of the trust nor declared the nature and purpose of the trust. The resignation and assignment were not recorded. In 1992, Rinker obtained two judgments against Edelman, unrelated to the property, and had the judgments recorded as liens on the property. When Beckham, another trustee, and Podhurst attempted to sell the property, they discovered the judgment liens in a title search and brought the action.⁵²¹

Rinker asserted that the plaintiffs were not entitled to relief because Edelman owned a fee simple estate under section 689.07(1) of the *Florida Statutes*.⁵²² The court agreed that the statute was implicated because Edelman

513. *Id.*

514. *BancFlorida*, 659 So. 2d at 1332.

515. *Id.* The court went on to quote from section 695.01 of the *Florida Statutes* (1989).

516. *Id.* at 1333 (citing *Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 129 So. 892 (Fla. 1930)).

517. *Id.* at 1333 (relying on *Caribank v. Frankel*, 525 So. 2d 942 (Fla. 4th Dist. Ct. App. 1988)).

518. *Id.*

519. 662 So. 2d 760 (Fla. 3d Dist. Ct. App. 1995).

520. *Id.* at 762.

521. *Id.* at 761.

522. *Id.*

took title “as trustee” through a deed that neither names the beneficiaries nor set forth the nature and purpose of the trust, and because the declaration of trust was not recorded.⁵²³ However, it disagreed with Rinker’s assertion that Edelman’s trustee capacity was immaterial.⁵²⁴ The court relied on *First National Bank of Arcadia v. Savarese*,⁵²⁵ from which it quoted the following passage:

[I]t is also generally recognized that a judgment creditor cannot have his debt satisfied out of property held by his judgment debtor under a resulting trust for another, no matter how completely his debtor has exercised apparent ownership over it, unless it is made to appear that it was on the faith of such ownership that the credit was given which resulted in the judgment sought to be satisfied.⁵²⁶

The contemplated exception did not apply in the present case because Rinker extended the credit to Edelman on the basis of his personal guarantee, not relying on the record title, having no specific knowledge of the property at issue.⁵²⁷ Thus, the beneficiaries were not equitably estopped from asserting their interests in the property against Rinker, and the judgment liens did not attach to the property.⁵²⁸ Accordingly, the summary judgment in favor of Rinker was reversed, and the case was remanded.⁵²⁹

*Beason-Simons v. Avion Technologies, Inc.*⁵³⁰ The Fourth District Court of Appeal reversed the circuit court’s determination that an unpaid seller’s right to reclaim equipment was superior to a landlord’s statutory lien.⁵³¹ Appellee sold and installed electronic equipment on premises leased to appellee Avion by appellant landlord Beason-Simons, providing in the sales contract that title to the goods would remain in the seller until full payment was made. However, the seller did not record the purchase agreement or file a UCC financing statement. When Avion abandoned the leased premises, the landlord claimed it was entitled to the equipment on the basis of a statutory landlord’s lien under section 83.08(2) of the *Florida Statutes*, while the seller claimed the same through a right of reclamation under section 672.507(2) of

523. *Id.*

524. *Beckham*, 662 So. 2d at 761.

525. 134 So. 501, 504 (1931).

526. *Beckham*, 662 So. 2d at 761 (quoting *Savarese*, 134 So. at 504).

527. *Id.* at 761.

528. *Id.* at 762.

529. *Id.*

530. 662 So. 2d 1317 (Fla. 4th Dist. Ct. App. 1995).

531. *Id.* at 1318.

the *Florida Statutes*.⁵³² Section 83.08(2) expressly states that the statutory landlord's lien "shall be superior to any lien acquired subsequent to the bringing of the property on the premises leased."⁵³³ The court noted that a landlord's statutory lien need not be filed or recorded to be perfected; rather, it attaches at the commencement of tenancy or as soon as the property is brought onto the premises.⁵³⁴

The appellate court then analyzed section 672.507(2) and found that although that section gives an unpaid seller an interest superior to that of a buyer, the statute does not determine priorities between an unpaid seller and a third party such as the landlord.⁵³⁵ The seller could have perfected its security interest in the equipment under the UCC before delivery,⁵³⁶ and failure to do so rendered the landlord's statutory lien superior. The appellate court reversed the circuit court.⁵³⁷

Gordon v. Ruvin.⁵³⁸ Robert Gordon appealed from an adverse summary judgment of foreclosure which found an equitable lien on real property was transferable to a bond under section 55.10(6) of the *Florida Statutes*.⁵³⁹ The Third District Court of Appeal affirmed.⁵⁴⁰ Gordon obtained a judgment foreclosing his mortgage on property owned by appellee Flamingo Holding Partnership ("Seller").⁵⁴¹ The judgment provided that should the sale produce insufficient funds to satisfy the amount due Gordon, an equitable lien of \$962,000 would be imposed upon the Seller's adjacent property. The property was purchased in 1995 by appellee First Equitable Realty III, Ltd. ("Buyer") for \$24.1 million, which intended to convert the apartment complex into condominiums. Apparently, pursuant to the contract of purchase and sale, the

532. *Id.*

533. *Id.* (citing FLA. STAT. § 83.08(2) (1993)).

534. *Id.* (citing *Lovett v. Lee*, 193 So. 538, 542 (Fla. 1940); *Florida E. Coast Properties, Inc. v. Best Contract Furnishings, Inc.*, 593 So. 2d 560, 562 n.6 (Fla. 3d Dist. Ct. App. 1992)).

535. *Beason-Simons*, 662 So. 2d at 1318 (citing *Florida E. Coast Properties*, 593 So. 2d at 562; *Suburbia Fed. Sav. & Loan Ass'n v. Bel-Air Conditioning Co.*, 385 So. 2d 1151 (Fla. 4th Dist. Ct. App. 1980)). In *Suburbia*, the district court held that a construction mortgage on real property was superior in priority to the claim of a seller of air conditioning equipment which had been installed on the property, where the seller's claim was only by virtue of a retain title contract and not by a perfected security interest. 385 So. 2d at 1153-54.

536. *Beason-Simons*, 662 So. 2d at 1318-19 (citing *Florida E. Coast Properties*, 593 So. 2d at 562 n.8).

537. *Id.* at 1319.

538. 664 So. 2d 1078 (Fla. 3d Dist. Ct. App. 1995).

539. *Id.* at 1078.

540. *Id.* at 1080.

541. *Id.* at 1078.

Seller was required to post a bond allowing the Buyer to take title unencumbered by Gordon's equitable lien. After the Seller obtained the bond for two million dollars, appellee Harvey Ruvin, Clerk of the Circuit Court for the Eleventh Judicial Circuit ("clerk"), issued a clerk's certificate transferring Gordon's lien to the bond, after which the sale was closed with title passing to the Buyer in February of 1995.⁵⁴²

Gordon sued the Buyer, the Seller, and the clerk. The Third District Court of Appeal disagreed with Gordon's assertion that an equitable lien is a constitutionally protected right which cannot be extinguished by substituting security without the lienholder's consent.⁵⁴³ The court noted that the "transfer to bond" provision of section 55.10(6) was added in 1977 and amended in 1987 to provide that any lien claimed under subsection (1) of that section may be transferred from the real property to security.⁵⁴⁴ The amendment, according to the court, furthers an important public policy in favor of free alienability of property.⁵⁴⁵ The statute, by specifically stating that the bond must be executed by a surety licensed by the Florida Insurance Department to do business in Florida, protects the valid substantive property rights of the lienholder while also furthering the legislature's intent of providing for free transferability of real estate.⁵⁴⁶ The court distinguished the present case from *White v. White*,⁵⁴⁷ a case relied upon by Gordon, because of the change in statutory law in the sixteen years since that decision, and because *White*, unlike the present case, involved a transfer to government securities rather than a corporate surety bond as required by the present statute.⁵⁴⁸

Hanley v. Kajak.⁵⁴⁹ The Fourth District Court of Appeal reversed the circuit court's finding of a valid mechanic's lien in favor of the subcontractor, Kajak, and the corresponding award of statutory attorneys' fees under section 713.29 of the *Florida Statutes*.⁵⁵⁰ The circuit court had concluded that Hanley's commencement of an action pursuant to section 713.21(4) of the *Florida Statutes* resulted in a waiver of the section 713.06(3)(d)(1) requirement that Kajak file a contractor's final affidavit.⁵⁵¹ The Fourth District Court

542. *Id.* at 1079.

543. *Gordon*, 664 So. 2d at 1079.

544. *Id.*

545. *Id.*

546. *Id.*

547. 129 So. 2d 148 (Fla. 1st Dist. Ct. App. 1961).

548. *Gordon*, 664 So. 2d at 1079.

549. 661 So. 2d 1248 (Fla. 4th Dist. Ct. App. 1995).

550. *Id.* at 1249.

551. *Id.* at 1248.

of Appeal disagreed, holding that the affidavit requirement is a condition precedent to the maintenance of a lien foreclosure action under chapter 713, and the fact that the foreclosure was filed as a counterclaim did not alter that requirement.⁵⁵² The court felt that Kajak had not shown good cause or a justifiable excuse for failure to comply with the statutory requirements and held the lien invalid.⁵⁵³

*Holly Lake Ass'n v. Federal National Mortgage Ass'n.*⁵⁵⁴ The Supreme Court of Florida, reviewing *Federal National Mortgage Ass'n v. McKesson*,⁵⁵⁵ asserted jurisdiction under Article V, section 3(b)(4) of the *Florida Constitution* and answered the following certified question in the negative, approving the decision of the Fourth District Court of Appeal:

WHETHER A CLAIM OF LIEN RECORDED PURSUANT TO A DECLARATION OF COVENANTS BY A HOMEOWNERS' ASSOCIATION HAS PRIORITY OVER AN INTERVENING RECORDED MORTGAGE WHERE THE DECLARATION AUTHORIZES THE ASSOCIATION TO IMPOSE A LIEN FOR ASSESSMENTS BUT DOES NOT OTHERWISE INDICATE THAT THE LIEN RELATES BACK OR TAKES PRIORITY OVER AN INTERVENING MORTGAGE.⁵⁵⁶

Holly Lakes is the homeowners' association ("Association") for a mobile home park. The Association's predecessor recorded a declaration of covenants covering the real property within the park in 1974, requiring residents to pay monthly assessments for maintenance of their sites, and including the following provision:

In the event the monthly mobile type home site charge is not paid when due, Owner, or its designee, shall have the right to a lien against said site and the improvements contained thereon for any such unpaid charges; and shall have the right to enforce said lien in any manner provided by law for the enforcement of mechanics' or

552. *Id.*

553. *Id.* at 1249. See *Timbercraft Enters., Inc. v. Adams*, 563 So. 2d 1090 (Fla. 4th Dist. Ct. App. 1990). See also *Holding Elec., Inc. v. Roberts*, 530 So. 2d 301 (Fla. 1988)).

554. 660 So. 2d 266 (Fla. 1995).

555. 639 So. 2d 78 (Fla. 4th Dist. Ct. App. 1994), *review granted*, 650 So. 2d 990 (Fla. 1995).

556. *Holly Lake Ass'n*, 660 So. 2d at 267.

statutory liens, but Owner shall not be restricted to such procedure in the collection of said overdue charges.⁵⁵⁷

John and Denise McKesson became the owners of a Holly Lakes site and executed a mortgage thereon, recorded in 1983, which was assigned to Federal National Mortgage Association (“FNMA”), the respondent.

In 1991, the Association recorded a claim of lien against the McKessons’ site for failure to pay the monthly maintenance fee. Then in 1992, FNMA commenced a foreclosure action against the McKessons for failure to pay the promissory note secured by the mortgage, and the Association filed a counterclaim against FNMA, asserting superiority of lien because its lien related back to the 1974 declaration of covenants. FNMA answered that its mortgage lien, having been recorded eight years before that of the Association, was superior, but the trial court found for the Association and granted summary judgment in its favor.⁵⁵⁸ The Fourth District Court of Appeal subsequently reversed, reasoning that the 1974 declaration, rather than creating an ongoing automatic lien, merely created a right to a lien and that because FNMA’s mortgage lien was recorded before the Association’s maintenance fee lien, FNMA’s lien had priority.⁵⁵⁹

The Association relied on *Bessemer v. Gersten*⁵⁶⁰ for the proposition that its lien related back to the date the declaration was recorded. The court found *Bessemer* inapplicable.⁵⁶¹ Unlike the present dispute between two creditors, *Bessemer* involved a dispute over a creditor’s lien and the property owner’s homestead right.⁵⁶² Also, the language of the present declaration differed significantly from that in *Bessemer*, which “put all parties on notice that an ongoing, automatic lien had been created at the time that the property was purchased, and that this lien would continue each month until the owner paid the monthly assessment fee.”⁵⁶³ The court concluded that the present declaration failed to put FNMA on such notice and that FNMA could not be charged with constructive notice because the Association had not yet filed its lien when FNMA’s mortgage was recorded in 1983.⁵⁶⁴ After commenting on the similar

557. *Id.*

558. *Id.* at 268.

559. *Id.*

560. 381 So. 2d 1344 (Fla. 1980).

561. *Holly Lake Ass’n*, 660 So. 2d at 268.

562. *Id.*

563. *Id.*

564. *Id.*

factual situation and holding in the Illinois case of *St. Paul Federal Bank for Savings v. Wesby*,⁵⁶⁵ the court also declared a general rule that:

in order for a claim of lien recorded pursuant to a declaration of covenants to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the lien relates back to the date of filing of the declaration or that it otherwise takes priority over intervening mortgages.⁵⁶⁶

Lamchick, Glucksman & Johnson, P.A. v. City National Bank of Florida.⁵⁶⁷ Appeal was taken from an adverse final summary judgment awarding diligent creditors a priority lien over the appellants' prior recorded lien. The Third District Court of Appeal, per curiam, reversed, ruling that unlike personal property, the diligent creditor rule does not apply to liens on real property.⁵⁶⁸ The court found that section 695.11 of the *Florida Statutes* governs judgment liens on real property, as in this case, and further noted that "because of the different concerns involved in the context of real property," the diligent creditor rule did not apply.⁵⁶⁹

Appellants obtained a judgment and filed it in the official records of Dade County on June 28, 1988, creating a lien on the property. Pursuant to section 695.11, appellants' lien, recorded before appellee's, had priority. The court noted further that appellants' "lien had neither expired nor been satisfied, and there is no evidence in the record, and no allegation in the pleadings, that the judgment lien was void or voidable."⁵⁷⁰ Thus, relying on *Sharpe v. Calabrese*,⁵⁷¹ the court held that appellant's lien "must be accorded its legal effect."⁵⁷²

Pappalardo v. Buck.⁵⁷³ Pappalardo, the principal on a preexisting lien transfer bond, was ordered by the trial court to increase the face amount of that bond to add coverage for attorneys' fees and costs incurred by the claimant in

565. 501 N.E.2d 707 (Ill. App. Ct. 1986).

566. *Holly Lake Ass'n*, 660 So. 2d at 269.

567. 659 So. 2d 1118 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 937 (Fla. 1996).

568. *Id.* at 1119.

569. *Id.* at 1120.

570. *Id.* at 1119.

571. 528 So. 2d 947, 950 (Fla. 5th Dist. Ct. App. 1988).

572. *Lamchick*, 659 So. 2d at 1119.

573. 659 So. 2d 422 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 251 (Fla. 1996).

excess of the original face amount.⁵⁷⁴ The Fourth District Court of Appeal quashed this decision, holding that Pappalardo was not personally liable because he was not made a party to the action.⁵⁷⁵

This case had already worked its way through the court system as *Aetna Casualty and Surety Co. v. Buck*,⁵⁷⁶ in which the Supreme Court of Florida determined that a surety's liability for attorneys' fees could not be imposed above the face amount of the bond.⁵⁷⁷ Having thus been denied access to Aetna's pocket by the supreme court, Buck apparently regrouped and directed its efforts at Pappalardo personally. Buck had initially sued only Aetna and Pappalardo's construction company and moved to add Pappalardo individually after final judgment. That motion was denied by the trial court, and Buck did not appeal the order.⁵⁷⁸ The court intimated that merely obtaining a transfer bond is insufficient to find that the party has submitted to the court's jurisdiction so as to expose him to liability in excess of the bond's face.⁵⁷⁹

*Robie v. Port Douglas (Florida), Inc.*⁵⁸⁰ Upon default by the tenant, Inverrary Cinema Corporation, the landlord, Port Douglas and chattel mortgagees, Kenneth L. and Barbara G. Robie, asserted liens to claim possession of equipment in the theater. The Fourth District Court of Appeal reversed the trial court's determination of superiority of the landlord's statutory lien because the landlord and tenant terminated the original lease prior to the tenant's default and entered into a new lease.⁵⁸¹

The tenant took possession of the theater pursuant to an assignment of lease from R & R Cinemas, Inc., a company owned by the Robies. The Robies filed a Form UCC-1 to secure the furnishings located in the theater. After

574. *Id.* at 423.

575. *Id.* at 424. The court cited *Canam Sys., Inc. v. Lake Buchanan Dev. Corp.*, 375 So. 2d 582, 583 (Fla. 5th Dist. Ct. App. 1979), *cert. denied*, 386 So. 2d 634 (Fla. 1980) and *Vic Tanny of Fla., Inc. v. Fred McGilvray, Inc.*, 348 So. 2d 648, 651 (Fla. 3d Dist. Ct. App. 1977) for the following proposition: "The principal on a bond to which there has been a transfer from lien must be made a party to be held personally liable." *Pappalardo*, 659 So. 2d at 423.

576. 594 So. 2d 280 (Fla. 1992).

577. *Id.* at 283. The Fourth District Court quoted the supreme court's opinion, which explained the powers and limits thereto conferred upon a trial court by section 713.24(3) of the *Florida Statutes*, which "allows a trial court to order the party providing the bond to either purchase an additional bond or increase the existing bond, or to otherwise provide increase security, [but] the statute does not permit the trial court to increase the liability of the surety beyond the amount of the bond." *Pappalardo*, 659 So. 2d at 423.

578. *Pappalardo*, 659 So. 2d at 423.

579. *Id.*

580. 662 So. 2d 1389 (Fla. 4th Dist. Ct. App. 1995).

581. *Id.* at 1391.

perfection of the Robies' interest, Inverrary and Port Douglas entered into a lease termination agreement and, thereafter, executed a new lease while the tenant was still current under the old lease.⁵⁸²

The court noted that under section 83.08 of the *Florida Statutes*, a landlord's statutory lien, which is not required to be filed or recorded in order to be perfected, attaches at the commencement of the tenancy or as soon as the property is brought onto the premises.⁵⁸³ However, "[w]hen the commencement of a tenancy, based upon a lease, creates a statutory landlord's lien, pursuant to section 83.08, Florida Statutes, such lien is viable only as long as the underlying lease exists."⁵⁸⁴ Although the chattel mortgage did not have priority over the original lease, that mortgage gained priority when the original lease was terminated and retained such priority over the subsequent lease.⁵⁸⁵

That the second lease was neither an option nor a renewal of the first lease was critical to a determination of priority of the Robies' lien.⁵⁸⁶ In the appellate court's opinion, the trial court relied too heavily on the fact that the new lease was between the same parties and involved the same premises as the old lease, and neglected the "operative inquiry" of "whether landlord and tenant continued their relationship under the initial lease either through an extension, a renewal or an option."⁵⁸⁷

Shawzin v. Sasser.⁵⁸⁸ Sasser represented Shawzin in a dissolution of marriage action, having first obtained a representation agreement which granted Sasser "all general, possessory and retaining liens and all equitable, special and attorney's charging liens upon the client's interest in any and all real and personal property . . . for any balance due, owing and unpaid at the conclusion of the case or the sooner termination of employment."⁵⁸⁹ The trial court granted Sasser's December 1992 motion to withdraw as counsel.⁵⁹⁰ Thereafter, Shawzin and his former wife entered into a settlement agreement with Shawzin retaining title to the marital home. When the trial court entered

582. *Id.* at 1390.

583. *Id.* at 1391 (citing *Lovett v. Lee*, 193 So. 538, 542 (Fla. 1940); *Beason-Simons Technologies, Inc. v. Avion Technologies, Inc.*, 662 So. 2d 1317, 1318 (Fla. 4th Dist. Ct. App. 1995)).

584. *Id.* at 1391 (quoting *Flowers v. Centrust Sav. Bank*, 556 So. 2d 1123, 1125 (Fla. 3d Dist. Ct. App. 1989)).

585. *Robie*, 662 So. 2d at 1390.

586. *Id.* at 1391.

587. *Id.*

588. 658 So. 2d 1148 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 252 (Fla. 1996).

589. *Id.* at 1149.

590. *Id.*

final judgment which incorporated the settlement agreement, Sasser moved for a charging lien, obtaining a money judgment of \$52,337.37 and a charging lien on the marital home.⁵⁹¹ Shawzin appealed. Sasser cross appealed, assigning error to the court's setting aside the proceeds of the sale of the marital home under the homestead exemption.

The Fourth District Court of Appeal upheld the award of the lien, outlining the four requirements for the imposition of such a lien, which the court found present.⁵⁹² The court, however, reversed the money judgment because Sasser had moved for the lien only.⁵⁹³ Shawzin thus had insufficient notice that such a judgment might be rendered against him.⁵⁹⁴

On Sasser's appeal of the homestead set aside, the court noted that, under *Orange Brevard Plumbing & Heating Co. v. La Croix*,⁵⁹⁵ only proceeds intended to be reinvested in another homestead qualify for homestead protection.⁵⁹⁶ In the present case, Sasser had demonstrated that "a significant portion of the proceeds derived from the sale of the homestead [were used] for purposes other than for reinvestment in another homestead."⁵⁹⁷ Thus, the court also reversed the trial court's setting aside of all the townhouse proceeds under the homestead exemption and remanded.⁵⁹⁸

*Stunkel v. Gazebo Landscaping Design, Inc.*⁵⁹⁹ In this case the Supreme Court of Florida, noting jurisdiction under article V, section 3(b)(4) of the

591. *Id.* at 1150.

592. *Id.* According to the court, these requirements include:

- (1) In order for a charging lien to be imposed, there must first be a contract between the attorney and the client.
- (2) There must also be an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery.
- (3) The remedy is available where there has been an attempt to avoid the payment of fees or a dispute as to the amount involved.
- (4) There are no requirements for perfecting a charging lien beyond timely notice.

Shawzin, 658 So. 2d at 1150. For this proposition, the court cited *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So. 2d 1383, 1385 (Fla. 1983), among others.

593. *Shawzin*, 658 So. 2d at 1151.

594. *Id.*

595. 137 So. 2d 201, 207 (Fla. 1962).

596. *Shawzin*, 658 So. 2d at 1151.

597. *Id.* *Shawzin* apparently diverted funds from the \$1,850,000 sale of the townhouse to pay his former wife's \$550,000 lump sum alimony and to pay his present counsel's fees and costs.

598. *Id.*

599. 660 So. 2d 623 (Fla. 1995).

Florida Constitution, answered the following certified question from the Fourth District Court of Appeal⁶⁰⁰ in the negative:

DOES A SUBCONTRACTOR BEGIN TO FURNISH SERVICES, FOR THE PURPOSE OF TIMELY PROVIDING A NOTICE TO OWNER IN ACCORDANCE WITH SECTION 713.06(2)(a), FLORIDA STATUTES (1991), WHEN, WITHOUT ANY BINDING CONTRACTUAL OBLIGATION TO DO SO, HE OR SHE BEGINS TO SELECT MATERIALS AT SOME LOCATION OFF THE JOB SITE, FOR FUTURE INSTALLATION ON THE JOB SITE?⁶⁰¹

The Stunkels contracted with general contractor Bill Free Custom Homes for the construction of a home on their property, who in turn orally contracted with landscaping subcontractor Gazebo. The Stunkels flew on their private plane with a Gazebo representative to a Tampa site to select trees on November 7, 1990. Gazebo began digging on the property on December 5, 1990 and planted the selected trees two days later on December 7, 1990. On February 11, 1992, Gazebo filed suit against the Stunkels and Bill Free Custom Home for breach of contract and to foreclose on its claim of lien.⁶⁰²

After an unsuccessful attempt to notify the Stunkels of an impending claim of lien on January 15, 1991, Gazebo posted a notice on the gate of the residence. Because section 713.06(2)(a) of the *Florida Statutes* requires posting of notice to the owner within forty-five days after a subcontractor begins furnishing services or materials, the court needed to determine whether commencement occurred, within the meaning of the statute, when the trees were selected by the Stunkels or when Gazebo began working on the Stunkel residence.⁶⁰³ The trial court entered an involuntary dismissal of Gazebo's claim of lien after concluding Gazebo began furnishing services when the Stunkels selected the trees and Gazebo failed to give notice within forty-five days of commencement, as required by section 713.06(2)(a).⁶⁰⁴ The Fourth District Court of Appeal reversed the trial court's ruling, noting that there was no authority on the timing question, and it "suggested that the trial court

600. *Gazebo Landscaping Design, Inc. v. Bill Free Custom Homes, Inc.*, 638 So. 2d 87 (Fla. 4th Dist. Ct. App. 1994).

601. *Stunkel*, 660 So. 2d at 624.

602. *Id.*

603. *Id.*

604. *Id.*

consider all relevant factors ‘based on the totality of the circumstances’ in determining when the subcontractor actually began to provide services.”⁶⁰⁵

The supreme court noted that a contract is essential to a mechanic’s lien,⁶⁰⁶ and when the selection of the trees was made, there was no binding contractual obligation.⁶⁰⁷ Therefore, the subcontractor could not have brought a claim of lien against the owner.⁶⁰⁸ On this basis, the certified question was answered in the negative.⁶⁰⁹ The supreme court rejected the district court’s suggested approach because it failed to provide certainty and would frustrate one of the purposes of mechanic’s lien law.⁶¹⁰ The court believed that under the suggested approach, “giving notice to owner would be determined on a case-by-case basis, and subcontractors would never know for sure when they had to give notice.”⁶¹¹

In a separate issue, the trial court refused to enforce the claim of lien, finding that Gazebo’s president took no oath when signing the claim.⁶¹² Additionally, despite being signed on January 14, 1991, the claim included a statement that the lien was hand-posted on January 18, 1991. After noting that section 713.08(3) imposes an attestation by notary requirement for claims on lien, the supreme court remanded for a determination by the trial court in accordance with section 713.08(4)(a)⁶¹³ on the question of whether the faulty claim of lien adversely affects the Stunkels.⁶¹⁴ Finally, the court denied attorneys’ fees to both parties under section 713.29, which allows the prevailing party in an action to enforce a construction lien to recover reasonable attorneys’ fees, until such time as the trial court determines a prevailing party on remand and any subsequent appeals are finalized.⁶¹⁵

605. *Id.* at 625 (quoting *Gazebo Landscape Design*, 638 So. 2d at 89).

606. *Stunkel*, 660 So. 2d at 625. The court cited *Viking Communities Corp. v. Peeler Const. Co.*, 367 So. 2d 737, 739 (Fla. 4th Dist. Ct. App. 1979) and section 713.06(1) of the *Florida Statutes* (1991) for the proposition that “[a] subcontractor . . . has a lien on the real property improved for any money that is owed to him for labor, services, or materials furnished *in accordance with his contract.*”

607. *Stunkel*, 660 So. 2d at 625.

608. *Id.*

609. *Id.*

610. *Id.* at 625–26.

611. *Id.* at 626.

612. *Stunkel*, 660 So. 2d at 626.

613. Section 713.08(4)(a) provides: “The omission of any of the foregoing details or errors in such claim of lien shall not, within the discretion of the trial court, prevent the enforcement of such lien as against one who has not been adversely affected by such omission or error.” FLA. STAT. § 713.08(4)(a) (1991).

614. *Stunkel*, 660 So. 2d at 627.

615. *Id.*

*Viyella Co. v. Gomes.*⁶¹⁶ Viyella Company appealed from an adverse partial final summary judgment, assigning error to the trial court's determination that no genuine issue of material fact existed concerning the value of work performed by Viyella and Viyella's intent to willfully exaggerate the amount of a mechanic's lien.⁶¹⁷ Viyella and the Gomeses executed a contract contemplating Viyella's completion of a \$76,900 contract for improvements to the Gomeses' residential property. Viyella was terminated prior to completion of the work and filed a claim of lien for the contract price above the twenty-five percent deposit of \$19,225 paid by the Gomeses at the time of execution of the contract.⁶¹⁸ The Third District Court of Appeal affirmed, holding that no genuine issue of material fact existed and that the lien was fraudulent under section 713.31(2)(a) of the *Florida Statutes*.⁶¹⁹ The Gomeses thus could invoke the complete defense provided under section 713.31(2)(b) which renders a fraudulent lien unenforceable.⁶²⁰

Julio Viyella, president of Viyella Company, first filed a claim of lien for \$57,675, the remainder of the contract price, stating that he completely performed the contract. He then filed a Contractor's Final Affidavit asserting that the Gomeses owed a smaller amount, \$51,883.95, acknowledging that he in fact failed to complete a substantial portion of the work. Then, at deposition, he testified that he had failed to perform an amount of work worth no less than \$27,740. The district court noted that "[t]hese facts are undisputed by the [Gomeses] and any contradictions stem completely from [Viyella's] own statements."⁶²¹ On this basis, the district court agreed with the trial court's

616. 657 So. 2d 83 (Fla. 3d Dist. Ct. App. 1995).

617. *Id.* at 84. The company also appealed the denial of its motion for rehearing and/or clarification. *Id.*

618. *Id.* The Gomeses thereupon posted a \$78,938 bond, transferring the lien from the property to the bond. *Id.*

619. *Viyella Company*, 657 So. 2d at 84. The court quoted the following language from sections 713.31 of the *Florida Statutes*:

(2)(a) Any lien asserted . . . in which the lienor has willfully exaggerated the amount for which such lien is claimed or in which the lienor has willfully included a claim for work not performed upon or materials not furnished for the property upon which he seeks to impress such lien . . . shall be deemed a fraudulent lien.

(b) It is a complete defense to any action to enforce a lien . . . that the lien is a fraudulent lien; and the court so finding is empowered to and shall declare the lien unenforceable, and the lienor thereupon forfeits his right to any lien on the property upon which he sought to impress such fraudulent lien. . . .

Id. (quoting FLA. STAT. § 713.31(2)(a)-(b) (1993)).

620. *Id.*

621. *Id.* at 85.

finding that there was no genuine issue of material fact regarding the fraudulent nature of the lien and affirmed the trial court's award of partial final summary judgment in favor of the Gomeses.⁶²²

*Ward v. 3900 Condominium Ass'n.*⁶²³ The Fourth District Court of Appeal reversed, in part, this action to foreclose a \$1,000 assessment lien.⁶²⁴ The court held that the trial court erred "in not considering the condominium association's decision not to deposit the unit owner's belated 1994 check which was less than the full sum then owed by the unit owner."⁶²⁵ The check should have been deposited and applied under section 718.116(3) of the *Florida Statutes* (1993), which would have resulted in the amount in dispute being halved "and the matter possibly resolved without all of the litigation."⁶²⁶ The court also ordered that the attorneys' fee award of \$13,100 "be reduced, without further hearing, to a reasonable sum based on a reduced, properly disputed amount."⁶²⁷

XX. LIS PENDENS

*Lennar Florida Holdings, Inc. v. First Family Bank.*⁶²⁸ Lennar sought certiorari review from the trial court's order denying its motion to dissolve First Family's notice of lis pendens on a Lake County property in which First Family had acquired a substantial interest, and which Lennar had contracted to sell at an amount which First Family alleged was below fair market value in breach of a participation agreement by which Lennar is bound.⁶²⁹ The Fifth District Court of Appeal granted Lennar's petition for certiorari and quashed the order of the trial court denying Lennar's motion to dissolve First Family's notice of lis pendens.⁶³⁰

In 1972 and 1973 First Family purchased an interest in two loans secured by properties in Lake and Orange Counties made by American Federal Savings and Loan Association of Orlando through contracts referred to as participation

622. *Id.* The district court commented that the trial court had applied the standard for determining the fraudulent nature and resultant unenforceability of such a lien set forth in section 713.31. *Viyella Company*, 657 So. 2d at 85.

623. 670 So. 2d 1182 (Fla. 4th Dist. Ct. App. 1996).

624. *Id.* at 1183.

625. *Id.*

626. *Id.*

627. *Id.*

628. 660 So. 2d 1122 (Fla. 5th Dist. Ct. App. 1995).

629. *Id.* at 1122.

630. *Id.* at 1124.

agreements. Under these participation agreements, First Family was to share a percentage of the accumulated principal and interest for contributing a percentage of the loan amount. American held the notes and mortgages for the benefit of all participants, and the agreements provided that, although American was authorized to deal with the loans as absolute owner, it would act as a prudent lender upon default. Upon breach or other failure to perform its obligations by American, the other participants could demand repurchase of their interest in the loans at par value. Successors and assigns were bound by the terms of the original participation agreements.⁶³¹

After American Federal merged with AmeriFirst Federal Savings and Loan Association, the Resolution Trust Corporation ("RTC") took possession of AmeriFirst's assets, including the participation agreements underlying the present litigation. The loans went into default. The RTC filed separate foreclosure actions on the Lake and Orange County mortgages, later obtaining a final summary judgment in Lake County and a final judgment of foreclosure in Orange County. First Family did not participate in the foreclosure proceedings. The RTC was the high bidder at an auction for the sale of the Lake County property and obtained a certificate of sale.⁶³²

Lennar purchased a large portfolio from the RTC, obtained assignments of the RTC's interest in the notes, mortgages, and judgments of foreclosure relating to the properties, and it was later issued a certificate of title to the Lake County property. On May 25, 1994, Lennar entered into a contract to sell the Lake County property for \$200,000, which First Family alleged was below fair market value. First Family alleged further that Lennar, successor in interest to American's obligations, breached its duty to exercise judgment as a prudent lender and refused to repurchase First Family's participation interest after its breach. First Family sought money damages for unpaid principal and interest and improperly charged maintenance costs, as well as a constructive trust and judgment conveying to it a fee simple ownership interest in the property of thirty-four percent, an amount proportional to its interest in the participation agreement.⁶³³

The appellate court noted that one of the purposes of the doctrine of *lis pendens*, aside from the protection of a plaintiff's interest, is to warn third parties of a dispute concerning the property.⁶³⁴ Courts may discharge a notice of *lis pendens* if the initial pleading fails to demonstrate that the action is

631. *Id.* at 1123.

632. *Id.*

633. *Lennar*, 660 So. 2d at 1123.

634. *Id.* See *Chiusolo v. Kennedy*, 614 So. 2d 491 (Fla. 1993).

founded on a duly recorded instrument or mechanic's lien.⁶³⁵ The court framed the issue in the present litigation as "whether the proponent of the lis pendens, First Family Bank, has shown that there is a sufficient nexus between its action and the property in question."⁶³⁶ The court, without explicitly explaining its reasoning, held that First Family had not so shown.⁶³⁷

XXI. MOBILE HOMES

*Sandpiper Homeowners Ass'n v. Lake Yale Corp.*⁶³⁸ The residents of a mobile home park purchased water and wastewater services from a utility company owned by the park owner. Originally the charge for water and wastewater was included in the rent. A dispute in 1990 led to a settlement agreement that annual rent in 1992, 1993, and 1994 would be adjusted according to the Consumer Price Index. After that agreement, the utility company applied for and received a new consumptive use permit from the Water Management District. Pursuant to the permit, water meters were installed in the homes in the park. Then, the utility company applied for and got approval of a new rate structure from the Florida Public Service Commission ("PSC"). The homeowners' association ("Association") objected on the basis that the rate structure would violate the settlement agreement and the park prospectus, but the PSC ruled that those were contract disputes that belonged in circuit court rather than before the PSC. Then, the park unilaterally notified the residents that their rent was being reduced twenty dollars per month to reflect the new separate billing for water and wastewater.⁶³⁹

635. *Id.* See FLA. STAT. § 48.23(3) (1993); *Mohican Valley, Inc. v. MacDonald*, 443 So. 2d 479 (Fla. 5th Dist. Ct. App. 1984).

636. *Id.* at 1124.

637. *Id.* The only evidence of the court's reasoning were the several factual circumstances it noted before announcing its judgment on the issue. The court noted that "[a]lthough First Family had a 'participation' interest in the subject note and mortgage, that mortgage was foreclosed and the collateral property sold pursuant to the judgment." *Id.* The court also took note of the fact that First Family failed to intervene in the foreclosure action, but did not explain how or if First Family's failure to do so would have made any significant difference in the court's present decision. Another fact similarly treated by the court was that First Family never alleged that Lennar fraudulently obtained title to the Lake County property. The court thus felt that First Family's action did not sufficiently implicate the property itself to sustain its notice of lis pendens. In so holding, the court did not directly address the fact that First Family had sought a 34% fee simple ownership interest in the subject property.

638. 667 So. 2d 921 (Fla. 5th Dist. Ct. App. 1996). Judge Goshorn wrote the opinion. Judges W. Sharp and Griffin concurred.

639. *Id.* at 922.

The Association brought this suit seeking declaratory and injunctive relief. The claim was that the rental reduction was inadequate and that the park owner had violated the terms of the settlement agreement and the park prospectus. The circuit court dismissed their claim on the basis that the court lacked subject matter jurisdiction over what was essentially a dispute over utility rates.⁶⁴⁰ The district court reversed.⁶⁴¹

Judge Goshorn wrote a thorough and well-reasoned opinion. It boiled down to this simple distinction. The PSC has exclusive jurisdiction over rate disputes, but this was not a rate dispute. This was a dispute over rent. As the PSC had recognized in its opinion, such a contract dispute belonged in the circuit court.⁶⁴²

XXII. MORTGAGES

Coral Springs Tower Club II Condominium Ass'n v. Dizefalo.⁶⁴³ The Fourth District Court of Appeal granted the association's petition for writ of mandamus, holding that the circuit court erroneously refused to exercise jurisdiction over this action to foreclose a mortgage where the amount in controversy was less than \$15,000.⁶⁴⁴ Under *Alexdex Corp. v. Nachon Enterprises, Inc.*,⁶⁴⁵ the circuit and county courts have concurrent jurisdiction over foreclosure actions where the action falls within the county court's monetary jurisdiction.⁶⁴⁶ After noting that the trial court transferred the case to county court *sua sponte*, the court noted that "[w]e are unaware of any statute, rule of procedure or local administrative order which authorizes transfer because a trial judge just does not want to hear the case."⁶⁴⁷

Lakeside Regent, Inc. v. FDIC.⁶⁴⁸ Lakeside appealed the trial court's award of summary judgment for the FDIC⁶⁴⁹ in a dispute over the proper amount of setoff Lakeside was entitled to apply to FDIC's judgment in a mortgage foreclosure deficiency action. Lakeside had commenced the action

640. *Id.* at 923.

641. *Id.* at 926.

642. *Id.* at 922.

643. 667 So. 2d 966 (Fla. 4th Dist. Ct. App. 1996).

644. *Id.* at 967.

645. 641 So. 2d 858 (Fla. 1994).

646. *Id.* at 862.

647. *Dizefalo*, 667 So. 2d at 967.

648. 660 So. 2d 368 (Fla. 4th Dist. Ct. App. 1995).

649. *Id.* at 368. FDIC in this case was acting as receiver for First American Bank and Trust, which was declared insolvent. *Id.*

on claims arising from a note, guaranty, and mortgage security agreement, and FDIC counterclaimed for the amounts due on the note and for foreclosure. Lakeside and two individuals, Carl A. Sax and Lanny Horowitz,⁶⁵⁰ were found liable to FDIC for \$6,694,017.⁶⁵¹ The subject property was later sold to the City of West Palm Beach for \$1000, whereafter “FDIC noticed for a non-jury trial the issue of the amount of the deficiency judgment.”⁶⁵² The FDIC moved for summary judgment on this issue, contending that Lakeside, Sax, and Horowitz were only entitled to a setoff in the amount of the \$1000 paid by the City. Although Lakeside contested the propriety of summary judgment on this issue, and had sought discovery on several issues including the terms and conditions of the foreclosure sale,⁶⁵³ the trial court granted FDIC’s motion for a protective order preventing this discovery, finding that these issues were not relevant to the setoff issue.⁶⁵⁴ The FDIC was granted summary judgment by the trial court.⁶⁵⁵

The Fourth District Court of Appeal agreed with Lakeside, and reversed.⁶⁵⁶ The court noted that the trial court erroneously held that Lakeside’s affidavits, which were not formal appraisals, were insufficient to create an issue of fact.⁶⁵⁷ The trial court “appear[ed] to have done so based on its erroneous belief that the *only* valid evidence that could be presented by the defendants to oppose a deficiency judgment was a *formal* appraisal of the property by a qualified expert.”⁶⁵⁸ The trial court had a duty to consider several factors in deciding whether a deficiency judgment is warranted, including the adequacy of the sale price.⁶⁵⁹ The court held that the information

650. Carl A. Sax and Lanny Horowitz were found jointly and severally liable on the guaranty, while final judgment was entered against Lakeside on the note. *Id.* at 369 n.1.

651. This figure included principal, interest, and post-judgment interest. *Id.*

652. *Lakeside*, 660 So. 2d at 369.

653. The other issues mentioned in the opinion on which Lakeside sought discovery were tax arrearages, asbestos removal, and the FDIC’s meetings with the FDIC. *Id.*

654. *Id.*

655. *Id.*

656. *Id.* at 370.

657. *Lakeside*, 660 So. 2d at 369.

658. *Id.*

659. *Id.* at 370. The court quoted the following language from *R.K. Cooper Constr. Co. v. Fulton*, 216 So. 2d 11, 13 (Fla. 1968):

A shockingly inadequate sale price in the foreclosure proceeding can be asserted as an equitable defense and the trial judge has the discretion and duty to inquire into the reasonable and fair market value of the property sold, the adequacy of the sale price, and the relationship, if any, between the foreclosing mortgagee and the purchaser at the sale, before entering a judgment on the note.

was discoverable and that “the debtor here ought not to be deprived of the opportunity to make a showing of additional factors justifying his right to challenge the deficiency judgment.”⁶⁶⁰ As a result of this “first” error regarding the discoverability of this information, the court felt that it must conclude that Lakeside had indeed raised material issues of fact such that summary judgment was improper and, accordingly, reversed.⁶⁶¹

Mellor v. Goldberg.⁶⁶² The Second District Court of Appeal reversed the trial court’s dismissal with prejudice of appellant’s complaint on a promissory note.⁶⁶³ William and Patricia Mellor filed a complaint against Morton A. Goldberg seeking \$750,000 on a promissory note, attaching the note to the complaint. The Mellors’ complaint survived Goldberg’s initial motion to dismiss by filing a copy of a mortgage executed in conjunction therewith, containing a clause reading “[t]he land subject to this mortgage shall be the sole security for the indebtedness secured hereby, and a deficiency judgment shall not be obtained against the mortgagor in the event of foreclosure.”⁶⁶⁴ The court granted Goldberg’s renewed motion, in which he argued that the two documents reflected an agreement precluding a personal judgment against him, and it dismissed the Mellors’ complaint with prejudice, while ruling that the Mellors were entitled to enforce the mortgage.⁶⁶⁵

The appellate court disagreed with the trial court’s dismissal with prejudice.⁶⁶⁶ The court noted the sparsity of the record, which contained no documents other than the note and mortgage, and espoused the “general rule . . . [that] a holder of a promissory note secured by real property is permitted to pursue both an action on the note and an action to foreclose the mortgage. These remedies are not inconsistent and are each available to satisfy the underlying obligation.”⁶⁶⁷ The court declared, “We cannot hold, as a matter of law, that the limitation precluding a deficiency judgment was intended unambiguously either to prohibit or permit a personal judgment.”⁶⁶⁸ It agreed

Lakeside, 660 So. 2d at 369. Without expressly labeling the sale price at the foreclosure sale of the property in the present case as “shockingly low,” the court did note that the \$1000 “represented less than .07% of its assessed value.” *Id.* at 370.

660. *Id.* at 369 (citing *Merrill v. Nuzum*, 471 So. 2d 128, 129 (Fla. 3d Dist. Ct. App. 1985)).

661. *Id.* at 370.

662. 658 So. 2d 1162 (Fla. 2d Dist. Ct. App. 1995).

663. *Id.* at 1164.

664. *Id.* at 1163.

665. *Id.*

666. *Id.*

667. *Mellor*, 658 So. 2d at 1163 (citing *Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C.*, 438 So. 2d 408 (Fla. 2d Dist. Ct. App. 1983)).

668. *Id.* at 1164.

the note and mortgage should be construed together, but declared that “evidence of intent is necessary to explain a latent ambiguity within the two documents.”⁶⁶⁹ Such evidence was not apparent from the sparse record in the present case.⁶⁷⁰ The court reversed the trial court’s order dismissing the Mellors’ complaint with prejudice and remanded.⁶⁷¹

*Noonan-Judson v. Surrency.*⁶⁷² The Fifth District Court of Appeal determined that the trial court erred in applying the doctrine of election of remedies.⁶⁷³ Surrency held a second mortgage on the subject property, and NationsBank foreclosed on its first mortgage. Surrency, seeking to save her interest in the property, found another party, Noonan-Judson, who was also a client of Surrency’s attorney, William Dixon. The parties agreed to the following terms: 1) Noonan-Judson would put up \$97,000 to bid for the property at the foreclosure sale; 2) the property would be placed on the market and sold; 3) Noonan-Judson’s initial investment of \$97,000 would be repaid from the sale proceeds; and (4) the amount remaining would be divided in half between Noonan-Judson and Surrency. Noonan-Judson tendered a check for \$97,000 with a notation stating “investment” thereon.⁶⁷⁴

Dixon bid \$97,000 at the judicial sale, in his name as trustee for Surrency, and later prepared a mortgage deed and note for Noonan-Judson for the \$97,000, which provided for \$1,500 monthly payments. Dixon “delayed putting the trust terms in writing to give Surrency time to hammer out auxiliary terms related to the marketing of the property.”⁶⁷⁵ Surrency failed to make the payments.

Noonan-Judson filed a two-count claim for foreclosure on the mortgage, asking the court to impose an express, resulting, or constructive trust on the property. The trial court awarded Noonan-Judson partial summary judgment

669. *Id.*

670. Judge Altenbrand’s statements raise interesting questions. How much more evidence of such intent other than an unambiguous clause in such documents would be required? Can a party to such a document ever ensure that the language is legally sufficient to serve the party’s bona fide intent to protect oneself from personal liability? Is not the legitimate purpose in using such unambiguous language to avoid subsequent litigation? Can such a purpose ever be served by the court’s implication that such language does not preclude the admission of other sources of evidence dispositive of the intent of the parties to such a document, which conceivably could be many years old whenever such litigation arises? Is not the motivation in including such language in these documents to avoid other problems of proof of the parties’ intent?

671. *Mellor*, 658 So. 2d at 1164.

672. 669 So. 2d 1058 (Fla. 5th Dist. Ct. App. 1996).

673. *Id.* at 1059.

674. *Id.*

675. *Id.*

on the mortgage claim, granting her a mortgage lien of \$113,378.51, and ordered sale, at which Surrency redeemed.⁶⁷⁶ Later, the court denied Noonan-Judson's claim of trust, despite its finding that Surrency understood and consented to the terms of the agreement.⁶⁷⁷ The court's reasoning was that Noonan-Judson, in pursuing a mortgage foreclosure claim, had elected her remedy, thus eliminating the preliminary agreement to enter into a written trust agreement as a remedy.⁶⁷⁸

The Fifth District Court of Appeal offered two reasons in assigning error to the court's application of the doctrine of election of remedies.⁶⁷⁹ First, Surrency failed to plead the doctrine as an affirmative defense, and the court's inquiry was framed by the pleadings, noting that "[w]here an issue is not presented by pleading or litigated by parties during a hearing, a judgment based on that issue is voidable on appeal."⁶⁸⁰ Second, the remedies were not inconsistent, and thus the doctrine was simply inapplicable.⁶⁸¹

*Pignato v. Great Western Bank.*⁶⁸² In 1993, the appellants defaulted on their mortgage executed in 1991 in favor of Great Western. Great Western filed suit to foreclose, and the appellants raised affirmative defenses, including an allegation that Great Western violated the Federal Truth in Lending Act ("TILA")⁶⁸³ by failing to include as a finance charge the intangible tax which it paid to the Clerk of the Court to record the mortgage, instead including the figure in the amount financed.⁶⁸⁴ A violation would, among other things, permit the borrower to rescind the loan.⁶⁸⁵ The circuit court found that the lender had complied with the TILA and ordered foreclosure.⁶⁸⁶

The Fourth District Court of Appeal affirmed, interpreting an exception in the definition of finance charge in Federal Reserve Board Regulation Z⁶⁸⁷ to

676. *Id.*

677. *Noonan-Judson*, 669 So. 2d at 1059.

678. *Id.*

679. *Id.* at 1060.

680. *Id.* (citing *Cortina v. Cortina*, 98 So. 2d 334, 337 (Fla. 1957)).

681. *Id.* (citing *Barbe v. Villeneuve*, 505 So. 2d 1331, 1333 (Fla. 1987); *Goldstein v. Serio*, 566 So. 2d 1338, 1340 (Fla. 4th Dist. Ct. App. 1990), *review denied*, 576 So. 2d 291 (Fla. 1991)).

682. 664 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 673 So. 2d 30 (Fla. 1996).

683. 15 U.S.C. §§ 1601-77 (1988 & Supp. IV 1992).

684. *Pignato*, 664 So. 2d at 1012-13.

685. *Id.* at 1013 (citing 15 U.S.C.A. § 1635(a) (West 1982)).

686. *Id.*

687. 12 C.F.R. § 226 (1994).

include the Florida intangible tax.⁶⁸⁸ In so doing, the court rejected the federal eleventh circuit's holding in *Rodash v. AIB Mortgage Co.*,⁶⁸⁹ decided after the circuit court entered the present judgment of foreclosure, that the TILA required that the intangible tax be included as a finance charge.⁶⁹⁰ The court did not feel bound by *Rodash* "because it construes Florida law, not federal law."⁶⁹¹

Actually, the court construed both Florida law and federal law in this case. The court looked to Regulation Z for the definition and exceptions to finance charge, and it looked at an exception for "[t]axes and fees prescribed by law that actually are or will be paid to public officials for . . . perfecting . . . a security interest."⁶⁹² The *Rodash* court had, according to the Fourth District Court of Appeal, found the exception inapplicable because the purpose of the tax was revenue enhancement, not perfecting a security interest.⁶⁹³ The court looked to Florida law to clarify the nature of the Florida intangible tax, and it decided that although revenue enhancement was the purpose of the tax, the above exception fit because "[w]ithout payment, the mortgage will not be recorded and the security interest will not be perfected."⁶⁹⁴

In its reasoning, the appellate court disputed the notion that the tax's purpose was relevant.⁶⁹⁵ All that was required, in the minds of the Fourth District Court of Appeal, was that the tax be prescribed by law, paid to a public official, for perfecting a security interest, and the Florida intangible tax fit.⁶⁹⁶ Since the exception fit, there was no TILA violation, and the court affirmed.⁶⁹⁷

688. *Pignato*, 664 So. 2d at 1014.

689. 16 F.3d 1142 (11th Cir. 1994).

690. *Pignato*, 664 So. 2d at 1015.

691. *Id.* The court commented that "[o]nly decisions of the United States Supreme Court are binding on the state courts of Florida." *Id.* (citing *Board of County Comm'rs v. Dexterhouse*, 348 So. 2d 916, 918 (Fla. 2d Dist. Ct. App. 1977), *aff'd*, 364 So. 2d 449 (Fla. 1978), *appeal dismissed*, 441 U.S. 918 (1979)).

692. *Id.* at 1014 (quoting 12 C.F.R. § 226.4(e)(i) (1994)). Under TILA, finance charge is generally defined as "the sum of all charges, payable directly or indirectly by the person to whom credit is extended, and imposed directly or indirectly as an incident to the extension of credit." *Id.* (citing 15 U.S.C.A. § 1605(a) (West Supp. 1995)); Reg. Z, 12 C.F.R. § 226.4(a) (1994)).

693. *Pignato*, 664 So. 2d at 1014 (citing *Rodash*, 16 F.3d at 1148–49).

694. *Id.* at 1015. Here too, the court looked to federal sources when it submitted a 1995 revision to the Commentary to Regulation Z. *Id.* at 1016 (citing Reg. Z, 60 Fed. Reg. 16,771 (1995)).

695. *Id.* (noting that the *Rodash* court supplied no authority for the proposition).

696. *Id.* (citing Reg. Z, 12 C.F.R. § 226.4(e)(1) (1994)).

697. *Pignato*, 664 So. 2d at 1016.

*Powers v. ITT Financial Services Corp.*⁶⁹⁸ The Fifth District Court of Appeal affirmed the trial court's order granting relief from judgment of foreclosure on account of excusable neglect.⁶⁹⁹ Powers executed a mortgage and promissory note to Family First Mortgage Company for \$50,700, which was subsequently assigned to First Nationwide Bank, and another mortgage in favor of ITT for \$22,560. Upon default by Powers, ITT filed a foreclosure action, listing Powers and Nationwide as defendants.⁷⁰⁰

Plaintiff executed service of process on Nationwide through Suzanne Podegraz, First Vice President of the human resources department of Nationwide in Sacramento, California. Podegraz accepted service because she recognized the name "Gary Powers." A person by that name had been employed at the bank and was involved in a divorce proceeding. Believing the documents to be related to that divorce action, Podegraz failed to forward the documents to the appropriate division in the company. As soon as the error was discovered, the papers were duly forwarded.⁷⁰¹

A final judgment of foreclosure was issued upon ITT's motion for summary judgment, which was followed by a judicial sale and issuance of a certificate of sale from the clerk of the court.⁷⁰² After learning of the Podegraz' mistake, Nationwide moved to vacate the judgment of foreclosure, ITT's certificate of title, and the foreclosure sale on grounds of excusable neglect pursuant to Rule 1.540 of the *Florida Rules of Civil Procedure*. The trial court granted Nationwide relief, and the Fifth District Court of Appeal affirmed, finding no error in the trial court's ruling.⁷⁰³

*Warehouses of Florida, Inc. v. Hensch.*⁷⁰⁴ The issue in this mortgage foreclosure action was whether it was error to enter a deficiency judgment in favor of the mortgagees where the mortgagees bid the entire amount of the final judgment of foreclosure at the foreclosure sale. The Fifth District Court of Appeal held that it was error and, therefore, reversed.⁷⁰⁵

The Hensches were second mortgagees who filed a foreclosure action when Warehouses failed to make payments. The court entered a judgment of

698. 662 So. 2d 1343 (Fla. 5th Dist. Ct. App. 1995).

699. *Id.* at 1344.

700. *Id.*

701. *Id.*

702. *Id.*

703. *Powers*, 662 So. 2d at 1345. Powers argued that Nationwide's mortgage was extinguished by the judgment of foreclosure, but the Fifth District Court of Appeal disagreed, stating that "once set aside, the judgment has no effect on the rights of either party." *Id.*

704. 671 So. 2d 885 (Fla. 5th Dist. Ct. App. 1996).

705. *Id.* at 886.

foreclosure which included the principal balance due on the note, accrued interest thereon, costs, and attorneys' fees, totaling \$336,343.91.⁷⁰⁶ The Henschelers were the sole bidders at foreclosure, bid the entire amount of the judgment of foreclosure, and, thereafter, filed a petition for entry of a deficiency judgment which the trial court granted. Included in the deficiency judgment were \$44,271.85 in first mortgage payments made by the Henschelers to preclude foreclosure on the first mortgage, \$14,375.02 in delinquent 1992 property taxes, \$9,733 in prorated 1993 property taxes, and \$8,500 representing a security deposit paid to Warehouses by a tenant during Warehouses' possession.⁷⁰⁷ These sums were added to the balance due on the first mortgage and the foreclosure judgment, which the trial court then subtracted from the "fair market value of \$700,000.00 to arrive at \$139,037.20, the amount of the deficiency judgment."⁷⁰⁸

The Henschelers relied on section 45.031(8) of the *Florida Statutes*, which provides in part:

If the case is one in which a deficiency judgment may be sought and application is made for a deficiency, the amount bid at the sale may be considered by the courts as one of the factors in determining a deficiency under the usual equitable principles.⁷⁰⁹

In rejecting the Henschelers' arguments and reversing, the Fifth District Court of Appeal noted that "the established law in this district is that when a mortgagee purchases the foreclosed property by bidding the full amount of the final judgment of foreclosure, the mortgagee's judgment is satisfied in full and a deficiency judgment is not possible."⁷¹⁰

*Wilken v. North County Co.*⁷¹¹ In this case, the Fourth District Court of Appeal, relying on the authority of *Bauer v. Resolution Trust Corp.*,⁷¹² held that the clerk of the court need not refund registry and sales fees to a successful bidder at a foreclosure sale where the mortgagor/debtor, prior to the sale and

706. *Id.*

707. *Id.*

708. *Id.*

709. *Warehouses*, 671 So. 2d at 886 (citing FLA. STAT. § 45.031(8) (1991)).

710. *Id.* at 887.

711. 670 So. 2d 181 (Fla. 4th Dist. Ct. App. 1996). Appellant, Dorothy H. Wilken, appealed in her capacity as Clerk of the Circuit Court of the Fifteenth Judicial Circuit. *Id.*

712. 621 So. 2d 521 (Fla. 4th Dist. Ct. App. 1993).

without written notice to the clerk, filed a suggestion of bankruptcy in federal court, requiring the sale to be later invalidated.⁷¹³

XXIII. QUIET TITLE

*Skelton v. Martin.*⁷¹⁴ This case “demonstrates a serious variance between the statutory method for the maintenance of public records and the electronic means by which most private and public records are now retrieved.”⁷¹⁵ Skelton took title to the subject property under a tax deed recorded January 20, 1994. The previous owner, Ernest Martin, had failed to pay the 1990 taxes on the lot, and a tax certificate was issued to Bank Atlantic for the unpaid taxes. The sale was conducted on January 19, 1994, after public notice was published on four separate dates in the *Pinellas County Review*.⁷¹⁶

Sandy K. Perry received a deed from Ernest Martin to the same property at a closing on January 7, 1994. The deed was recorded on January 25, 1994. Equity Title conducted a title search on the property. Equity neither sent an abstractor to the courthouse nor examined the notices in the *Pinellas County Review*. The abstractor instead used a computer to connect to the “Pinellas County Computer Dial-Up System” and examined the current tax year screen which normally indicates if there are delinquent taxes. No delinquencies were so indicated, and the abstractor did not check the delinquent tax screen.⁷¹⁷

Since she did not challenge the validity of the tax certificate or of the tax sale, “[i]n essence, Ms. Perry maintained that the current tax screen on the dial-up computer misled Equity Title, and that she would have learned of the tax sale but for this mistake.”⁷¹⁸ The appellate court responded by stating that “[t]he question remains whether this error deprived Ms. Perry of constitutional notice of either the tax certificate or of the pending sale.”⁷¹⁹ The court concluded that it did not, since the tax certificate was recorded in the manner required by statute, and it noted that “there is no present statutory right to accurate information on the Internet. At this point in history, such computerized data is not a form of notice constitutionally guaranteed by article I, section

713. *Wilken*, 670 So. 2d at 181.

714. 673 So. 2d 877 (Fla. 2d Dist. Ct. App.), *review denied sub nom.* *Perry v. Skelton*, No. 88,141, 1996 LEXIS 1741, at *1 (Sept. 16, 1996).

715. *Id.* at 879.

716. *Id.* at 878.

717. *Id.*

718. *Id.* at 879.

719. *Skelton*, 673 So. 2d at 879.

9, of the *Florida Constitution*, or by the Fourteenth Amendment to the *United States Constitution*.”⁷²⁰

XXIV. RESTRICTIVE COVENANTS

Kilgore v. Killearn Homes Ass’n.⁷²¹ The question before the First District Court of Appeal was whether the property in question became subject to the covenants and restrictions of Killearn Estates.⁷²² The Kilgores were allegedly in violation of the covenants and restrictions by keeping more than thirty miniature horses on the property.⁷²³ The appellate court reversed a portion of the partial summary judgment which determined that the entire parcel of Appellant’s property was subject to the covenants and restrictions of Killearn Estates.⁷²⁴

In 1994, the Kilgores purchased the subject property surrounded on three sides by property that is within Killearn Estates. The property itself is within Killearn Estates and provides access to a public road and additional adjacent acreage not within Killearn Estates. The homeowners’ association (“Association”) alleged that the Kilgores purchased the property subject to all covenants and restrictions, reservations, and easements of record. The Association further alleged that J.T. Williams, the initial owner and developer, made Lot 14 subject to the covenants and restrictions, but did not subject the several adjacent acres of property. The association also alleged that the Kilgores’ predecessors in title, the Hintikkas, had applied to the City of Tallahassee to create a minor subdivision, Gardenview Too, from a portion of the unplatted additional acreage formerly owned by Williams, and in the process were required by the City to execute a unity of title document, under which the additional acreage which the Hintikkas retained merged with and became part of Lot 14 of Killearn Estates and subject to the covenants and restrictions in question.

The trial court found that the Kilgores’ land was subject to the covenants and restrictions, and it permanently enjoined them from keeping the animals on the land.⁷²⁵ The First District Court of Appeal reversed, finding that the unity

⁷²⁰ *Id.*

⁷²¹ 676 So. 2d 4 (Fla. 1st Dist. Ct. App. 1996). The opinion in this case was modified on grounds not pertinent to the discussion of this case. *See Kilgore v. Killearn Homes Ass’n*, 21 Fla. L. Weekly D1532 (1st Dist. Ct. App. June 25, 1996).

⁷²² *Kilgore*, 676 So. 2d at 5.

⁷²³ *Id.* at 6.

⁷²⁴ *Id.* at 5.

⁷²⁵ *Id.* at 6.

of title document did not have the effect of merging Lot 14 and the additional acreage for a purpose other than that intended by the parties to the agreement.⁷²⁶ The court noted that in general, a unity of title document is meant to restrict or transfer development rights, and that it is an agreement entered into by the property owner and the governing authority.⁷²⁷ The appellate court found that the purpose of the document in this case was to prevent further subdivision of the additional property without the City's approval, and it noted that the Association was not a party to the agreement.⁷²⁸ The court also noted that "covenants restraining the free use of realty are not favored in the law"⁷²⁹ and are enforceable as private rights arising out of contract.⁷³⁰ In closing, it found that there was no agreement between the Kilgore, or their predecessors in title, and the Association which made the subject acreage subject to the covenants and restrictions.⁷³¹

XXV. SALES

*Alvarez v. Garcia.*⁷³² Less than a month after Hurricane Andrew, the parties entered into a contract for the sale of a house. Before signing the contract, the buyers knew that the hurricane had damaged the roof. Both sides got estimates for what the repairs would cost, and the sellers collected under their property insurance policy. Before closing, the buyers discovered that the roof damage was more extensive than they had thought and that the roof damage was causing the house to deteriorate. The seller, having refused to repair the damage or give the insurance proceeds to the buyers, canceled the

726. *Id.*

727. *Kilgore*, 676 So. 2d at 6. See generally *Gordon v. Flamingo Holding Partnership*, 624 So. 2d 294 (Fla. 3d Dist. Ct. App. 1993), *review denied*, 637 So. 2d 234 (Fla. 1994); *Maturo v. City of Coral Gables*, 619 So. 2d 455 (Fla. 3d Dist. Ct. App. 1993)).

728. *Id.* at 7.

729. *Id.* (citing *Sinclair Refining Co. v. Watson*, 65 So. 2d 732, 733 (Fla. 1953); *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 308 (Fla. 2d Dist. Ct. App.), *cert. denied*, 192 So. 2d 489 (Fla. 1966); *Ortega Co. v. Justiss*, 175 So. 2d 554, 559 (Fla. 1st Dist. Ct. App. 1965)).

730. *Id.* (citing *Dade County v. Matheson*, 605 So. 2d 469, 474 (Fla. 3d Dist. Ct. App. 1992); *Board of Public Instruction v. Town of Bay Harbor Islands*, 81 So. 2d 637, 641 (Fla. 1955)).

731. *Id.* at 7.

732. 662 So. 2d 1312 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 938 (Fla. 1996). Judge Jorgenson wrote the opinion for the panel which included Judges Hubbard and Gersten.

contract. The buyers sued for reformation of the contract and specific performance and won in the trial court.⁷³³ The district court reversed.⁷³⁴

Based on what the broker had said to the buyers, the trial court reformed the contract, requiring the seller to apply the insurance proceeds to the roof repairs.⁷³⁵ That constituted error. A court of equity has the power to reform a written contract to reflect what the parties actually intended, but there was no evidence that the seller ever intended this term. There was no evidence that the broker had the authority to bind the seller to any terms that varied from the terms of the written contract. Nor was there any evidence that the parties had left that term out of the written agreement by mutual mistake.⁷³⁶

The trial court also erred in relying on the doctrine of equitable conversion to find that the buyers were entitled to insurance proceeds.⁷³⁷ First, the buyers had never pled the doctrine, and second, the doctrine would only apply if the casualty occurred after the contract had been signed, i.e., when the buyers were arguably the equitable owners of the land that suffered the casualty.⁷³⁸ Here, the property was damaged before the contract was signed, and, therefore, the doctrine was inapplicable.⁷³⁹

The contract explicitly provided that the seller would be responsible for roof repairs up to two percent of the purchase price. The seller could have voluntarily paid more, but was not required to do so. If roof repairs exceeded two percent and the seller was unwilling to pay the excess, the buyers would have the right to cancel the contract.⁷⁴⁰ An addendum to the contract provided in essence that if neither party was willing to pay for a required repair and a compromise could not be reached, then either party could cancel the contract. The district court ruled these provisions should be read together.⁷⁴¹ The roof repairs easily exceeded the two percent. Neither the seller nor the buyers were willing to pay the excess. Clearly a compromise was not reached. Thus, the seller had the right to cancel the contract.

733. *Id.* at 1313.

734. *Id.* at 1314.

735. *Id.*

736. *Id.*

737. *Alvarez*, 662 So. 2d at 1314.

738. *Id.*

739. *Id.*

740. *Id.* at 1313.

741. *Id.*

*Broward County v. Conner.*⁷⁴² The County began an eminent domain action to take the Conners' land. Settlement negotiations began and the parties explored the possibility of settling the case by a real estate exchange. The parties reached an agreement in principle, and the landowners' lawyer sent a letter to the County's private attorney which "confirmed the parameters" of the proposed settlement. The parties subsequently had further meetings, exchanged letters, and exchanged unsigned drafts of the settlement. Then, the County decided not to settle according to these terms.⁷⁴³

The trial court granted the landowners' motion in the eminent domain proceeding to specifically enforce the settlement because "the agreement had been partly performed; that [the landowners] had relied to their detriment based on the representation of the county's agents and employees; and, that the county was estopped to deny the settlement."⁷⁴⁴ The District Court of Appeal reversed relying on two alternative grounds, the Statute of Frauds and the Sunshine Law.⁷⁴⁵ The latter is discussed in the Eminent Domain section of this survey.⁷⁴⁶

The court held that the settlement was a contract for the sale of land.⁷⁴⁷ Consequently, the Statute of Frauds⁷⁴⁸ required that the contract be in writing and signed by the party to be charged, but the County had not signed the settlement. The court relied upon *Collier v. Brooks*⁷⁴⁹ and the cases cited therein for the proposition that "[p]art performance does not remove an oral contract for sale of land from the statute of frauds unless there is payment of all or part of the consideration, possession by the vendee, and valuable improvement so as to constitute a fraud on the vendee if there were no performance."⁷⁵⁰ The landowner had not established these elements and, therefore, could not rely on part performance to take the contract out of the Statute of Frauds. This author⁷⁵¹ thinks that the court's conclusion on this point was incorrect. Assuming in fact that there was a contract, a point that this court

742. 660 So. 2d 288 (Fla. 4th Dist. Ct. App. 1995), *review denied*, 669 So. 2d 250 (Fla. 1996). Judge Klein wrote the opinion in which Chief Judge Gunther concurred. Judge Farmer wrote a special concurrence.

743. *Id.* at 289.

744. *Id.* at 290.

745. *Id.*

746. See discussion *supra* pp. 304-06.

747. *Conner*, 660 So. 2d at 290.

748. FLA. STAT. § 725.01 (1993).

749. 632 So. 2d 149 (Fla. 1st Dist. Ct. App. 1994).

750. *Conner*, 660 So. 2d at 290 (citing *Collier*, 632 So. 2d at 155).

751. Professor Brown.

does not address, the court should not have determined part performance by a rigid mechanical test. Part performance is an equitable doctrine designed to prevent the Statute of Frauds from being used as a tool to perpetrate a fraud. The court should look at all the circumstances to determine if that is what the county was doing. It is impossible to tell from the facts in the opinion whether the landowners could have prevailed under the proper analysis.

Judge Farmer made an interesting point in his special concurrence.⁷⁵² He would have remanded the case to see if any of the writings signed by the county's attorneys were sufficient to satisfy the Statute of Frauds.⁷⁵³ His approach seems to recognize that the writing requirement can be satisfied by a combination of writings.

*Caronte Enterprises, Inc. v. Berlin.*⁷⁵⁴ The contract of sale provided that the seller would make certain repairs prior to the closing but did not specify a closing date, and the "time is of the essence" clause was crossed out. Although the buyers complained for several months that the repairs were not being made quickly enough, they never made a formal demand that the repairs be completed by a particular date. Finally, the seller notified the buyers that the repairs were complete. The buyers disagreed and brought this suit. The jury verdict was for the buyers.⁷⁵⁵ On appeal, the district court ruled that the trial judge erred by failing to grant a judgment notwithstanding the verdict.⁷⁵⁶

The district court did not clearly express its theory, but it is apparent that the court concluded that seller was not yet in breach of the contract. Time was not of the essence under the contract, and the buyers had never formally demanded performance by a date certain. So, even if the repairs were not yet satisfactory, the seller still had the time to complete the repairs. It is not known whether the buyers failed to follow the advice of counsel or simply lacked competent legal advice, but these buyers lost because they simply did not play this game by the rules.

XXVI. SIGNATURES

Although the Florida Legislature did not seem to enact significant legislation this year affecting substantive property law, it did pass the Elec-

752. *Conner*, 660 So. 2d at 290–91 (Farmer, J., concurring specially).

753. *Id.* at 290.

754. 668 So. 2d 233 (Fla. 3d Dist. Ct. App. 1996). Judges Levy, Gersten and Green concurred in the per curiam opinion.

755. *Id.* at 234.

756. *Id.*

tronic Signature Act of 1996 ("Act").⁷⁵⁷ One of this Act's primary purposes is to develop authenticity and integrity to electronic signatures and electronic commerce.⁷⁵⁸ As a result, unless prohibited by law, one may now use an electronic signature to sign a writing and such a signature has an equal effect as a written signature.⁷⁵⁹ However, although it is the Secretary of State's responsibility to issue to public and private entities certificates (computer-based records) to verify digital signatures, no public or private entity is required to participate in such a program.⁷⁶⁰

XXVII. TAXES

*Chapparral Partners v. Department of Revenue.*⁷⁶¹ Chapparral is a general partnership composed of Congden Properties, Inc. and First Interstate Bank of California as trustee. First Interstate held defaulted notes and mortgages on two Jacksonville properties which were worth substantially less than the amount due on the notes. First Interstate gave the guarantors of the notes a covenant not to sue in exchange for conveyances of the properties.⁷⁶²

The present dispute centered on the amount of documentary stamps to be affixed to those deeds. The parties agreed that the several indebtednesses on the properties were not discharged and remained encumbrances on the land. The Department of Revenue, relying on a part of section 201.02(1) of the *Florida Statutes* "which defines 'consideration' for a conveyance to include 'the amount of any mortgage . . . or other encumbrance, whether or not the underlying indebtedness is assumed,'" felt the stamp taxes should be assessed based on the amount of debt encumbering the land at the time of conveyance.⁷⁶³ The appellants argued that the part of the statute which should govern provides "[i]f the consideration . . . includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property"⁷⁶⁴ The appellants submitted that the covenant not to sue is "property other than money," making the more specific part of the section referenced by the Department inapplicable to the present case.⁷⁶⁵

757. Ch. 96-224, § 3, 1996 Fla. Laws at 837.

758. *Id.* § 2, 1996 Fla. Laws at 837.

759. *Id.* § 3, 1996 Fla. Laws at 838.

760. *Id.* § 6, 1996 Fla. Laws at 838.

761. 662 So. 2d 727 (Fla. 1st Dist. Ct. App. 1995).

762. *Id.* at 728.

763. *Id.* (quoting FLA. STAT. § 201.02(1) (1991)).

764. *Id.*

765. *Id.*

The First District Court of Appeal held that applying the language offered by the appellant to the present case would “render the clear legislative intent to define ‘consideration’ in terms of the amount of an encumbrance that survives a conveyance as meaningless,” and noted that otherwise, the specific definition could be regularly evaded by “the giving of any non-money consideration.”⁷⁶⁶ The court thus concluded that the Department of Revenue had correctly based the assessment of stamps on the amount of the debt.⁷⁶⁷

XXVIII. TITLE INSURANCE

*American Title Insurance Co. v. Carter.*⁷⁶⁸ The trial court found that American Title had a duty under the title insurance policy to defend the Carters in a boundary dispute, and American Title appealed.⁷⁶⁹ The Fifth District Court of Appeal reversed.⁷⁷⁰ After purchasing the subject property, the Carters had a professional survey performed, and in reliance thereon, they erected a fence on what they believed was their eastern boundary line. Their neighbor to the East, Eugene Calabrese, had a survey performed, which evidenced that the Carters’ fence encroached 26.5 feet onto Calabrese’s property.

Calabrese filed an action alleging encroachment, seeking recovery of possession of the fenced portion, damages, and attorney’s fees, and the Carters made a formal demand on American Title to defend them. American Title refused, and the Carters filed a third party complaint against American Title and their predecessors in interest, alleging that American Title insured them against loss and damages for circumstances as alleged in Calabrese’s complaint and breached the policy by failing to defend them in the suit. American Title answered, stating two bases for its denial of Calabrese’s claim as not covered under the policy. First, Calabrese’s claim did not assert any claim to any lands described in the Carters’ deed.⁷⁷¹ Second, the claim was not covered due to the survey exception in Schedule B of the policy.⁷⁷²

The Fifth District Court of Appeal agreed that American Title was not under a duty to defend under the policy under these circumstances.⁷⁷³ The issue did not pertain to title, but was merely a boundary dispute not covered by

766. *Chapparral Partners*, 662 So. 2d at 728.

767. *Id.* at 729.

768. 670 So. 2d 1115 (Fla. 5th Dist. Ct. App. 1996).

769. *Id.* at 1115.

770. *Id.* at 1118.

771. *Id.* at 1116.

772. *Id.*

773. *American Title*, 670 So. 2d at 1116.

the policy.⁷⁷⁴ Also, there was an exclusion in the policy excluding from coverage any “encroachments, easements, measurements, variations in area or content, party walls or other facts which a correct survey of the premises would show.”⁷⁷⁵ The court thus noted that, “essentially, the Carters are asking the court to write them an insurance policy superior to the one they purchased.”⁷⁷⁶

*National Title Insurance Co. v. Safeco Title Insurance Co.*⁷⁷⁷ National appealed the trial court’s decision to grant a new trial on the issue of damages while Safeco cross appealed the trial court’s denial of its motion for directed verdict on the issue of liability for breach of contract.⁷⁷⁸ The Third District Court of Appeal reversed the trial court’s denial of directed verdict to Safeco, a decision which the court felt “moot[ed] . . . the appeal in chief.”⁷⁷⁹

In 1982, National loaned \$103,500 to buyers Younts and Bowman. Home Title, an agent of Safeco, acted as closing agent for Safeco, the underwriter of the title insurance policy, which provided that Safeco insured “against loss or damage . . . sustained or incurred by the insured by reason of . . . any defect in or lien or encumbrance on such title.”⁷⁸⁰ The policy listed only National’s mortgage and no second mortgage. At closing, Rosen, president of Home Title, notarized and witnessed documents⁷⁸¹ indicating that no second mortgage existed. He did this despite the fact that prior to closing, unbeknownst to National, the buyers had obtained a second mortgage for \$3,009.02 from their developer, Interdevco, which Rosen had also notarized and witnessed. National sold the mortgage to the Federal National Mortgage Association (“FNMA”) in November 1982, while purchasing private mortgage insurance from Verex, representing that no second mortgage existed.

The second mortgage was satisfied in 1984, but the buyers defaulted on the first mortgage. Upon discovery of the second mortgage, the Verex policy was invalidated despite the fact that it had been satisfied four years prior. National paid to FNMA \$75,000, representing the balance unpaid on the first mortgage, and it obtained a deed to the property in lieu of foreclosure.

774. *Id.* at 1117.

775. *Id.* at 1116.

776. *Id.* at 1117.

777. 661 So. 2d 1234 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 939 (Fla. 1996).

778. *Id.* at 1235.

779. *Id.* at 1236.

780. *Id.* at 1235.

781. Among these documents was a Federal National Mortgage Association document certifying that no second mortgage existed. *Id.*

In July 1989, National sued Safeco, Interdevco, Home Title, and Rosen for breach of the title insurance policy and negligence seeking recovery of the \$75,000 payment to FNMA.⁷⁸² Default judgments were entered against Interdevco and Home Title.⁷⁸³ The jury found that Rosen had no knowledge of the second mortgage at closing.⁷⁸⁴ Safeco argued that any loss to National was no result of a breach in its obligations under the policy, and after the trial court denied its motion for directed verdict on the issue of breach, the jury, by special interrogatory verdict, found Safeco had breached, resulting in \$75,000 in damages to National.⁷⁸⁵ The jury also found that the two defaulting defendants were negligent and allocated liability among them, with Interdevco responsible for \$50,000 and Home Title responsible for \$25,000.⁷⁸⁶ The trial court ordered a new trial on the issue of breach, believing that Safeco's damage liability could not be greater than that of its agent, Home Title.⁷⁸⁷

The Third District Court of Appeal reversed the trial court's denial of Safeco's motion for directed verdict.⁷⁸⁸ The court felt that even if Safeco had breached the policy, such breach was not the natural and proximate cause of National's damages.⁷⁸⁹ The court then noted that when a title insurer breaches a mortgagee's policy, the proper measure of damages is "the difference between the market value of the mortgage, if the lien thereof were as insured, and the market value of the mortgage with the title imperfection."⁷⁹⁰ The court also noted that the second mortgage was not an outstanding encumbrance when National paid FNMA, and that National's loss was a result of the buyers' default, not the second mortgage.⁷⁹¹ The court then affirmed the jury verdict for Rosen, not reaching the evidentiary issues, but held, as a matter of law, that Rosen could not be held liable for National's loss because that loss was not caused by Rosen's failure to disclose the second mortgage, even assuming Rosen was aware of its existence.⁷⁹²

782. *National Title*, 661 So. 2d at 1235.

783. *Id.*

784. *Id.* at 1235-36.

785. *Id.* at 1236.

786. *Id.*

787. *National Title*, 661 So. 2d at 1236.

788. *Id.* at 1237.

789. *Id.* at 1236.

790. *Id.* (quoting *Goode v. Federal Title & Ins. Corp.*, 162 So. 2d 269, 271 (Fla. 2d Dist. Ct. App. 1964); *Interstate Title Corp. v. Miller*, 581 So. 2d 213, 214 (Fla. 4th Dist. Ct. App. 1991)).

791. *Id.*

792. *National Title*, 661 So. 2d at 1236 (citing *Applegate v. Barnett Bank*, 377 So. 2d 1150, 1152 (Fla. 1979) (holding that "[e]ven when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports

XXIX. TRUTH IN LENDING ACT

*Beach v. Great Western Bank.*⁷⁹³ In this case, the Fourth District Court of Appeal addressed the following question of first impression in Florida:

[W]hether a consumer has right to rescind a mortgage on a home, under 15 U.S.C.A. section 1635 of the Truth in Lending Act (TILA), as a defense by way of recoupment to the lender's foreclosure action, when the defense is asserted beyond the three year period set forth in the statute.⁷⁹⁴

The court held that a consumer was not entitled to rescission; rather, he is limited to a damage set off.⁷⁹⁵

The opinion included a brief overview of the TILA, noting that the Act gives consumers the right to rescind, for up to three years, any agreement that results in the lender taking a security interest in the consumer's principal dwelling, if the creditor fails to make all material disclosures to the borrower as required.⁷⁹⁶ Exercise of the right results in discharge of the consumer's liability for any finance and other charges paid by the consumer, as well as

it."); *Bird Lakes Dev. Corp. v. Raskin*, 596 So. 2d 133, 134-35 (Fla. 3d Dist. Ct. App. 1992) (holding that a trial court decision may be upheld for any reason appearing in the record)).

793. 670 So. 2d 986 (Fla. 4th Dist. Ct. App.), review granted, 678 So. 2d 337 (Fla. 1996).

794. *Id.* at 988 (citation omitted).

795. *Id.* at 990. After criticizing the Colorado Supreme Court decision of *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796 (Colo. 1984), the court observed that "[w]hether one may agree with *Dawe* or not, the ultimate question is whether as a matter of Florida law, the defensive assertion of rescission should be allowed." *Beach*, 670 So. 2d at 991. In asserting the right of statutory rescission, the appellants relied upon the Supreme Court of Florida decision of *Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987). *Id.* at 991.

The court distinguished *Allie* as a case which "addressed a claim barred by a statute of limitations, which bars not the right, but the remedy." *Id.* In distinguishing *Allie*, the court also noted that in *Rybovich Boat Works, Inc. v. Atkins*, 585 So. 2d 270 (Fla. 1991), the Supreme Court of Florida later explained that *Allie* "'rested primarily on consideration of public policy and fairness as well as an analysis of the purpose of the statute of limitations.'" *Beach*, 670 So. 2d at 991 (quoting *Rybovich Boat Works*, 585 So. 2d at 270). The court then explained that, in *Allie*, the Supreme Court of Florida refused to permit assertion of a claim for specific performance after the expiration of the statute of limitations due to the adverse consequences on the free alienability of title. *Id.* The court was persuaded into similar reasoning by Great Western's argument that the same reasoning should apply in the present case. Great Western relied on a January 1972 report submitted to Congress by the Board of Governors of the Federal Reserve System in which the "Board recommended that a limitation on the right to rescind be established because the title to residential real properties may be clouded by the uncertainty regarding the right of rescission." *Id.*

796. *Id.* at 988.

discharge of any security interest taken by the creditor in conjunction with the extension of credit, leaving the creditor with only an unsecured claim on the principal amount.⁷⁹⁷ The TILA also allows for money damages for violations with a one year statute of limitations.⁷⁹⁸ However, the statute specifically provides that, as a defense of recoupment or set-off to an action for collection of the debt by the creditor, the consumer may assert the damages to which the consumer would be entitled to under the Act for any violations.⁷⁹⁹

In dissent, Judge Pariente noted that the 1995 amendment to 15 U.S.C. § 1635(i)(3) applied to all consumer credit transactions in existence and provided “[n]othing in this subsection affects a consumer’s right of rescission in recoupment under State law,”⁸⁰⁰ and that the majority’s interpretation ran contrary to Congress’ intent.⁸⁰¹ Judge Pariente noted that 15 U.S.C. § 1635(f) was not part of the original statute, “but rather has been described as part of a series of technical amendments designed to improve the administration of TILA. In fact, the original version of [15 U.S.C.] § 1635, which created the statutory remedy of rescission, had no time limitations.”⁸⁰²

Finally, the appellate court certified the following question to the Supreme Court of Florida as being of great importance:

UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635 BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?⁸⁰³

797. *Id.* at 999 (citing 15 U.S.C.A. § 1635(b); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir. 1988), *aff’d in part*, 898 F. 2d 907 (3d Cir. 1990)).

798. *Beach*, 670 So. 2d at 989 (citation omitted).

799. *Id.* (citing 15 U.S.C.A. § 1640(e) (West 1982)). In its reasoning, the court relied on *Bowery v. Babbit*, 128 So. 801 (Fla. 1930), for the following general rule of statutory interpretation:

[W]here a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided.

Beach, 670 So. 2d at 991.

800. *Id.* at 994 (Pariente, J., dissenting) (quoting Pub. L. No. 104-29 §§ 5, 8, 109 Stat. 1517 (1995) (codified at 15 U.S.C. § 1635(f))).

801. *Id.*

802. *Id.*

803. *Id.*

Home Savings of America, F.S.B. v. Goldstein.⁸⁰⁴ The trial court granted summary judgment on the ground that there had been violations of the Federal Truth in Lending Act (“TILA”).⁸⁰⁵ Five specific grounds were alleged by the appellees/borrowers, but “the trial court affirmatively refused to specify what violations it found in the documents.”⁸⁰⁶ The appellate court stated that its review was hampered by the trial court’s failure in this regard.⁸⁰⁷ The court further noted that one of the alleged violations was the exclusion of the Florida intangible tax finance charge.⁸⁰⁸ Since the entry of the summary judgment in this case, the Fourth District Court of Appeal decided, in *Pignato v. Great Western Bank*,⁸⁰⁹ that the charge was excludable under the TILA. The trial court appeared to have relied on *Rodash v. AIB Mortgage Co.*,⁸¹⁰ which the Fourth District Court of Appeal departed from in deciding *Pignato*.⁸¹¹ The court also found that material issues of fact and law remained on the other violations.⁸¹² Thus, the court reversed and remanded.⁸¹³

XXX. USURY

Donofro v. Dick.⁸¹⁴ The first district affirmed the trial court’s finding of a lack of “corrupt intent to knowingly and willfully charge and receive an unlawful rate of interest” because the record contained competent and substantial evidence supporting the finding.⁸¹⁵ The court reversed the attorneys’ fee award of \$5,576 because the award exceeded that specified in the note.⁸¹⁶ The note called for an award of ten percent of the principal due under the note or \$750, whichever was greater. Under that provision, \$2,200 was due on the \$22,000 outstanding. The court noted that under section 687.06 of the *Florida Statutes*,⁸¹⁷ where the parties have provided for fees in a written

804. 672 So. 2d 883 (Fla. 4th Dist. Ct. App. 1996).

805. *Id.* at 883.

806. *Id.* at 884.

807. *Id.*

808. *Id.*

809. 664 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1995).

810. 16 F.3d 1142 (11th Cir. 1994).

811. *Home Savings*, 672 So. 2d at 884.

812. *Id.* (citing *Moore v. Morris*, 475 So. 2d 666, 668–69 (Fla. 1985)).

813. *Id.*

814. 21 Fla. L. Weekly D1339 (1st Dist. Ct. App. June 4, 1996).

815. *Id.* (quoting *Sumner v. Investment Mortgage Co. of Fla.*, 332 So. 2d 103, 105 (Fla. 1st Dist. Ct. App. 1976), *cert. denied*, 344 So. 2d 327 (Fla. 1977)).

816. *Id.*

817. FLA. STAT. § 687.06 (1993).

instrument, and the fee does not exceed ten percent of the principal, the fee is deemed reasonable and, absent a showing that the fee raises equitable questions, such as unconscionability, the parties have contracted away their opportunity to have judicial inquiry into whether a greater or lesser fee should be awarded.⁸¹⁸

*Jersey Palm-Gross, Inc. v. Paper.*⁸¹⁹ The Supreme Court of Florida affirmed the Fourth District Court of Appeal's decision in *Jersey Palm-Gross, Inc. v. Paper*,⁸²⁰ in which the fourth district certified conflict with the Fifth District Court of Appeal's opinion in *Forest Creek Development Co. v. Liberty Savings & Loan Ass'n.*⁸²¹ The supreme court disapproved of *Forest Creek* insofar as it was inconsistent with the opinion in the present case.⁸²² The Fourth District Court of Appeal posed the following question, which the Supreme Court of Florida answered in the negative:

[W]hether the existence of a contractual disclaimer of intent to violate the usury laws commonly known as a 'usury savings clause' in the loan documents in this case removes the determination of usurious intent from a factual inquiry and conclusively proves as a matter of law that the lender could not have 'willfully' or knowingly charged or accepted an excessive interest rate.⁸²³

Justice Anstead, who authored the court's opinion,⁸²⁴ announced the court's core holding on the effect of these clauses, stating, "[W]e conclude that a usury savings clause cannot, by itself, absolutely insulate a lender from a

818. *Id.* (citing *Dean v. Coyne*, 455 So. 2d 576, 576 (Fla. 4th Dist. Ct. App. 1984); *A&E Int'l Enters., Inc. v. Gold Credit Co.*, 450 So. 2d 1166, 1166 (Fla. 3d Dist. Ct. App.), *review denied*, 461 So. 2d 113 (Fla. 1984); *Sepler v. Emanuel*, 388 So. 2d 28, 29 (Fla. 3d Dist. Ct. App. 1980)).

819. 658 So. 2d 531 (Fla. 1995).

820. 639 So. 2d 664 (Fla. 4th Dist. Ct. App. 1994), *review granted*, 651 So. 2d 1194 (Fla.), *decision approved*, 658 So. 2d 531 (Fla. 1995). See *Brown et. al.*, *supra* note 423, at 358 (discussing the opinion rendered in this case).

821. 531 So. 2d 356 (Fla. 5th Dist. Ct. App. 1988), *review denied*, 541 So. 2d 1172 (Fla. 1989).

822. *Jersey Palm-Gross*, 658 So. 2d at 532.

823. *Id.* at 533.

824. Concurring in Anstead's opinion were Chief Justice Grimes, and Justices Shaw, Kogan, Harding, and Wells. Justice Overton also joined Anstead's opinion and wrote a concurrence in which Justice Wells joined. Justice Overton wrote "to emphasize that a savings clause is still a valid factor—but not the exclusive factor—in determining the intent of the lender at the time of making the loan," and ended by noting that the borrower still has the burden of proof on the issue of usurious intent. *Id.* at 537.

finding of usury.”⁸²⁵ Rather, such clauses are but one factor properly considered in the determination of the lender’s intent.⁸²⁶ The court also felt that its rule struck the proper balance between the legislature’s policy and “the need to preserve otherwise good faith, albeit complex, transactions which may inadvertently exact an unlawful rate of interest.”⁸²⁷ Such clauses have a legitimate purpose and, thus, should be enforced under appropriate circumstances, such as where the actual rate charged is close to the legal rate, and “the transaction is not clearly usurious at the outset but only becomes usurious upon the happening of a future contingency.”⁸²⁸ This statement raises interesting analytical questions since “it is generally agreed that money, which is not absolutely payable, is not interest for usury purposes.”⁸²⁹

*Levine v. United Companies Life Insurance Co.*⁸³⁰ The Supreme Court of Florida reviewed the Third District Court of Appeal’s decision in this case,⁸³¹ and it rejected that court’s view in so far as it conflicts with the court’s opinion in *Jersey Palm-Gross v. Paper*,⁸³² holding that a usury savings clause is not conclusive evidence of lack of usurious intent, but is merely relevant evidence to be considered on the issue of intent.⁸³³

XXXI. CONCLUSION

The foregoing survey of cases and legislation presents selected materials of significance to real estate professionals. Although there seems to be no consistent pattern to the case law and legislative development, the survey is useful in maintaining contact with the progression of real property law.

825. *Id.* at 535.

826. *Id.*

827. *Jersey Palm-Gross*, 658 So. 2d at 535.

828. *Id.* (quoting and approving of Judge Pariente’s statement in the fourth district’s opinion in the present case, *Jersey Palm-Gross*, 639 So. 2d at 671).

829. Brown et. al., *supra* note 423, at 360.

830. 659 So. 2d 265 (Fla. 1995).

831. *Levine v. United Companies Life Ins., Co.*, 638 So. 2d 183 (Fla. 3d Dist. Ct. App. 1994), *decision approved*, 659 So. 2d 265 (Fla. 1995).

832. 658 So. 2d 531 (Fla. 1995).

833. *Levine*, 659 So. 2d at 267.

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I. INTRODUCTION AND SCOPE

This topic was last surveyed in 1993.¹ Cases and statutory changes addressed in the current survey generally cover the period from 1994 through the first half of 1996.

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To a substantial degree, the topics covered in the prior article are still the "hot topics" of today. These include attorneys' fees, claims, trusts, guardianships, joint bank accounts, and elective share. Two added hot topics are jurisdiction and power of attorney. A topic which has "cooled," and which has become unusually quiet in the reported cases and in the legislature, is homestead. This last topic has been addressed in other articles written or contributed to by this author and will not be covered here. Contrary to the format in the prior article, coverage of legislation will be integrated in the topical discussion with the case law, and is briefly summarized here.

In 1994, there were no changes at all to the probate statutes, and only minor changes to the guardianship and advance directive statutes.² However, the 1995 legislature was very active in the trusts and estates area adopting chapter 95-401, of the *Laws of Florida*.³ This omnibus bill, sponsored by the Real Property and Trust Law Section of The Florida Bar, addressed probate and trust administration fees and commissions, revised trust claim procedures, including the repeal of significant trust claim legislation which had been adopted as a part of chapter 93-257, imposed execution requirements on express trusts, significantly revised the power of attorney statute, and defined trustee's and personal representative's powers and duties relative to environmentally contaminated property. An unusual provision which sounds like "special case" legislation now requires the spouse of a ward to consent to dissolution before the court can grant special authority to a guardian to bring or maintain an action for dissolution.

In the 1996 legislative session, there were virtually no statutory changes relating to trusts or estates statutes, although important legislation in several relevant areas was introduced. House Bill 2157, which provided for a significant overhaul of the elective share statutes and incorporated a modified augmented estate concept, failed to pass. It is expected to be reintroduced in the next session.

There were minor changes to chapter 765, having to do with advance directives, which allow a person to designate a separate surrogate to consent to mental health treatment, and if no separate surrogate is designated, the designation of a general surrogate is assumed to include this authority.⁴

1. Mary Sue Donohue, *Probate and Trust Law: 1993 Survey of Florida Law*, 18 NOVA L. REV. 355 (1993).

2. See 1994 Fla. Laws ch. 94-183.

3. 1995 Fla. Laws ch. 95-401.

4. Ch. 96-169, § 49, 1996 Fla. Laws 243, 303.

There were also some changes to chapter 744 regarding guardianships.⁵ The amendment provides a definition for a professional guardian as a person who has been compensated for service as guardian for more than two wards who were not near relatives.⁶ A professional guardian petitioning for appointment must reveal that guardian's professional status.

A ward may be relocated to an adjacent county without court approval, but even temporary relocation to any other state or other county must be immediately reported by the guardian to the court. The class of persons who may serve on an examining committee has been enlarged.⁷ Also, the fees of the examining committee are to "be paid by the guardian from the property of the ward, or if the ward is indigent, by the county."⁸ Previously, the fees were paid from the general fund of the county.⁹ A guardian of the property may elect to file annual accountings on a fiscal year basis, unless the court otherwise orders. This election must be made by the filing of a notice of intention within thirty days after issuance of letters. A broad class of defined persons are authorized to bring a proceeding for removal of a guardian, if notice was not given to them of the original appointment.¹⁰ Authorized persons are relatives who could qualify as a nonresident guardian and persons with statutory preference in initial appointment. This, practically, must result in broader service of notice of the initial guardianship appointment proceedings. Finally, a securities dealer, such as Merrill Lynch, may now serve as a depository for a guardian in the same manner as a bank or other financial institution.¹¹ Otherwise, 1996 was a very quiet year for relevant legislation.

5. Ch. 96-354, § 1, 1996 Fla. Laws 2032, 2033 (to be codified at FLA. STAT. § 744.102(15)).

6. *Id.*

7. This class includes a graduate gerontologist, and any "other person who by knowledge, skill, experience, training, or education, may in the court's discretion, advise the court in the form of an expert opinion." *Id.* § 7, 1996 Fla. Laws at 2034-35 (to be codified at FLA STAT. § 744.331(3)(a)). However, the statute now eliminates lay members and requires that all three members be qualified persons.

8. *Id.* § 7, 1996 Fla. Laws at 2035 (to be codified at FLA. STAT. 744.331(7)(b)).

9. This statutory amendment seems to contemplate that the person will be adjudicated incapacitated. What happens if the person is not adjudicated and no guardian is appointed, then what is the source of payment of the examining committee's fees?

10. See comment on "interested persons" and cases cited under the main title, Guardianships, *infra* part VI Guardianships.

11. See Ch. 96-354, §§ 1, 4, 7, 8, 9, 10, 13, 1996 Fla. Laws 2032, 2033-37.

II. JURISDICTION

Lawyers and trial judges are becoming more jurisdictionally aware. Previously, the practice was if you could send a formal notice by registered mail return receipt requested, then jurisdiction was not a problem because probate or trust administration was an in rem proceeding and the court already had jurisdiction over the rem. However, the modern view is "first test jurisdiction."¹² This was the author's central theme in the articles, *Homestead Made Easy Parts 3 and 3A*.¹³ These articles suggest that jurisdiction or notice may be deficient in many determinations of homestead status.¹⁴

In personam jurisdiction based on the long arm statute,¹⁵ typically thought to be the concern of the commercial litigator or the negligence lawyer, has become a real concern to the fiduciary litigator. Two cases found lack of personal jurisdiction over nonresident trustees based on allegations under the long arm statute.

In *Lampe v. Hoyne*,¹⁶ a complaint against a successor trustee for breach of trust, unjust enrichment and declaratory relief alleged jurisdiction over the defendant stating that she conducted substantial and not isolated activity within Florida.¹⁷ The defendant by special appearance, challenged jurisdiction over her individually and as trustee, and refuted the jurisdictional allegations of the complaint which alleged only minimum contacts with Florida.¹⁸ No traverse was filed by the plaintiff and the appellate court reversed the trial court holding that there was no jurisdiction over the trustee.¹⁹

In *Beaubien v. Cambridge Consolidated, Ltd.*,²⁰ the complaint alleged that the trustee, acting through an agent, mismanaged the trust and failed to account to the beneficiary.²¹ The trustee, Cambridge Consolidated, Ltd., was

12. See generally Rohan Kelley & Tae T. Kelley, *Homestead Made Easy Part 3: How to Find the Courthouse and What To Do Next*, 59 FLA. B.J. 105 (1995); Rohan Kelly & Tae T. Kelley, *Homestead Made Easy Part 3A: How to Find the Courthouse and What To Do Next*, 69 FLA. B.J. 56 (1995).

13. *Id.*

14. See *id.*; see also James J. Altman & Rohan Kelley, *Procedural Considerations, in LITIGATION UNDER FLORIDA PROBATE CODE*, §§ 1.12-.17 (1993).

15. FLA. STAT. § 48.193 (1995).

16. 652 So. 2d 424 (Fla. 2d Dist. Ct. App. 1995).

17. *Id.* at 425.

18. *Id.* at 426.

19. *Id.*

20. 652 So. 2d 936 (Fla. 5th Dist. Ct. App. 1995).

21. *Id.* at 937.

a dissolved Cayman Islands corporation. The proper procedure to acquire personal jurisdiction under the long arm statute is to plead jurisdiction in the language of the statute.²² A motion to dismiss only tests the legal sufficiency of the allegations as pled. In order to test the court's jurisdiction, or to refute the contention of minimum contacts, the defendant must file affidavits in support of his position. Once this is done, the plaintiff has the burden of proof, by affidavit or deposition, of the basis upon which jurisdiction may be obtained.²³ Here, the court remanded the matter to the trial court for an evidentiary hearing on the Florida activities of Cambridge.²⁴

The lack of Florida business activity, however, did not deter the Fourth District Court of Appeal from finding in *Rogers & Wells v. Winston*²⁵ that in personam jurisdiction existed over a New York law firm when it ordered a possible refund of excess attorneys' fees paid to that firm for work performed, mainly in New York, for a Florida estate.²⁶ In *Rogers & Wells v. Winston*, the fourth district held even though "virtually all of the services . . . [largely federal tax return preparation and tax planning] were performed in New York" and the "fees . . . [were] paid by the trustees out of assets in a New York marital trust [from decedent's predeceased husband]" and not by the Florida estate, nonetheless, since the firm was employed to perform services by a Florida estate it "should have foreseen that it would be haled into a Florida court in the event of litigation over the services performed for the estate."²⁷ Since it was employed to perform services for a Florida estate, this opinion, and the service on which the court's jurisdiction is based, apparently did not involve the long-arm statute. Nowhere was that statute cited in this opinion. Service was made on the law firm by mailed notice under Rule 5.041(b) of the *Florida Probate Code*.²⁸

The sense of the opinion is that the Florida court has inherent in personam jurisdiction over non-residents employed by and furnishing services to a Florida estate even absent compliance with, or allegations based upon, the long-arm statute. Under prior application of due process considerations, in rem jurisdiction could be obtained over one claiming an interest

22. *Id.* at 939.

23. *Id.*

24. *Id.* at 940-41.

25. 662 So. 2d 1303 (Fla 4th Dist. Ct. App. 1995), *review denied*, 675 So. 2d 929 (Fla. 1996). Please note that the author represented one of the parties in this litigation which may color the objectivity with which this case is analyzed.

26. *Id.* at 1304.

27. *Id.* at 1303-04.

28. *Id.* at 1304.

in the *res* through mailed notice, however this was not applicable. In personam jurisdiction could only be obtained through compliance with the long-arm statute, through an unrestricted appearance, by requesting affirmative relief in a proceeding, or by personal service of a summons within the State of Florida. However, none of these methods were applicable here.

The fourth district reached a contrary result, however, in *Manufacturers National Bank of Detroit v. Moons*,²⁹ wherein the court held that a mailed notice in a guardianship proceeding to an out of state trustee for the ward was insufficient to gain jurisdiction over the out of state trustee to order payment of attorneys' fees of the guardian's attorney in other non-related proceedings from trust assets³⁰.

Finally, in *Laushway v. Onofrio*³¹ a removed personal representative was ordered to account for property transferred to him prior to death, by the decedent.³² The defendant contended that the court lacked jurisdiction over him. Since the trial court clearly had in personam jurisdiction over the defendant when he was removed as personal representative after having been found guilty of procuring the last will by undue influence, that jurisdiction continued to permit the present order.³³

III. ATTORNEYS' FEES

Is the probate and trust attorneys' fee trauma over? Has the birth concluded or are we still in labor? Is the baby healthy or genetically flawed? In the prior iteration of this article, Ms. Donohue recorded the first and second phase of the metamorphosis of this topic and this article will record, hopefully, the final phase.

To recap, prior to 1976 there was no statutory provision relating to how the fee of the attorneys was to be determined, other than that a personal

29. 659 So. 2d 474 (Fla. 4th Dist. Ct. App. 1995).

30. *Id.* at 475.

"[F]ormal notice" used to obtain service in probate and in guardianship matters was not sufficient in trust related proceedings to confer on the court jurisdiction over the trustee; rather, pursuant to section 737.201, *Florida Statutes*, proceedings related to trusts were governed by the *Rules of Civil Procedure of Florida*. The latter, of course, prescribe summons or other process issued by or under authority of the court and served as provided by law.

Id.

31. 670 So. 2d 1135 (Fla. 5th Dist. Ct. App. 1996).

32. *Id.* at 1136.

33. *Id.*

representative was allowed necessary expenses including attorneys' fees paid in the settlement of the estate.³⁴ The 1976 *Florida Probate Code* provided for a "reasonable fee" to be paid to the personal representative, the attorney and other agents employed by the personal representative.³⁵ Like many other states, the statute also grafted the ethical concepts which are used to identify a "reasonable" fee into the statute.³⁶ However, these concepts did not adapt particularly well to the determination of an attorney's fee for probate administration³⁷ and over the sixteen years since this statute was adopted, there were at least two amendments made in the hopes of achieving a better fit.

With the 1976 statutory change, the actual practice of setting the fee remained generally unchanged. Nearly universally, probate attorneys' fees were set as a percentage of the value of the estate, as were the fees paid to corporate personal representatives. Over time, market forces, and supply and demand, overtook the probate bar and demands by some consumers resulted in some attorneys changing the *method* used to determine the fee to be charged. In many cases, lawyers and firms, generally the larger firms, determined and charged their attorneys' fees for probate matters based on an hourly charge, with little or no consideration to the value of the assets under administration.³⁸

34. FLA. STAT. § 734.01 (1973).

35. *Id.* § 733.617 (1975).

36. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1995). *See also* FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-1.5(b) (1987).

37. The "reasonable fee" and "ethical" concepts were little help in determining fees for fiduciaries or their agents, although these fees were also controlled by the same statute and the same considerations applied.

38. It is understandable that estate beneficiaries generally wish to hire lawyers at the smallest possible fee. In very large estates, the beneficiaries would want to have the fee determined on an hourly charge, while in very small estates, the beneficiaries would prefer the fee be calculated based on a percentage. For purposes of this discussion, assume two example estates. The first estate has an inventory value of \$40,000 and the second, a value of \$4,000,000. If both estates required approximately the same amount of professional time to administer (assume 50 hours), and a reasonable rate is considered to be \$150 per hour for the smaller estate and \$300 for the larger estate, the fee would be \$15,000 for the larger estate and the fee for the smaller estate would be \$7,500.

As a percentage of the value of the assets, that translates to 18.75% in the smaller estate and .375% in the larger. The beneficiaries in the larger estate are pleased. If the fee is percentage-based (assuming the scale in the 1995 statute), the fee in the smaller estate is \$1,500, while the fee in the larger estate is \$95,000. The applicable percentage then is 3.75% for the smaller estate and 2.375% for the larger estate. The beneficiaries in the smaller estate are pleased.

This was the fee environment in place when *Florida Patient's Compensation Fund v. Rowe*³⁹ and *Standard Guaranty Insurance Co. v. Quanstrom*⁴⁰ (neither were probate fee cases) were decided and which defined the "lodestar" method of fee determination.⁴¹ These cases stood for the proposition that the controlling ethical considerations, taken as a whole, applied to determine a reasonable fee, to be paid by one who was not the lawyer's client (the loosing party in these two cases), required imposition of an hourly-based charge.⁴² The opinions in *Rowe* and *Quanstrom* were written by Justice Ben Overton, who then also wrote the opinion, *In re Estate of Platt*,⁴³ which applied the *Rowe* and *Quanstrom* reasoning specifically to fee determination in probate administration.⁴⁴ The *Platt* rule established that, in the absence of an enforceable agreement, if the fee for the attorney for the personal representative and the fee for the personal representative is to be set by the court, it may not be set based solely on a percentage of the value of the assets.⁴⁵ This is so in spite of the language of the controlling statute, which provides that the court shall consider "one or more"⁴⁶ of the statutory factors in setting a reasonable fee and which provides that one of the statutory factors is "[t]he nature and value of the assets of the estate, [and] the amount of income earned by the estate."⁴⁷

Platt was far ranging in laying down rules for the determination of fees in probate administration matters and included a number of additional rules, which are more fully reviewed in Ms. Donohue's case analysis in the prior survey article and also in this author's article in *Practice Under Florida Probate Code*.⁴⁸ However, the "central holding" of *Platt* was that neither the attorney's fee nor the personal representative's fee could be determined

While it is true that larger estates generally require the expenditure of more time, this is not always the case; and in any instance, the relationship is not linear. In some instances, more professional time is expended on a smaller estate than a larger estate. Of course, it goes without saying that the lawyer's liability is always much greater in the larger estate.

39. 472 So. 2d 1145 (Fla. 1985).

40. 555 So. 2d 828 (Fla. 1990).

41. *Id.* at 830-35 (discussing the origin and calculation of attorneys' fees under the "Lodestar" method); *Rowe*, 472 So. 2d at 1150-52.

42. See *Quanstrom*, 555 So. 2d at 835; *Rowe*, 472 So. 2d at 1150.

43. 586 So. 2d 328 (Fla. 1991).

44. *Id.* at 333.

45. *Id.* at 336-37.

46. *Id.* at 332 (citing FLA. STAT. § 733.617 (1975)).

47. *Id.* at 332-33 (citing FLA. STAT. § 733.617 (1989)).

48. See John Arthur Jones & Rohan Kelley, *Compensation of Personal Representative and Attorney and Other Expenses of Administration*, in PRACTICE UNDER FLORIDA PROBATE CODE, § 15.23 (1994).

based solely on a percentage of the value of the estate.⁴⁹ The opinion went on to require the attorney's portion of the fee to be set as an hourly-based charge, but failed to provide any guidance with regard to how the personal representative's fee should be set.

It was within this environment that the Real Property Probate and Trust Law ("RPPTL") section of The Florida Bar determined that the *Platt* opinion was too narrow and, while it might work well for the insurance defense bar or plumbers, fees determined under *Platt* would not consistently or fairly compensate the probate bar for legal services performed in probate administration. This was particularly true in administration of large taxable estates where the responsibility assumed by the lawyer, but not necessarily the time expended, was significant.

Since the RPPTL section perceived that reasonable compensation properly involved two factors, time reasonably expended (effort) and responsibility assumed (liability), if an hourly rate was the only allowable compensation method, where responsibility was significant, it could only be properly compensated if the number of hours expended was also large. Lawyers observed that generally, responsibility (liability) attached upon acceptance of the representation and did not increase or decrease regardless of the effort (hours) required to perform the services. Therefore, if the responsibility was great because of the nature of the administration and the value of the assets, but the administration could be accomplished in a small number of hours, responsibility was under compensated if it was a factor included in the hourly rate. By contrast, if responsibility was comparatively small and built into the hourly rate, but the problems experienced were very time consuming, responsibility was overcompensated. This was true even if the hourly rate paid was adjusted because, in practice, it was not sufficiently elastic to adjust for factors which it was not best suited to compensate.

The RPPTL section chairman appointed a committee to study the problems of compensation which were raised by the *Platt* decision and to recommend solutions.⁵⁰ This committee was known as the Belcher Committee after its chairman.⁵¹

The Belcher Committee proposed a radical and untested formula for probate attorney compensation which had never been tried either by statute, rule, or in practice, in any other jurisdiction. The formula was designed to compensate attorneys for probate administration by separately compensating

49. *Platt*, 586 So. 2d at 336-37.

50. The author served as a member of that Committee.

51. William S. Belcher, Esq. (1924-1992).

effort and responsibility. The committee drafted an entirely new statute incorporating this concept.

The goal of the Committee was to return compensation levels to approximately those that existed in actual practice prior to 1991 when *Platt* changed the rules; it was not the intention of the committee to increase fees paid to lawyers in probate administration. To accomplish the goal of fairness to the lawyer and to the client while still retaining historical compensation levels, and also adopting an entire new method of compensation, the committee members called on their many years of experience in probate administration and setting fees and devised a formula intended to accomplish the desired result. That formula provided for a bifurcated fee, a one percent charge against the probate assets, including income earned during administration, to compensate responsibility (liability was most directly related to the value of estate assets) plus an adjusted hourly-based fee to compensate effort.

So as not to “double-dip,” the hourly rate to compensate effort should be reduced under the lawyer’s general office hourly rate because responsibility assumed, normally a factor in the hourly rate, was being compensated separately. By this formula, if effort (time) was high in relation to responsibility (measured by the size of the estate), then responsibility would not be overcompensated as it would if it was included as a part of an hourly charge. If responsibility (liability) was high in relation to effort required (time), then responsibility would be fairly compensated. The formula was self-adjusting for estates which did not fit a “cookie cutter” composition.

A second new concept adopted was that the fee determined by the formula was presumptively reasonable. However, by considering a set of eight probate-specific factors identified in the statute, the presumptively reasonable fee could be adjusted upward or downward to reach a reasonable fee for the particular probate administration.

However, the “great experiment” was doomed to failure before it began. When the Belcher committee reported its recommendations to the executive counsel of the RPPTL section, in general meeting, that counsel doubled the proposed responsibility fee from the one percent of the value of the assets recommended by the Belcher committee to two percent of the value of the probate assets and tacked on a “surcharge” of an additional one percent of the value of non-probate assets over which the probate attorney had no responsibility. Thus, compensation for responsibility was increased from a

minimum of 100% to perhaps thousands of percent over that recommended by the Belcher committee.⁵²

Upon becoming law, this new fee statute was immediately perceived by the bench and the media (as well as substantial portions of the probate bar) as resulting in excessive compensation for probate attorneys; substantially in excess of the facts which were in general usage before *Platt*. At the trial court level, few judges were willing to award the presumed reasonable fee and many experienced probate lawyers were quoting fees to their prospective clients which were substantially less than the presumed reasonable statutory rate. However, lawyers who were not probate specialists, or who had less experience in the field, generally quoted fees for their services at the rates presumed reasonable by the statute. Thus, the anomaly was created that the most experienced probate lawyers were quoting and charging fees at a lower rate than lawyers with less experience.⁵³

An example of the anomalous results produced by application of the statutory presumption is found in *Sitomer v. First America Bank-Central*.⁵⁴ In this administration, the probate assets were valued at \$104,000, but decedent had created an out-of-state corporate-trusteed revocable trust with a value of approximately \$25,000,000.⁵⁵ The only connection the large trust had with the probate administration was that it was required to be reported on the estate's federal estate tax return which, although signed by the personal representative, was not prepared by the personal representative or his attorney.⁵⁶ By application of the one percent "surcharge" to non-probate assets, in addition to the two percent of the value of the probate assets and 100 hours of attorney time in the probate, the presumptively reasonable fee

52. The proposed rate was so high that Senator Fred Dudley who was tapped to sponsor the section's legislative package in the senate, refused to introduce the bill at the rates now included for responsibility. However, a different sponsor was located in the house and a bill with those rates was introduced, and was eventually adopted with no change to the rates, as House Bill 1295. This bill later became chapter 93-257 of the *Laws of Florida*.

A shortcoming of the proposed change which was inherent in the Belcher Committee proposal was the failure to scale the percentage compensation for responsibility back at higher levels, for example, over \$5,000,000 in asset value.

53. This author was one of those who opposed the increase in the statutory rates over the levels recommended by the Belcher Committee and consistently lobbied all who would listen for a reduction in the rates set in the statute.

54. 667 So. 2d 456 (Fla. 4th Dist. Ct. App. 1996).

55. *Id.* at 457.

56. The attorney was also the personal representative and signed the federal estate tax return; however, any fee for serving as personal representative was affirmatively and intentionally waived.

determined by the statutory formula was \$265,236.57, an amount that was more than two and one-half times greater than the value of the total of the probate estate. The trial court considered the factors in the statute and determined that \$30,000 was a reasonable fee to compensate responsibility and that an hourly rate of \$300 was correct for 100 hours of effort. Accordingly, the court awarded a total adjusted fee of \$60,000. This award was subsequently affirmed by the Fourth District Court of Appeal.

Another case of interest which addressed the fee presumed reasonable by the 1993 statute was *Florida Bar v. Garland*.⁵⁷ This was a disciplinary case in which one of the charges against the lawyer, on which the referee determined guilt, was charging a clearly excessive fee in a probate administration.⁵⁸ Mr. Garland charged a fee of \$32,956.30 on a probate estate with a gross value of \$590,000.⁵⁹ Expert testimony established a reasonable fee at \$15,000 to \$18,000.⁶⁰ The fee was determined and collected under the statute prior to the 1993 amendment as interpreted by *Platt*.⁶¹ The supreme court overturned the referee's finding of charging a clearly excessive fee under rule 4-1.5(a)(1).⁶² It said:

We agree with Garland that in light of sections 733.617 and 733.6171, Florida Statutes (1993), which provide the manner by which reasonable fees to the personal representative and attorney of an estate are to be determined, the referee's recommendation as to this violation must be rejected. Although sections 733.617 and 733.6171 did not become [sic] effective until after the Locke estate was closed, if the fee charged in this case were charged today it likely would be considered reasonable under the new statutory provisions.⁶³

This statement of the law was a surprise to the author and others who believed that a fee could be calculated under the formula provided in the statute as presumed reasonable, and still violate the constraints of Rule 4-1.5(a) of the *Rules of Professional Conduct of Florida*, since one is a guideline established by the legislature under which a court may determine an attorney's

57. 651 So. 2d 1182 (Fla. 1995).

58. *Id.* at 1183.

59. *Id.*

60. *Id.*

61. *See id.* at 1184; *Platt*, 586 So. 2d at 336-37.

62. *Garland*, 651 So. 2d at 1184.

63. *Id.* (footnote omitted).

fee, and the other is a professionally imposed constraint on charging and collecting a clearly excessive fee.⁶⁴ However, it would appear that the final word, at least for now, has been spoken on this point.

To its credit, the leadership in the probate bar, and specifically in the RPPTL section, quickly recognized that the 1993 statute often produced an excessive fee (of course the media was running exposes on the fee-gouging probate lawyers and judges were routinely adjusting fees downward under the statutory presumed reasonable rate), and prepared legislation to remedy the situation.

Two alternative approaches to “fixing the mess” were considered. The first alternative was to retreat to the compensation levels initially proposed by the Belcher Committee (and also scaling back the applicable percentage in larger estates) and giving the bifurcated concept another try to see if it would work. The second alternative was to scrap the entire bifurcated fee concept and start over entirely.

The consensus within the RPPTL section was that the “well had been poisoned” and the bifurcated fee was (perhaps unfairly) branded as the culprit and as excessive in concept, and not merely by its operation. Therefore, those who were in a position to make the decision elected to abandon the bifurcated fee concept entirely and begin again. This is an unfortunate result, in this author’s opinion, since inherently the statutory bifurcated fee is the most reasonable approach to setting probate attorney’s fees and if the rates had not been initially set at excessive levels, might have served as a model which could have been adopted in other jurisdictions. However, this author concurred that the practical solution was to begin anew and in this case, throw the baby out with the bath water.

In order to accomplish this, the obvious starting point was with the compensation formula which had been adopted to compensate personal representatives. This formula was both simple to apply and had not created the media firestorm which the attorneys’ fee statute had. In fact, there had been little complaint regarding the compensation formula or resulting fees for personal representatives since the new statute was adopted in 1993 concurrently with the offending attorneys’ fee statute.

The other favorable aspect of that statute, in addition to its absence of controversy, was its simplicity of application. Specifically, time and hourly rates were not required to be determined. It was generally considered that the attorney for the personal representative contributed as much value to the

64. This point of view is discussed at section 15.38 of *Practice Under Florida Probate Code*. See Jones & Kelley, *supra* note 48, § 15.38.

probate administration as did the fiduciary, and the logical extension was that the attorney should be equally compensated with the fiduciary.⁶⁵ There was also some case law authority which predated the adoption of the 1976 statute, for this approach.⁶⁶

A committee was again appointed by the chairman of the RPPTL section, comprised of the surviving members of the Belcher Committee and several others, to draft a proposal for new legislation. Using the personal representative's compensation formula as a template, with adjustments, a significant conceptual overhaul was quickly accomplished. Actually, very little redlining was required in 733.6171; merely deleting subsection (3)(a) (compensation for responsibility) and subsection (3)(b) (compensation for effort), and copying over a sliding scale (with minor adjustment), percentage-based formula as found in 733.617(2),⁶⁷ the statute setting compensation for the personal representative. When this had been done, since the formula compensation clearly excluded compensation for extraordinary services, it was necessary to define a representative list of those services, and that was added as new subsection (4).

Of note, and in contrast to the recent media characterization of probate lawyers as fee-gouging, the Committee believed that the sliding scale at levels over \$3,000,000 in assets, may produce an excessive fee. Therefore, at that level and upward, the schedule found in the statute providing compensation for the fiduciary was cut back for attorneys' fees by one-half percent. The Committee's recommendation was adopted by the executive counsel, this time without the fatal tinkering to the percentages, and a sponsor offered the bill in the legislature which became chapter 95-401, section 2, and which became law on June 18, 1995.⁶⁸

Another revolutionary concept which was reported out of the Committee, and adopted by the executive counsel, again without change, was a statutory "presumed reasonable" attorneys' fee for representing a trustee in the initial administration of a revocable trust as a will substitute. This

65. Although it was not considered by the Committee in drafting the statute, this previous survey, published shortly after the 1993 amendments to the statute, predicted the ultimate direction of the law on this point. As Ms. Donohue stated: "It is not clear why there is a distinction between compensation as a personal representative and for attorney fees paid on the same estate." Donohue, *supra* note 1, at 361. With the 1995 change, that is now the law.

66. See, e.g., *In re Lieber's Estate*, 103 So. 2d 192, 201 (Fla. 1958).

67. See FLA. STAT. § 733.617(2) (1993).

68. Ch. 95-401, § 43, 1995 Fla. Laws 3275, 3310.

became section 4 of chapter 95-401, which was later codified at section 733.2041, of the *Florida Statutes*.⁶⁹

The concept which this statute recognizes is that the legal value added to the process of administration of a revocable trust as a will substitute is approximately the same value added to a probate administration of the same assets. The effort required and the responsibility assumed are approximately the same. Therefore, reasonable compensation should be approximately the same.⁷⁰

The specific point should be made that the trustee is not required to retain counsel for administration, contrasted with a personal representative who is so required.⁷¹ Also, the trustee may retain the lawyer for specific and limited purposes and, like a similar provision pertaining to probate administration, may agree to a fee different than the one the statute presumes reasonable. The substantial public interest to be served is that some certainty is created regarding fees for this type of service.

The structure of the trustee attorneys' fee statute⁷² is nearly identical to the structure of the amended probate attorneys' fee statute.⁷³ The only difference of note is the inclusion in the trust statute of a laundry list of ordinary services, that list being absent in the probate statute. The reason for this difference was that it was felt that ordinary services in probate administration are generally well known, whereas revocable trust initial administration is a new concept not widely known throughout the bar. As a result, in the trust statute, both ordinary legal services as well as extraordinary legal services are identified.

The compensation rates for trust legal services are set at seventy-five percent of the rates for probate legal services, and use the same sliding scale

69. See FLA. STAT. § 733.2041 (1995). The Florida Bankers' Association successfully lobbied an amendment to the bill which eliminates any presumption of a reasonable fee if the trustee or one of the trustees is a corporate fiduciary. This "bankers exception" may suffer from congenital constitutional defects.

70. The legal services compensated directly and logically in this statute are the same legal services which were intended to be compensated by the one percent "surcharge" added to the 1993 version of section 733.6171, except that surcharge applied to all non-probate assets (eg. life insurance proceeds, IRA roll-overs, joint bank accounts, entireties real property, homestead real property, etc.). It is true that the lawyer will expend substantial effort and assume substantial responsibility in the initial trust administration, but probably neither is the case as to the other listed non-probate assets. This direct approach to a specific situation is far superior to the "shotgun" approach of the prior statute.

71. FLA. PROBATE CODE RULE 5.030(a) (1996).

72. FLA. STAT. § 733.6171 (1995).

73. See *id.* § 737.2041 (1995).

of value to reach a presumed reasonable fee. The reason for the reduction of twenty-five percent in the fee is that some of the work will not be required in a trust administration; for example, marshalling of the assets would not be required if the trust was previously funded.

As is the case in the probate statute, review or preparation of the federal estate tax return is a defined extraordinary legal service. For preparation, a presumed reasonable fee is one-half percent of the value of the gross estate up to ten million and one-quarter percent on the value of the excess.

An interesting but often unnoticed remedial provision was also added by chapter 95-401 which became subsections (2) through (4) of section 737.204.⁷⁴ Under previous procedure, if a beneficiary wished to challenge a fee paid to the trustee, the trustee's attorney, or any trust agent, the only alternative was to bring a civil action under the provisions of section 737.201 and serve all necessary parties with a summons or by publication. If there is a pending associated probate administration, the idea is that a probate proceeding would be a convenient forum to resolve issues of trust fees and objections to those fees. So the statutory amendment grants subject matter jurisdiction to the probate judge and provides that formal notice may be used, rather than forms of service required in a civil action. One should note in passing that there are extensive new trust attorneys' fee provisions in section 737.2041, but there is still no statutory provision which quantifies or sets a fee for the trustee, not even a statutory requirement that the fee be a "reasonable fee." As noted below, it is this author's opinion that *Platt* will

74. *Id.* § 737.204(2)–(4) (1995). This section, entitled, "Proceedings for review of employment of agents and review of compensation of trustee and employees of trust—" provides in part:

(2) If the settlor's estate is being probated, the trustee, the attorney, or any interested person may have the propriety of employment and the reasonableness of the compensation of the trustee or any person employed by the trustee determined in the probate proceeding.

(3) In any proceeding under this section the petitioner shall either:

(a) Serve notice on all interested persons in the manner provided for service of formal notice under s. 731.301, together with a notice advising the interested person that an answer to the petition must be filed and served on petitioner within 20 days from the service of the petition or the petition may be considered *ex parte*, and such notice shall be sufficient for the court to acquire jurisdiction for this proceeding over the person receiving formal notice to the extent of the person's interest in the trust; or

(b) Obtain jurisdiction over interested persons in any other manner permitted by law.

(4) Persons given notice as provided in this section shall be bound by all orders entered on the petition.

Id.

apply to the determination of a trustee's fee, but not (as to those matters contained in the statute) to the determination of an attorney's fee for the trustee's attorney.

Section 733.6171(7),⁷⁵ reversed another of the holdings of *Platt*. That subsection provides for the award of attorneys' fees for the attorney for the personal representative if court proceedings are required to determine attorney's fees. This would normally be the case where no agreement could be reached on the fees, and an objection to the fees was filed. The statute was improved by the 1995 amendment which proscribed the award of fees under this provision if "the court finds the request for attorney's fees to be substantially unreasonable."⁷⁶ This same provision and the same limitation is also found in section 737.2041 relating to trustee attorneys' fees.⁷⁷

An important concept which was included in chapter 93-257 is found in subsection (8) of section 733.6171.⁷⁸ Subsection (8) provides: "This section shall apply to estates in which an order of discharge has not been entered prior to its effective date but not to those estates in which attorney's fees have previously been determined by order of court after notice."⁷⁹

The purpose of this effective date provision was to apply the new procedure to determine reasonable attorneys' fees to estates then in administration. Of course, this was what happened upon *Platt* being decided. The court did not limit its application only to estate probates commenced after the opinion issued; rather, the *Platt* procedures for determination of a reasonable fee applied to all estates then in probate. The intention was to achieve parity between what the court had done with *Platt* and what the legislature had done with chapter 93-257. This same language continues in the present statute.

However, this provision quickly came under constitutional attack in *Williams College v. Bourne*.⁸⁰ In *Williams College*, the fifth district initially

75. *See id.* § 733.6171 (1993). This was renumbered as 733.6171(8) in the 1995 amendment.

76. FLA. STAT. § 733.6171(8) (1995). *See also* *Williams College v. Bourne*, 670 So. 2d 1118 (5th Dist. Ct. App. 1996), which was decided approximately three months before the effective date of this amendment, where the court notes: "Williams College points out that the mandatory language of this legislation leaves open the argument that fees for the personal representative's attorney must be paid for the fee litigation even if the fee request is exorbitant and only a fraction of the claimed fees is awarded." *Id.* at 1121 n.5.

77. *See* FLA. STAT. § 737.2041 (1995).

78. *Id.* § 733.6171(8) (1993). This section has been renumbered as 733.6171(10) in the 1995 amendment.

79. *Id.*

80. 625 So. 2d 913 (Fla. 5th Dist. Ct. App. 1993).

reversed and remanded the trial court's finding from May of 1991 that Williams College had agreed to a valid percentage-based fee contract with the attorney.⁸¹ A petition for discharge in the estate was filed on June 29, 1990, which predated *Platt* and all of the ensuing statutory changes. The only remaining item of administration was to determine the attorney's fee. The initial fee request from the attorney for the personal representative was \$125,175.54.⁸²

After remand, but before further trial ensued, section 733.6171(8) was adopted which directed the court to determine the fee, absent an agreement (which the appellate court had already determined was not binding), based on the fee presumed reasonable in the new statute.⁸³ In accordance with the statute, the trial judge made that determination and found a fee of \$116,676 to be reasonable.⁸⁴ However, since *Platt* had also been decided in the interim, the trial judge also made a determination in accord with the *Platt* guidelines, in case section 733.6171(8) was constitutionally defective and *Platt* controlled the determination.⁸⁵ A reasonable fee decided under the *Platt* guidelines was \$63,624.⁸⁶

The constitutionality of the "retroactive" effect of section 733.6171(8) was argued and the trial judge ruled on that issue. The court ruled that the portion of the statute which provides how a reasonable fee is to be determined is not a new right, but rather a modification of existing procedures.⁸⁷ However, the court held that section 733.6171(7), which allowed fees for the process of determining fees, was a new entitlement which did not previously exist, and found this provision to be unconstitutional to the extent it is applied retroactively. As the court stated:

An analysis of the case law suggests that a distinction should be drawn between cases where a new right or entitlement is created and cases where procedures concerning an existing right are modified. Not surprisingly, this case has both. The estate has always been obligated to pay a reasonable attorney's fee in this case. The

81. *Id.* at 914.

82. *Williams College v. Bourne*, 670 So. 2d 1118, 1119 (Fla. 5th Dist. Ct. App. 1996).

83. *See Williams College v. Bourne*, 656 So. 2d 622, 623 (Fla. 5th Dist. Ct. App. 1995).

84. *Id.* at 623.

85. *Williams College*, 625 So. 2d at 914 n.1.

86. *Williams College*, 656 So. 2d at 623 (applying *In re Estate of Platt*, 586 So. 2d 328 (Fla. 1991)).

87. *In re Estate of Rosenberg*, Fla. Admin. Order No. PR88-911 (June 24, 1994) (on file with Clerk, Probate Div. Orange County Cir. Ct).

method of determining fees has varied but the obligation has not. The Court finds that the application of F.S. 733.6171 to determine a reasonable fee in this case is not an unconstitutional deprivation of a vested right.

....

On the other hand, F.S. 733.6176(7) (sic) provides for the recovery of costs and fees expended to determine compensation. These items were not recoverable under Platt and it is fundamentally unfair to impose a new obligation retroactively to this set of facts. The Court finds that the application of F.S. 733.6171(7) to impose fees previously unrecoverable to be unconstitutional.⁸⁸

Not surprisingly, this ruling was appealed.⁸⁹ The appellate court again reversed the trial judge, this time finding that the fee award was not controlled by section 733.6171(8), but rather application of the statute to determine attorneys' fees earned for services rendered before the statute becomes effective was unconstitutional and these fees must be determined in accordance with the procedures mandated by *Platt* (requiring the award of an hourly fee in the amount of \$63,624).⁹⁰ This author disagrees with the fifth district and believes that the trial judge properly determined the constitutional issues.

The underlying law relating to the constitutionality of a statutory amendment and its application to events occurring before the amendment is that substantive changes in the law generally cannot have retroactive effect although remedial or procedural provisions may.⁹¹ The Fifth District Court of Appeal addressed the question of whether the amendment to section 733.6171, which fixed the method to be followed to determine a reasonable fee, is procedural on the one hand, and therefore constitutional, or substantive on the other hand, and thus unconstitutional.⁹²

In *Miami Children's Hospital v. Tamayo*,⁹³ the court considered whether its decision in *Florida Patient's Compensation Fund, Inc. v. Rowe*⁹⁴ should be applied retroactively to limit attorneys' fees awardable by statute against the losing party in a medical malpractice action where the action

88. *Id.*

89. *See Williams College v. Bourne*, 656 So. 2d 622 (Fla. 5th Dist. Ct. App. 1995).

90. *Id.* at 623. It is interesting to note that *Platt* was also decided after the attorney's services had been rendered in the estate.

91. *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275 (Fla. 1978).

92. *Williams College*, 656 So. 2d at 623.

93. 529 So. 2d 667 (Fla. 1988).

94. 472 So. 2d 1145 (Fla. 1985).

arose prior to the *Rowe* decision.⁹⁵ The court held “[w]e emphasize that the factors to be utilized in computing a reasonable attorney’s fee, whether established by this Court through the Code of Professional Responsibility or by case law, are procedural in nature.”⁹⁶

The supreme court also considered the retroactive effect of section 768.56 (in medical malpractice actions attorneys’ fee awarded to the prevailing party—the statute upon which *Rowe* was based) in cases where the cause of action accrued before the effective date of the statute.⁹⁷

In Florida, it is clear that in the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only. . . . This rule mandates that statutes that interfere with vested rights will not be given retroactive effect. On the other hand, statutes which relate only to the procedure or remedy are generally held applicable to all pending cases. In *McCord v. Smith*, 43 So.2d 704 (Fla. 1949), we stated:

A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein . . . a new obligation or duty is created or imposed . . . in connection with transactions or considerations previously had or expiated.⁹⁸

Under these concepts, therefore, the trial judge appears to be correct that a change in the method by which a reasonable fee is determined is only remedial and is permitted to have retroactive effect, especially where so directed by the legislature. However, the creation of a right to collect attorneys’ fees for a dispute involving the determination of fees, where that right did not previously exist, would be unconstitutional if applied to a fee determination in progress when the statute was enacted.

The next step in the continuing saga began when the attorney filed a petition for allowance of attorneys’ fees for services rendered in the proceedings to determine fees, but only for that part of the services rendered after the statute became effective. This petition was based on language in the *Williams* opinion, that “once the services by the attorney for the estate were rendered, the estate became obligated to pay a reasonable attorney fee . . . based on then applicable law.”⁹⁹ Based on that statement, the attorney

95. *Tamayo*, 529 So. 2d at 667.

96. *Id.* at 668.

97. *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985).

98. *Id.* (citations omitted).

99. *Williams College*, 656 So. 2d at 623.

reasoned that attorneys' fees incurred after the effective date of section 733.6171(7) incurred on the issue of determination of attorneys' fees, would be compensable. He filed a motion in the trial court to allow attorney fees for services after October 1, 1993.¹⁰⁰ The trial court allowed those fees and the appeal ensued. Maintaining its consistency, the Fifth District Court of Appeal reversed the trial judge and ruled:

[T]he *Williams* . . . panel utilized principles analogous to those found in *Young* and *L. Ross* to find that Ward had a cause of action against the estate for the value of his services from the moment he began to render them. It was at that moment when, although the ultimate fee amount would increase over the course of Ward's services, the estate's liability to compensate Ward was legally fixed, as was the legal formula by which the fees would be calculated. The subsequent enactment of a statute that provided for a new formula could not constitutionally be effective to enhance that liability.

. . . .
. . . To the extent Ward did or did not possess the right to compensation calculated in a certain way and the right to charge his time to litigate his own compensation, these rights were inextricably bundled at the moment Ward began his representation of the estate.¹⁰¹

If this is correct law, it is an unfortunate policy result. All estates, probate of which has commenced after October 1, 1993, and before June 18, 1995, would be locked into the bloated bifurcated compensation formula that the probate bar worked so hard to eliminate.

A concept generally overlooked by lawyers and judges who assume that later statutory amendments in the area of fees "reversed *Platt*" is that the *Platt* rules for determination of a reasonable fee continue to apply in all probate, trust, and guardianship proceedings for fees other than attorneys' fees for representing the fiduciary in probate administration and initial trust administration and fees of the personal representative. This continued application of *Platt* would include, at least, determination of a reasonable fee under section 744.108 (guardianship attorneys' fees and guardians' fees), section 733.106(2) (attorneys' fees awarded to a person offering a will in

100. *Williams College*, 670 So. 2d at 1119.

101. *Id.* at 1121 (referring to *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985); *L. Ross, Inc. v. R.W. Roberts Constr. Co.*, 466 So. 2d 1096 (Fla. 5th Dist. Ct. App. (1985), *approved*, 481 So. 2d 484 (Fla. 1986).

good faith), section 733.106(3) (fees to an attorney who benefits an estate), section 733.609 (fees awarded in an action challenging proper exercise of a personal representative's powers), section 737.627 (fees awarded in an action challenging proper exercise of a trustee's powers), and section 737.204 (trustees' fees). An argument can be made that *Platt* also applies to determine fees for employees or agents of the personal representative (or the trustee); however, there is no further authority on this point, and certain applications would appear to be illogical (e.g. a fee to a real estate broker for sale of estate real property, or to an auction house for sale of a valuable collection of personalty).

Finally, with regard to the topic of probate and trust attorneys' fees, there is one additional change included in the 1995 amendment and a sampling of recent cases on the subject of attorney fees which will be addressed here.

New subsection (9) was added to section 733.6171 which requires that the amount and manner of determining compensation for the attorney must be disclosed in the final accounting¹⁰² unless the disclosure is waived in writing by the parties bearing the impact of the fees, and those waivers must be filed. If waived, the content of the waiver must meet certain requirements. First, the waiver must contain a statement that the party has actual knowledge of the amount and manner of determining the attorney compensation, and in addition, that the waiving party either has agreed to the compensation or that the waiving party has a right to petition the court to decrease the compensation and is waiving that right.¹⁰³ Waivers which do not meet these requirements are ineffective.

Two cases are worthy of mention. In *Berger v. Brooks*¹⁰⁴ a discharged attorney for a personal representative was entitled to a fee based on quantum meruit; however, the amount awarded could not exceed the total of the fee contracted for. In this case, the agreed fee was \$1,000, but the attorney applied for a quantum meruit fee of \$8,800. The trial court also ruled that section 733.6171 is unconstitutional without stating the basis for that

102. FLA. STAT. § 733.6171(a) (1995). This was an oversight on the part of the legislature. Disclosures regarding fees are typically stated in the petition for discharge, not, except as a line item, in the final accounting. Courts and clerks generally are accepting the accounting and the petition for discharge if the disclosures are contained in the petition for discharge. It is to be expected that this statute will be amended to conform with the practice.

103. *Id.*

104. 657 So. 2d 1281 (Fla. 3rd Dist. Ct. App. 1995).

ruling.¹⁰⁵ The Third District Court of Appeal reversed this portion of the trial judge's order which declared the statute unconstitutional.¹⁰⁶

In *Dew v. Nerreter*,¹⁰⁷ the trial court awarded a fee to the attorney for an unsuccessful will contestant under 733.106(3).¹⁰⁸ Under some limited circumstances fees under this statute have been allowed to the attorney for a nonprevailing party in estate litigation.¹⁰⁹ However the services rendered in this case were of no benefit to the estate and the fee award was reversed.¹¹⁰

IV. CLAIMS

This topic has been active in recent case law regarding the nature of the applicable statutory provisions.

There are three possible classifications of statutory provisions purporting to bar claims:

- 1) a statute of repose or nonclaim;
- 2) a statute of limitations; and
- 3) a rule of judicial procedure.

There are also three different actions that may be taken regarding estate claims which are affected by the different types of statutory provisions:

- 1) filing the claim
 - A. where the potential claimant has received notice
 - B. where the potential claimant has not received notice
- 2) objection to the claim
- 3) commencement of an independent action on the claim.

105. *Id.* at 1282.

106. *Id.*

107. 664 So. 2d 1179 (Fla. 5th Dist. Ct. App. 1995).

108. *Id.* at 1180. Section 733.106 entitled, Costs and attorney fees, provides in part:

....

(3) Any attorney who has rendered services to an estate may apply for an order awarding attorney fees, and after informal notice to the personal representative and all persons bearing the impact of the payment the court shall enter its order on the petition. FLA. STAT. § 733.106(3) (1995).

109. *See, e.g., In re Estate of Lewis*, 442 So. 2d 290 (Fla. 4th Dist. Ct. App. 1983); *In re Whitehead's Estate*, 287 So. 2d 9 (Fla. 1973).

110. *Dew*, 664 So. 2d at 1180-81.

The nature of the statute impacts the rights of the party charged to act if that action is tardy or does not occur and impacts the ability to obtain relaxation of the statutory deadline. The importance of determining the effect of the statutory provisions on the actions or inactions of parties is not well understood, as evidenced by the divergence in result in the reported cases.

A statute of nonclaim or repose is an automatic and complete bar to a claim. A late filed claim may simply be ignored and need not be stricken on motion. Defenses such as estoppel or fraud are unavailable to the claimant and the court cannot extend the time for filing the claim (unless specifically authorized by the nonclaim statute).¹¹¹

A statute of limitations, in contrast, must be pled and proved by the estate as an affirmative defense or it is waived. It is also subject to the defense of estoppel or fraud which may be raised by reply under Rule 1.100 of the *Florida Rules of Civil Procedure*.¹¹²

A rule of judicial procedure is a limitation which may be relaxed or extended, even after it has expired, in the broad discretion of the judge for good cause shown. In *Yerex v. Durzo*,¹¹³ the fourth district interpreted section 733.705(4) as a rule of judicial procedure rather than a statute of nonclaim and the court allowed a late filing of an independent action, after objection to the claim.¹¹⁴ In this case, the widow's claim was contingent upon the personal representative suing her, which event had not occurred.¹¹⁵ Since the filing of an independent action on the claim was premature, the trial court granted an extension of time to file.¹¹⁶

A difference of opinion exists regarding the classifications of sections 733.702 and 733.710 as either statutes of nonclaim or statutes of limitation. What is surprising is the number of reported opinions from the various courts of appeal which have totally ignored a statement in the supreme court majority opinion in *Spohr v. Berryman*¹¹⁷ that "[w]hile known as a statute of

111. See FLA. STAT. § 733.702(3) (1995). This section provides: "an extension [of time to file a claim] may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period." *Id.*

112. FLA. R. CIV. P. 1.100.

113. 651 So. 2d 220 (Fla. 4th Dist. Ct. App. 1995).

114. *Id.* at 221.

115. *Id.*

116. *Id.*

117. 589 So. 2d 225 (Fla. 1991).

nonclaim, it [733.702] is nevertheless a statute of limitations.”¹¹⁸ Prior writing by this author¹¹⁹ has also concluded that section 733.702 is a statute of nonclaim, although a contrary view is expressed by another author in the same treatise.¹²⁰ The reason Justice Grime’s statement in *Spoehr* seems to be so uniformly ignored is because it is probably wrong; and, in any case, it is clearly dicta which is not binding on the appellate courts.¹²¹

As of this writing, the first, third, and Fourth District Courts of Appeal have held that section 733.702¹²² in its present form is a statute of nonclaim.

118. *Id.* at 227 (referring to *Barnett Bank of Palm Beach County v. Estate of Read*, 493 So. 2d 447 (Fla. 1986)) (finding that it is a statute of nonclaim, which is uniformly to the contrary).

119. *Kelley, Probate Litigation, in PRACTICE UNDER FLORIDA PROBATE CODE, supra* note 48, at §§ 20.39–40.

120. “It is the author’s opinion that practitioners should continue to treat F.S. 733.702 as a statute of limitations.” L. Kathleen Horton-Brown, *Creditor’s Claims and Family Allowance, in PRACTICE UNDER FLORIDA PROBATE CODE* § 8.7 (1994).

121. Professor David T. Smith of the University of Florida Law School, in his treatise, states, “Fla. Stat. § 733.702 now is a jurisdictional statute of nonclaim and not a statute of limitations as it was at the time of *Barnett Bank v. Estate of Read*.” *FLORIDA PROBATE CODE MANUAL* § 7.2 (Mitchie 1996).

122. Section 733.702, entitled Limitations on presentation of claims, provides:

(1) If not barred by s. 733.710, no claim or demand against the decedent’s estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed within the later of 3 months after the time of the first publication of the notice of administration or, as to any creditor required to be served with a copy of the notice of administration, 30 days after the date of service of such copy of the notice on the creditor, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the beneficiaries adversely affected according to the priorities provided in this code and when the settlement is made within the statutory time for filing claims; or, within 3 months after the first publication of the notice of administration, he may file a proof of claim of all claims he has paid or intends to pay.

(2) No cause of action heretofore or hereafter accruing, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed within the time periods set forth in this part.

This line of cases began when Judge Smith writing for the First District Court of Appeal in *In re Estate of Parson*¹²³ first characterized section 733.702, as amended in 1984, as a nonclaim statute.¹²⁴ This opinion preceded *Spohr* by more than a year. Judge Smith again writing for the court in *Thames v. Jackson*,¹²⁵ reaffirmed this characterization after *Spohr*, without mentioning *Spohr*.¹²⁶ Judge Schwartz, writing for the First District Court of Appeal in *Baptist Hospital of Miami, Inc. v. Carter*¹²⁷ cited *Parsons* with approval, but did not mention *Spohr*. However, the *Baptist Hospital* characterization of section 733.702, as a statute of nonclaim, was dicta, since the issue before the court was the nature of section 733.710 as either a statute of nonclaim or a statute of limitations. Finally, the Fourth District Court of

(3) Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed on the grounds of timeliness or otherwise unless the court extends the time in which the claim may be filed. Such an extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless such an extension has been granted. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an extension or be forever barred, the creditor shall be limited to a period of 30 days from the date of service of the notice in which to file a petition for extension.

(4) Nothing in this section affects or prevents:

(a) A proceeding to enforce any mortgage, security interest, or other lien on property of the decedent.

(b) To the limits of casualty insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by the casualty insurance.

(c) The filing of a claim by the Department of Revenue subsequent to the expiration of the time for filing claims provided in subsection (1), provided it does so file within 30 days after the service of the inventory by the personal representative on the department or, in the event an amended or supplementary inventory has been prepared, within 30 days after the service of the amended or supplementary inventory by the personal representative on the department.

(d) The filing of a cross-claim or counterclaim against the estate in an action instituted by the estate; however, no recovery on such a cross-claim or counterclaim shall exceed the estate's recovery in such an action.

(5) Nothing in this section shall extend the limitations period set forth in s. 733.710.

FLA. STAT. § 733.702 (1995).

123. 570 So. 2d 1125 (Fla 1st Dist. Ct. App. 1990). "These changes . . . indicate the legislature's intent to create a jurisdictional statute of nonclaim which, under the circumstances specified in the statutes, automatically bars untimely claims." *Id.* at 1126 (footnote omitted).

124. *Id.*

125. 598 So. 2d 121 (Fla. 1st Dist. Ct. App. 1992).

126. *See id.*

127. 658 So. 2d 560 (Fla. 3d Dist. Ct. App. 1995).

Appeal fell in line with *Comerica Bank & Trust, F.S.B., v. SDI Operating Partners, L.P.*,¹²⁸ and found section 733.702 to be a statute of nonclaim.¹²⁹ It seems most likely when this issue reaches the supreme court that it will retreat from its characterization of the statute in its current version as a statute of limitations.

Regarding section 733.710,¹³⁰ agreement is not uniform among the districts in classifying that estate, with the Fourth District Court of Appeal finding it to be a statute of non-claim and the Third District Court of Appeal finding it to be a statute of limitations.

In *Baptist Hospital of Miami, Inc. v. Carter*, the hospital, a known creditor of decedent, was advised by the widow that the decedent died without any assets requiring probate administration.¹³¹ However, the hospital filed a creditor's caveat anyway.¹³² Very shortly after the expiration of a two year period following the decedent's death, the widow commenced administration of the estate.¹³³ The hospital was notified of the administration by the court because of the caveat, and promptly filed its claim.¹³⁴ The personal representative/widow moved to strike the claim as being barred by section 733.710 and the trial court struck the claim.¹³⁵

The hospital appealed arguing that "733.710 is a statute of limitations, rather than of repose, [and therefore] fraud or misrepresentation of the type alleged here may serve to estop the estate from raising the limitations

128. 673 So. 2d 163 (Fla 4th Dist. Ct. App. 1996).

129. *Id.* at 168.

130. Section 733.710 entitled Limitations on claims against estates, provides:

(1) Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative (if any), nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

(2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.

(3) This section shall not affect the lien of any duly recorded mortgage or security interest or the lien of any person in possession of personal property or the right to foreclose and enforce the mortgage or lien.

FLA. STAT. § 733.710(1)–(3) (1995).

131. *Baptist Hosp.*, 658 So. 2d at 561.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

defense.”¹³⁶ The Third District Court of Appeal agreed and reversed and remanded for a factual determination of the misrepresentation/estoppel issue.¹³⁷ Had section 733.710 been a statute of repose (nonclaim statute), no defense would have been available and the claim would have been finally barred. To illustrate a statute that operates with such finality, the opinion pointed out that section 733.702 was such a statute of repose.¹³⁸

In direct and certified conflict is *Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P.*¹³⁹ The probate court, on motion, granted an extension of time, beyond two years following decedent’s death in which to file its claim.¹⁴⁰ The personal representative appealed arguing that section 733.710 was a statute of repose and unequivocally erases any liability on claims filed after the repose period.¹⁴¹ The Fourth District Court of Appeal agreed and reversed.¹⁴² The effect of this determination is that none of the equitable defenses of fraud or estoppel are available to excuse noncompliance with the statute. The reasoning of the Fourth District Court of Appeal is based on the fact that section 733.702, by its terms, is subordinate to 733.710.¹⁴³ The court reasoned that if section 733.702 most likely is a statute of repose (in this it agrees with the Third District Court of Appeal), then section 733.710 which is preeminent, must also be a statute of repose, and not a statute of limitations.

To its credit, the Fourth District Court of Appeal opinion in *Comerica Bank & Trust* is the first opinion which makes note of the “throw-away” line in *Spohr v. Berryman* which characterizes section 733.702 as a statute of limitations.¹⁴⁴ As gently as possible, Judge Farmer writing for the *Comerica*

136. *Baptist Hosp.*, 658 So. 2d at 561.

137. *Id.* at 561.

138. *Id.* at 563.

139. *Comerica Bank*, 673 So. 2d at 163.

140. *Id.* at 164. There was no issue as to whether the claims were timely under section 733.702, since the period runs from service of notice of administration.

141. *Id.*

142. *Id.* at 163.

143. Section 733.702(1) begins: “If not barred by s. 733.710, no claim or demand against the decedent’s estate . . .” FLA. STAT. § 733.702(1) (1991). Also, 733.702(5) provides: “Nothing in this section shall extend the limitations period set forth in s. 733.710.” *Id.* § 733.702(5). Finally, 733.710(1) begins: “Notwithstanding any other provision of the code . . .” *Id.* § 733.710(1). The author agrees with the Fourth District Court of Appeal regarding preeminence of 733.710, but disagrees that it be at of least equal authority with 733.702. Also, the balance of the opinion is an intricately constructed model of logic, which rests on a faulty foundation. It is the author’s opinion that section 733.710 is an ordinary statute of limitations.

144. *Comerica Bank*, 673 So. 2d at 166 n.5.

court, points out that by the time *Spohr* was decided, section 733.702 had been amended from a statute of limitations to a statute of nonclaim.¹⁴⁵

Trying to make procedural sense of the unsettled state of the law becomes difficult for the practitioner. Recognizing widespread disagreement, this author suggests the following:

1.(a) A claimant is not barred until the passage of two years from decedent's death for failure to timely file a claim if he was reasonably ascertainable but was not served with notice of administration. The claim may be filed at any time during the two year period and it will be determined timely. The better procedure for the claimant would be to file a motion to extend the time for filing a claim on the authority of section 733.702(3) (on the grounds of insufficient notice of the claims period)¹⁴⁶ so as not to have the court mistakenly enter an order of discharge, without notice to the claimant, believing the claim to have been barred without further action by section 733.702(3).¹⁴⁷ Section 733.710 is a statute of limitations, which must be pled as an affirmative defense and by case law interpretation is subject to the equitable defenses of fraud and estoppel.

1.(b) A claimant who has received notice of administration but who has not timely filed the claim is automatically barred without further action¹⁴⁸ unless the claimant requests an extension of time to file, which may only be granted on the ground of fraud, estoppel, or insufficient notice of the claims period. 733.702(3).

2. The time for objection to a claim¹⁴⁹ may be extended by the court before or after the thirty-day time period expires upon a showing of good cause. This is a rule of judicial procedure which may be relaxed in the broad discretion of the trial court.¹⁵⁰

3. An independent action must be commenced by the claimant if the claim has been objected to, within thirty-days from the date of service of the

145. *Id.* at 166.

146. This is probably not required for the validity of the filed claim, since the claim simply has not been barred.

147. *See Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988).

148. No motion to strike the claim is required.

149. On or before four months of the first publication of the notice of administration or 30 days from the filing of the claim, whichever is later. *See* FLA. STAT. § 733.705(2) (1995).

150. *Golden v. Atlantic Nat'l Bank of Jacksonville*, 481 So. 2d 16 (Fla. 1st Dist. Ct. App. 1985), *review denied*, 492 So. 2d 1332 (Fla. 1986). Although the court in *Golden* did not construe the same portion of the present statute, it may be cited as authority for this proposition. *See also* FLA. STAT. § 733.705(2).

objection. This is a rule of judicial procedure which may be relaxed in the broad discretion of the trial court for good cause shown.¹⁵¹

V. TRUSTS

The law of trusts has seen substantial legislative action in the past three years, especially as it relates to a trust where the settlor has reserved a power to revoke.¹⁵² Several significant legislative changes have occurred which impact trusts.

The first, setting a method to determine reasonable attorneys' fees for the trustee's attorney, was covered in detail above under the section on attorneys' Fees and will not be further discussed here.

The second involves the "on to off" creditor's procedures imposed on revocable trusts. The third creates a statute of limitations¹⁵³ to mirror section 733.710 which is applicable to claims two years after the settlor's death.¹⁵⁴ The fourth involves new execution requirements for trusts with testamentary aspects. Finally, several trust cases were discussed above in the section on Jurisdiction.

In the 1993 survey, Ms. Donohue noted that an effect of the recent legislation "was to make trust administration more similar to probate administration."¹⁵⁵ In fact, the provisions adopted in chapter 93-257, relating

151. See FLA. STAT. § 733.705(4); see also *Yerex v. Durzo*, 651 So. 2d 220 (Fla. 4th Dist. Ct. App. 1995).

152. The statutory references in several places throughout the code are to "a trust described in s. 733.707(3)." That section provides:

(3) Any portion of a trust with respect to which a decedent who is the grantor has at the decedent's death a right of revocation, as defined in paragraph (c), either alone or in conjunction with any other person, is liable for the expenses of the administration of the decedent's estate and enforceable claims of the decedent's creditors to the extent the decedent's estate is insufficient to pay them as provided in § 733.607(2).

FLA. STAT. § 733.707(3) (1995) (emphasis added). The further reference "as defined in paragraph (c)" is an erroneous reference, as paragraph (3)(c) notes:

(c) This subsection shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in s. 414(p) of the Internal Revenue Code of 1986, as amended.

Id. § 733.707(3)(c). The correct paragraph (c) was omitted through legislative error. Although the error was created in ch. 95-401, it was not corrected in the 1996 Legislative session.

153. Or a statute of repose, depending on whether you are in the fourth district. See discussion *supra* p. 407.

154. FLA. STAT. § 737.306(4).

155. Donohue, *supra* note 1, at 383.

to creditors' rights in trust assets and trustees' liability to creditors, was the first step in a trend toward requiring probate of trusts. Ms. Donohue also noted that this would "[make] such trusts less attractive."¹⁵⁶

Apparently her warnings did not go unheeded. Chapter 95-401 began reversing that process. The philosophy behind this was that if the public desired a probate of the estate, that was now available through the use of a will as a testamentary document. Why should we labor to build a parallel system to probate trusts when the existing will probate system has evolved and been refined over many years and is well suited to its purpose. In fact, it was the intention of many people to avoid probate which motivated the use of the living trust as a testamentary vehicle. It was unfair and unreasonable to force the living trust into a probate process.

However, it was also unfair and unreasonable to allow persons to avoid their just debts, either during lifetime or upon death, by using a revocable trust as a testamentary alternative to a will. Therefore, the statutory duty of the trustee to be responsible ultimately to see to the payment of just debts of the decedent was retained, but in a revised format.

Specifically, the 1993 version of section 737.3056, "[t]rustee's duty to pay expenses and obligations of settlor's estate," was repealed, as was the 1993 version of section 737.3057, entitled "[t]rustee's duty to notice creditors," by chapter 95-401, sections 41 and 42, respectively, effective October 1, 1995. Adopted by chapter 95-401, section 737.3054, entitled "[t]rustee's duty to pay expenses and obligations of settlor's estate," replaced the prior statute so the trustee's duty and liability to creditors of the decedent remains in the statute.¹⁵⁷

Some have described it as a legislative oversight that the trustee's duty to pay creditors (and expenses of administration of the settlor's estate) under the conditions described in the statute continues, but no provision for the trustee to bar creditor's claims remains. This is an accurate analysis of the present state of the law, however, it was accomplished intentionally rather than by oversight. If the legislature was to keep the faith with those who assumed that their revocable trust would avoid probate, and intended it to be so, it needed to remove the "probate vestige," the creditor's publication and claim filing procedure from the trust law, which it did. That should not, however, shelter the trustee or the trust assets from just debts of the decedent, unless those debts are paid by, or extinguished through, a probate estate.

156. *Id.*

157. FLA. STAT. § 737.3054 (1995). *See also id.* § 733.707(3).

So what is the present state of the law? In the absence of a concurrent probate proceeding, the trustee is well advised to determine and pay the settlor's just debts from the trust assets. If there are disputed claims, dissident beneficiaries, challenges to the trust validity by omitted heirs, or other adversarial matters to which procedural solutions are not provided in the trust statutes, then a concurrent probate administration of the estate is the solution. Assuming none of these items are present, an "informal administration" of the trust alone is required.

The alternative would be to erect a complex procedural structure in the trust law, identical to that in probate, to resolve these issues for trusts. This cannot be what is desired by the public.

A practical problem which exists because of the implementation of this "informal trust administration" concept is that the designated trustee may have no authority to pay claims directly to the claimants. The statute does not authorize the trustee to make direct payments of creditors. That authority, if it exists, could only come from the governing instrument, the trust. Certainly 99.9% of the trust documents presently in place do not allow the trustee that authority. What results is that the payments are either made with the formal or informal consents of all beneficiaries, or a concurrent probate is initiated. The former solution should prevail in most of the trust administrations where the plan benefits only a surviving spouse, or the spouse and children. In the latter instance, the procedures of the statute¹⁵⁸ will operate to provide the structure to accomplish the desired result, that being payment of the settlor's just debts. The trustee is now defined as an interested person in the probate administration¹⁵⁹ and would, therefore, have the right to petition for administration.¹⁶⁰

A part of the new concept of a trust's responsibility for payment of the just debts of the decedent, is the necessity that the trust and the trustee become known to the creditors or to the personal representative. This is accomplished by requiring the trustee to file a notice of trust with the clerk.¹⁶¹

158. See generally *id.* § 737.3054.

159. *Id.* § 731.201(21).

160. *Id.* § 733.202(1).

161. See ch. 95-401, § 4, 1995 Fla. Laws 3275, 3281 (adopting FLA. STAT. § 737.308 (1995)). Section 737.308 provides:

(1) Upon the death of a settlor of a trust described in s. 733.707(3), the trustee must file a notice of trust with the court of the county of the settlor's domicile and the court having jurisdiction of the settlor's estate.

That notice is indexed by the clerk in the manner of a caveat if no probate proceeding is then pending, or is filed in the probate file with a copy sent by the clerk to the personal representative if such a proceeding is then pending.

The structure of this procedure provided by statute is that the personal representative (who is aware of the trust and the trustee by virtue of the notice of trust which was filed and served as required in 737.308(4)) will certify in writing to the trustee the estate's shortfall after the residuary of the probate estate (or in case of intestacy, all assets other than statutory entitlements, such as family allowance) has been consumed. Note that preresiduary devises and statutory entitlements are protected.¹⁶² The trustee, after reserving sufficient sums to pay the expenses of trust administration, including fees of the trustee and the trustee's attorney, remits amounts sufficient to fund the personal representative's certification. A settlor in the trust document may provide for the manner in which the remittitur is apportioned within the trust among the various interests, but absent specification in the trust document, the statute creates the schedule of apportionment.

Most lawyers have assumed that the concurrent probate administration, with its published notice of administration and required service on known or reasonably ascertainable creditors, will also bar the rights of creditors in the trust assets and extinguish the liability of the trustee for payment (before the two year statute of limitations expires); however, some have questioned this

(2) The notice of trust must contain the name of the settlor, the settlor's date of death, the title of the trust, if any, the date of the trust, and the name and address of the trustee.

(3) If the settlor's probate proceeding has been commenced, the clerk must notify the trustee in writing of the date of the commencement of the probate proceeding and the file number.

(4) The clerk shall file and index the notice of trust in the same manner as a caveat, unless there exists a probate proceeding for the settlor's estate in which case the notice of trust must be filed in the probate proceeding and the clerk shall send a copy to the personal representative.

(5) In any proceeding affecting the expenses of the administration of the estate, or any claims described in s. 733.702(1), the trustee of a trust described in s. 733.707(3) is an interested person in the administration of the grantor's estate.

(6) Any proceeding affecting the expenses of the administration of the estate or any claims described in s. 733.702(1) prior to the trustee filing a notice of trust are binding upon the trustee.

(7) The trustee's failure to file the notice of trust does not affect the trustee's obligation to pay expenses of administration and enforceable claims as provided in s. 733.607(2).

FLA. STAT. § 737.308 (1995).

162. *Id.* § 733.607(2) (1995).

result. The operative statute¹⁶³ provides: “no claim or demand *against the decedent’s estate . . . is binding on the personal representative, or on any beneficiary unless filed within the later of 3 months after the time of the first publication of the notice of administration.*”¹⁶⁴

An amendment to this statute is being considered by the probate law committee of the RPPTL section to add specific reference to the trust, trustee, and trust beneficiaries in this section.

Another significant legislative change which must be considered by the practitioner in drafting living trusts is chapter 95-401, specifically section 11, which later became section 737.111.¹⁶⁵ This statute reversed the holding in *Zuckerman v. Alter*¹⁶⁶ to the effect that a trust of personal property (specifically stocks and a bank account), which included post-death dispositions, did not require witnesses as a condition of validity.¹⁶⁷ Under the terms of the new statute, the testamentary aspects of an express trust, as defined in section 731.201(33), are invalid unless the trust is executed with the formalities required by section 732.502¹⁶⁸ for execution of a will. The compel-

163. *Id.* § 733.702 (1995).

164. *Id.* (emphasis added).

165. Section 737.111 of the *Florida Statutes* is entitled “Execution requirements for express trusts” and provides:

(1) The testamentary aspects of a trust defined in s. 731.201(33), are invalid unless the trust is executed with the formalities required for the execution of a will.

(2) The testamentary aspects of a trust created by a nonresident are not invalid because the trust does not meet the requirements of this section, if the trust is valid under the laws of the state or country where the settlor was at the time of execution.

(3) The testamentary aspects of an amendment to a trust are invalid unless the amendment is executed with the same formalities as a will.

(4) For the purposes of this section, the term “testamentary aspects” means those provisions of the trust that dispose of the trust property on the death of the settlor other than to the settlor’s estate.

FLA. STAT. § 737.111 (1995).

166. 615 So. 2d 661 (Fla. 1993). See Donohue, *supra* note 1, at 376 (providing additional discussion on this case).

167. Trusts of real property have always required execution with the formalities of a deed, requiring two witnesses, as a condition to validity. FLA. STAT. §§ 689.01, .05, .06 (1995). However, the formalities required for execution of deed differ from the formalities required for execution of a will, even though both require two witnesses.

168. See section 732.502 which provides that every will must be in writing and executed as follows:

(1)(a) Testator’s signature.—

1. The testator must sign the will at the end; or

ling question, especially as it relates to self-trusted trusts, is why should one be able to make a deathtime disposition of property by a trust, without witnesses present and subscribing, while that same disposition, if done by will, would require present and subscribing witnesses. Witnesses should be required in both or neither. The consensus is that the dignity and formality added to the event, together with the potential for later eye witness testimony, mandates the presence of witnesses. Because of the definitional breadth in section 731.201(33),¹⁶⁹ all of the popular forms of split interest trusts and the qualified personal residence trust¹⁷⁰ are caught within the scope of this execution requirement.

The drafting oversight is that existing trusts were not excluded from the operation of this section. While revocable or amendable trusts may cure the problem with an amendment or revocation, the real problem lies in existing trusts which are neither revocable or amendable. The argument may be made by testate or residuary beneficiaries of the decedent's probate estate,¹⁷¹ that application of the statute to existing qualified charitable remainder trusts, or pooled income funds created in the trust form, invalidate the post death disposition provisions. Moreover, these trust assets are properly assets

2. The testator's name must be subscribed at the end of the will by some other person in the testator's presence and by his direction.

(b) *Witnesses.*—The testator's:

1. Signing, or

2. Acknowledgment:

a. That he has previously signed the will, or

b. That another person has subscribed the testator's name to it, must be in the presence of at least two attesting witnesses.

(c) *Witnesses' signatures.*—The attesting witnesses must sign the will in the presence of the testator and in the presence of each other.

(2) Any will, other than a holographic or nuncupative will, executed by a nonresident of Florida, either before or after this law takes effect, is valid as a will in this state if valid under the laws of the state or country where the testator was at the time of execution. A will in the testator's handwriting that has been executed in accordance with subsection (1) shall not be considered a holographic will.

(3) No particular form of words is necessary to the validity of a will if it is executed with the formalities required by law.

(4) A codicil shall be executed with the same formalities as a will.

FLA. STAT. § 732.502 (1995).

169. Section 731.201(33) provides that, "[t]rust" means an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust." FLA. STAT. § 731.201(33) (1995).

170. To the extent of any testamentary aspects.

171. Or perhaps by the IRS.

subject to the residuary clause of the grantor/settlor's will, or to be inherited by beneficiaries of the intestate grantor/settlor. Assuming, however, these trusts are of the nature of contracts, then retroactive application of this statute is constitutionally defective as impairing the right to contract. This deficiency was recognized after the passage of chapter 95-401, however, since no legislation of any consequence in the trusts and estates area passed during the 1996 Legislative session, this oversight was not corrected.

Chapter 95-401 added several new trust administration aspects which create a power in the trustee to hold new additions to the trust as a separate trust, or incorporate them into the trust, and also creates a right to sever an existing trust.¹⁷² These powers are granted principally to avoid tax consequences involving the generation skipping tax.¹⁷³ In the first instance, if a devise is made to an existing exempt generation skipping trust, whether one which is grandfathered as exempt, or one which was created as exempt, by keeping the new assets separate, a taint of the existing trust will be avoided. In the second instance, this will allow a fiduciary, absent documentary authority, to divide a trust which might have an inclusion ratio¹⁷⁴ of greater than zero and less than one into two identical trusts, one having an inclusion ratio of zero and the other of one. This will facilitate administration and will affect taxable distributions and taxable terminations.¹⁷⁵

VI. GUARDIANSHIPS

With a court order, a guardian may exercise certain defined powers regarding trusts held by the ward in a fiduciary capacity.¹⁷⁶ In *In re Guardian-*

172. See FLA. STAT. § 737.402(2)(c) (1995). The court is also granted authority to order severance or combination of trust. FLA. STAT. § 737.403 (1995).

173. See I.R.C. § 2613 (1995).

174. *Id.*

175. *Id.* §§ 2612, 2621.

176. See FLA. STAT. § 744.441 (1995). This section entitled Powers of guardian upon court approval provides:

(1) After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

....

(2) Execute, exercise, or release any powers as trustee, personal representative, custodian for minors, conservator, or donee of any power of appointment or other power that the ward might have lawfully exercised, consummated, or ex-

ship of Muller,¹⁷⁷ the guardian who was the decedent's son, wanted to remove the serving trustee of the decedent's preexisting revocable trust on the grounds of conflict of interest. There was pending litigation between the guardian on behalf of the ward and the person who was serving as trustee of the trust. The equities were clearly with the guardian, but the trial judge "with reluctance" denied the petition finding that the statutes relied upon by the movants did not contain the authority to remove a trustee.¹⁷⁸

The Fourth District Court of Appeal in a per curiam opinion from a panel of senior judges construed the language of section 744.441(2) providing "or other power" to include the power a ward reserved to amend his own trust. This construction ignores the well established rule of statutory and document construction, *ejusdem generis*, which provides that a general reference following a specific list is to be construed as limited by the types of items in the specific list.¹⁷⁹ In this instance, all the powers referred to are powers held in a fiduciary capacity.¹⁸⁰ That rule of construction would require the reference to "other power" to be interpreted as, "other fiduciary power." In this instance, the reserved power of the ward was a personal power as grantor, to amend his trust. It is curious that if there was an actual present conflict of interest between the trustee and the ward, that the circuit court, in a proceeding brought under section 737.201(1)(a), which gives the court specific power to "[a]ppoint or remove a trustee,"¹⁸¹ would not have done so.

Another Fourth District Court of Appeal case decided one year later also addresses section 744.441.¹⁸² In *In re Guardianship of Sherry*,¹⁸³ the court would not permit a circuit judge to allow a guardian to create a trust for the ward so as to change the ultimate beneficiary of the ward's estate because it would not result in any tax savings.¹⁸⁴ As the court stated, there is no reason to negate the general principal that a guardian cannot exercise a

cuted if not incapacitated, if the best interest of the ward requires such execution, exercise, or release.

....

(19) Create revocable or irrevocable trusts of property of the ward's estate which may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or in connection with estate planning.

Id. § 744.441(1), (2), (19).

177. 650 So. 2d 698 (Fla. 4th Dist. Ct. App. 1995).

178. *Id.* at 699.

179. See generally *Metropolis Publishing Co. v. Lee*, 170 So. 442 (Fla. 1936).

180. Except the reference to a power of appointment, which is a personal power.

181. FLA. STAT. § 737.201(1)(a) (1995).

182. See FLA. STAT. § 744.441(19).

183. 668 So. 2d 659 (Fla 4th Dist. Ct. App. 1996).

184. *Id.* at 660.

purely personal right of the ward.¹⁸⁵ In this case, the ward, Ruth, and her husband, George, were the co-grantors of a joint revocable trust. That trust provided for disposition of its assets on the death of both grantors to Harold and his wife, George's son and daughter-in-law. At the time of the guardianship adjudication, Ruth and George were in dissolution proceedings. The guardianship court approved an agreement between the guardian and George (who was the trustee of the trust) to distribute one-half of the family assets by means of a distributions of the corpus of the trust to Ruth's guardian. Harold and his wife did not approve the agreement.

Ruth's guardian received the distribution of assets, but Ruth's existing will poured her assets on death back into the trust. The guardian petitioned to create a new trust for Ruth into which the funds would be placed, which provided testamentary disposition to Ruth's friends. George objected and the court held:

the trial court erred in approving Appellee's petition to create a trust that would change the ultimate beneficiary of Ruth's estate from Harold and his wife to Fields, as it is clear that doing so had nothing to do with either tax or estate planning, as authorized under the statute. No benefits will accrue to the estate as a result of the guardian's substituting his judgment of what the ward would do now if she were not incapacitated.¹⁸⁶

There is another interesting line of cases which limits fees that are charged and collected by close family members for guardianship services. In one such case, a mother became a guardian for her daughter and was the recipient of a medical malpractice settlement of \$2.85 million on behalf of her daughter.¹⁸⁷ An estrangement later developed between the mother and her now adult daughter, which resulted in removal of the mother as guardian and restoration of some of the rights of the ward. As a part of her removal, the mother/guardian applied for the award of guardian's fees. The court in *In re Guardianship of Neher* held:

a daughter is not entitled to compensation as a guardian of the person of her mother for doing what a daughter does. *In re Read v. Kenefick*, 555 So.2d 869 (Fla. 2d DCA 1989). There is also no reason that a mother should be entitled to compensation for doing

185. *Id.*

186. *Id.*

187. *In re Guardianship of Neher*, 659 So. 2d 1294 (Fla. 2d Dist. Ct. App. 1995).

what a mother does. In this case, however, not all of Sharon Neher's actions were actions that are normally done by a mother, and she should have received compensation for those services that were not. This ruling constitutes a holding that Sharon Neher preformed some compensable services for the guardianship. Sharon Neher established a guardianship for her daughter, filed annual accountings, performed other services that were beyond the duties of a mother, and successfully thwarted an attempt to terminate the guardianship. Therefore, she should be compensated for some services.¹⁸⁸

Another interesting case, which follows a developing line of authority is *Wright v. Department of Health and Rehabilitative Services*.¹⁸⁹ Ms. Wright, a professional guardian, was removed from all guardianships on a finding of probable cause by the Department of Health and Rehabilitative Services ("HRS") that "she had exploited her wards by improper management of funds."¹⁹⁰ The statute requires that the guardian "file with the court a true, complete, and final report of [her] guardianship within twenty days after [her] removal."¹⁹¹ Ms. Wright refused to do so claiming her fifth amendment privilege against self-incrimination. The court held her in contempt for refusal to comply with its order and ordered her incarcerated until compliance.¹⁹² The Fourth District Court of Appeal made an extensive review of the law from other states, and federal jurisdictions, and concluded that by accepting her fiduciary position, with its requirement to account, that Ms. Wright waived her future right not to incriminate herself by fulfilling those incumbent duties.¹⁹³

The issue of standing in a guardianship matter is one not well defined in the statutes. Persons who allege that they are "relatives and beneficiaries under the ward's will" and who were taking care of the ward before she was declared incapacitated are interested persons under Rule 5.700(a) of the *Florida Probate Rules*, and have standing to object to a final accounting and petition for discharge of the guardian of a deceased ward.¹⁹⁴

188. *Id.* at 1297.

189. 668 So. 2d 661 (Fla. 4th Dist. Ct. App. 1996).

190. *Id.* at 662.

191. *See* FLA. STAT. § 744.511 (1995).

192. *Id.* at 662.

193. *Id.* at 662-63.

194. *Bachinger v. SunBank/South Florida, N.A.* 675 So. 2d 186, 186 (Fla. 4th Dist. Ct. App. 1996).

If they do not have a sufficient interest to question how her funds were spent, there is probably no one who does, and we do not think that should be the case. As Judge Sharp observed in *SunBank and Trust Co. v. Jones*, “[c]ourts must scrupulously oversee the handling of the affairs of incompetent persons under their jurisdiction and err on the side of over-supervising rather than indifference.”¹⁹⁵

Judge Glickstein’s dissent follows *McGinnis v. Kanevsky* holding to the contrary.¹⁹⁶

Finally, in *Lawyers Surety Corp. v. Saltz*, a surcharge action, the court found that the burden of proof of improper expenditures was with the plaintiff and that the plaintiff had failed to meet that burden.¹⁹⁷ The guardian had paid \$3,000 per month to the ward’s wife for eight months for the care of the ward. The allowance was deposited by the ward’s wife into a joint account from which her personal expenses were also paid. The guardian did not require or obtain any accounting from the wife for the expenditures. The court found that the plaintiff failed to carry the burden of proof to show that the guardianship had been damaged by this admittedly improper disbursement by the guardian.¹⁹⁸

VII. ELECTIVE SHARE

In 1994, the Third District Court of Appeal decided an important elective share case entitled, *Friedberg v. SunBank/Miami, N.A.*¹⁹⁹ The widow petitioned to take an elective share against the assets of a revocable inter vivos trust created by the decedent two years prior to death. The marriage was a thirty-eight year marriage. The total value of the estate exceeded \$7,000,000 of which all but about \$250,000 was funded in the decedent’s revocable trust at the time of his death. The trust provided for the majority of the estate to pass outright to charity, with a small portion to remain in trust in order to generate income for the widow during her lifetime. The opinion suggests that the trust was created and intended “to diminish or eliminate a surviving

195. *Id.* at 188 (quoting *SunBank & Trust Co. v. Jones*, 645 So. 2d 1008, 1017 (Fla. 5th Dist. Ct. App. 1994)).

196. *Id.* (Glickstein, J., dissenting) (following *McGinnis v. Kanevsky*, 564 So. 2d 1141 (Fla. 3d Dist. Ct. App. 1990)).

197. 658 So. 2d 1152 (Fla. 2nd Dist. Ct. App. 1995).

198. *Id.* at 1152-53.

199. 648 So. 2d 204 (Fla. 3d Dist. Ct. App. 1994).

spouse's statutory elective share."²⁰⁰ The opinion noted that the legislature had considered and rejected adoption of the "augmented estate" concept in the Uniform Probate Code, which includes in the elective share right the value of assets not subject to probate, but over which the decedent exercised ownership or control; in this case the value of the revocable trust would have been included under that provision of the Uniform Probate Code.

The court was troubled by this result and indicated:

[w]e must point out, however, that we are troubled by this result. This case involves a long term, intact marriage. We find it strange that a divorced spouse is entitled under section 61.075, Florida Statutes, to reach assets held in a revocable, inter vivos trust, but a loving, devoted spouse is not. . . . Indeed, the amicus brief stated that a citizen has "a constitutional right to be a mean-spirited, no good curmudgeon" and that there are no "statutory impediments to developing an estate plan that cuts out the spouse." Although we believe this to be a manifestly unfair result and poor public policy, we recognize that we are not the appropriate forum to correct the same. We encourage the legislature to revisit the issue.²⁰¹

The admonition in the opinion for the legislature to revisit the issue was prophetic because, while the court was deciding this issue, a special committee of the RPPTL section was drafting proposed legislation which would reverse the *Friedberg* result by adoption of a hybrid version²⁰² of the augmented estate concept. A motivating factor for this revision was a different situation similar to *Friedberg*, whereby, a well know trusts and estates lawyer who died in 1993 created and funded a revocable living trust before his death to deprive his widow in a very long term marriage of any interest in his estate. Under the proposed legislation, Mrs. Friedberg would have had an entitlement to forty

200. *Id.* at 205 (citation omitted).

201. *Id.* at 206.

202. The current version of the augmented estate in the Uniform Probate Code includes not only the decedent's probate and nonprobate estate in the calculation, but also includes the surviving spouse's net personal estate (including certain nonprobate transfers to others and reduced by "enforceable claims" against the surviving spouse) in the calculation, first "grossing up" all the family property, then considering the wife's net personal assets as being first funded in satisfaction of the elective share. U.P.C. § 2-207. If there remains a deficiency, then assets of the decedent's estate are used to satisfy the "short fall." In the Florida modification, the surviving spouse's assets (and obligations) are neither counted in the original pool, nor in the funding formula. This was a concession to simplicity at the expense of perfect equity.

percent of the value of the assets of the revocable living trust, with a partial credit for the value of the income trust created for her.

In reality, the elective share is a right only available to spouses of decedents who do not have good legal advice on the ease with which it may be avoided. If there is a public policy in this state to prevent total disinheritance of a spouse, the law should be amended so it accomplish its intended result; if not, it should be repealed.

After several years of intensive work, the special elective share committee²⁰³ reported proposed legislation to the executive counsel, which approved the recommendation and this was introduced in the 1996 Legislature as House Bill 2157. This bill was not reported out of the committee on either the house or the senate side and did not receive action during 1996. It will be reintroduced again in 1997.

VIII. JOINT BANK ACCOUNTS

The topic of joint and survivorship bank accounts has remained active in the case law since the last survey, and remains both unsettled, conflicting, and confusing.

A difficult concept is the effect of creation of a joint account with right of survivorship as it relates to creation of an immediate ownership in the funds deposited by the non-depositing joint tenant. This arises in the context of the effect on a non-withdrawing joint tenant's rights when another joint tenant withdraws the proceeds in the account. The Third District Court of Appeal has held that, absent clear and convincing evidence to the contrary, creation of a joint tenancy with rights of survivorship presumed the immediate creation of ownership rights by present gift in the non-contributing tenant(s), and that interest survives withdrawal by another tenant.²⁰⁴ This view is based on cases which found the immediate creation of an interest in the joint tenant, so as to avoid difficulty with the failure to comply with the statute of wills. The theory was that the statute of wills required that testamentary dispositions of property only occur if the instrument complied with the requirements for execution of a will. Bank signature cards, although providing for survivorship, did not comply. Therefore, before appropriate changes to the statutes, the only way courts could validate the survivorship provisions in signature cards was to find that a gift of the

203. The author served as a member of this Committee.

204. *De Soto v. Guardianship of De Soto*, 664 So. 2d 66 (Fla. 3d Dist. Ct. App. 1995); *Hagopian v. Zimmer*, 653 So. 2d 474 (Fla 3d Dist. Ct. App. 1995).

account occurred at its creation. Some of the old cases discussed the fact that the surviving joint tenant was in possession of the passbook, evidencing the "donor's" intent to make a present gift.²⁰⁵ That fiction is unnecessary under the present statutory provisions²⁰⁶ and the old cases which found the legal fiction of a present gift in order to validate the survivorship rights are no longer required.²⁰⁷ However, they are still being cited, and in the Third District Court of Appeal, are still good law.

However, in *Katz v. Katz*,²⁰⁸ where the contributing joint tenant withdrew the funds from the joint account and purchased securities in his own name, the Fourth District Court of Appeal rejected the argument of his surviving spouse that, following his death, the securities belonged to her since the funds used to purchase the securities had been joint funds.²⁰⁹ In the third district, the funds would have resulted in an immediate gift to the non-contributing spouse, and she would have been entitled to at least one-half of the securities, since it was presumably her funds (by gift) which were used to purchase that one-half. The better reasoned view is that there is no immediate gift upon deposit and that the interest of the non-contributing joint tenant or tenants is only created by the survivorship provisions of the account and only comes into possession after the death of the contributing tenant.

There is also some case law suggesting that such accounts may be owned by the entireties, if the joint tenants are also husband and wife.²¹⁰ This concept is sometimes applied to bank accounts to shelter them from lifetime third party creditor claims of one tenant. However, the concept is native to real property interests and does not fit well when applied to personal property ownership. Since an entireties interest cannot be severed without the consent of both spouses, one characteristic of such a bank account is that neither spouse can withdraw funds from the account without the consent of the other. In practice, this would require two signatures on each check or withdrawal order.

205. See generally *Spark v. Canny*, 88 So. 2d 307 (Fla. 1956); *Chase Federal Sav. & Loan Ass'n v. Sullivan*, 127 So. 2d 112 (Fla. 1960).

206. See ch. 92-303, § 48, 1992 Fla. Laws 2739, 2788 (creating FLA. STAT. § 655.79 (Supp. 1992) (effective July 3, 1992)).

207. See *In re Estate of Combee*, 601 So. 2d 1165 (Fla. 1992); *In re Guardianship of Medley*, 573 So. 2d 892 (Fla. 2d Dist. Ct. App. 1990), *cause dismissed*, 629 So. 2d 134 (Fla. 1993).

208. 666 So. 2d 1025 (Fla 4th Dist. Ct. App.), *review denied*, 675 So. 2d 927 (Fla. 1996).

209. *Id.* at 1027.

210. *Sitomer v. Orlan* 660 So. 2d 141 (Fla 4th Dist. Ct. App. 1995).

IX. DURABLE POWER OF ATTORNEY

1995 was an important legislative year for powers of attorney. Section 17 of chapter 95-401 substantially reworded section 709.08, entitled "Durable power of attorney."²¹¹ This was another piece of important legislation which had been drafted by a special committee²¹² of the RPPTL section, and which had previously been introduced, but failed to pass.

Among the changes brought by this amendment was to allow "a financial institution as defined in chapter 655, with trust powers, having a place of business in this state and authorized to conduct trust business in this state" to serve as an attorney in fact. If a petition to adjudicate incapacity of the principal is filed, notice of the petition must be served on each known attorney in fact. This is because adjudication will suspend the power of attorney unless the guardianship court orders otherwise.

One of the most important aspects of the new statute is the authority of third parties to rely on the power of attorney until notice of revocation is received. The principal must hold each third party harmless from any loss or liability suffered as a result of actions taken at the direction of the attorney in fact. It also authorizes the third party to require the attorney in fact to execute and deliver an affidavit stating that the principal is not deceased, a petition to determine incapacity is not pending, that the principal has not been adjudicated incapacitated, and has not revoked the power. A statutory form of the affidavit is provided.

However, what makes the law work, is a provision which allows for assessment of attorneys' fees against any third party who unreasonably refuses the directions of an attorney in fact pursuant to the power. It had been a very common practice for banks and stock brokers to decline to accept instructions of an attorney in fact pursuant to a durable power of attorney. In practice, that now appears to be the exception rather than the rule so long as the power of attorney is executed after October 1, 1995 and pursuant to the amended statute. In fact, although prior powers continue to be valid, to gain the protection and expanded scope of the new law, the power must be executed after October 1, 1995.

Another provision of the new law which should give pause to prospective attorneys in fact, is that the attorney is charged as a fiduciary who must observe the standards of care applicable to trustees. Also, the attorney in fact is liable to interested persons if the power is exercised improperly. The

211. See FLA. STAT. § 709.08 (1995) (effective Oct. 1, 1995).

212. The author served as a member of this committee.

prevailing party in an action under this provision is entitled to award of attorneys' fees. In the case of multiple attorneys in fact, each is required to attempt to prevent a breach of the fiduciary obligations by the other or others.

X. CONCLUSION

It is not only the tax laws which are continuously in a state of change that need to be of concern to the trusts and estates lawyer, it is the changes in substantive state law and applicable state procedure. An up-to-date lawyer is as important to the practice in this substantive area as an up-to-date judge.

Eavesdropping in Florida: Beware a Time-Honored But Dangerous Pastime

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I. INTRODUCTION

In Florida, it is a third degree felony, punishable by up to five years imprisonment,¹ for a private party to tape a private conversation unless all participants consent.² Any tape made without the consent of all participants is inadmissible.³ Anthony Paul Inciarrano least expected that Earvin Herman Trimble was taping Inciarrano when Inciarrano shot Trimble to death in Trimble's office on July 7, 1982.⁴ Because the tape was the only evidence of the murder, the Florida courts were forced to decide whether they would apply the plain language of the Florida statutes or allow a cold-blooded murderer to go free.

Trimble had once been extremely successful in the real estate business in Riverside, California. Apparently, Trimble began losing profits from the business, and customers' down payments, gambling on the horse races. In 1979, when he was about to stand trial for thirteen counts of grand theft, Trimble left California for Florida and changed his name to Michael A. Phillips. First he became Reverend Phillips, a minister of the First Church of Utilitarian Science, whose mail order church sponsored a bingo parlor. Then, under phony credentials, he opened an office in Fort Lauderdale, Florida and practiced psychology as Dr. Michael A. Phillips.⁵

Inciarrano's bingo hall in Oakland Park, Florida, had been closed down by the police. Phillips met Inciarrano in 1982 through a newspaper ad and they struck a deal for Inciarrano to invest \$7000 and become a partner with Phillips in the bingo business. Later, Phillips decided not to go into business with Inciarrano. Inciarrano and Phillips argued about their business deal on July 1, 1982, in Phillips' office. Phillips tape recorded the conversation by hiding a microphone in a pencil holder, with the microphone connected by wire to a tape recorder in a desk drawer.⁶

1. FLA. STAT. § 775.082(3)(d) (1995).

2. FLA. STAT. § 934.03(2)(d) (1995).

3. *See id.* § 934.03, .06 (1995). Section 934.10 would have allowed Inciarrano to recover statutory and punitive damages as well as attorney's fees and costs. FLA. STAT. § 934.10 (1995).

4. Barry Bearak, *Court to Consider Privacy Issue; Victim Taped His Murder but Slayer May Be Freed*, L.A. TIMES, Jan. 13, 1985, at 1.

5. *Id.*; Brian Dickerson, *Murder Tape is Allowed as Evidence*, NAT'L L.J., July 22, 1985, at 5.

6. Bearak, *supra* note 4, at 1.

On July 6, 1982, Inciarrano went to Phillips' office and they argued again, with the tape recorder running.⁷ The tape caught Inciarrano yelling, "[w]e have a deal, yes or no?"⁸ Then Inciarrano cocked his gun and fired five times at Phillips. Phillips groaned and fell to the floor beside his desk.⁹ At approximately 3:30 to 3:40 p.m., a neighbor heard gunshots and called the police.¹⁰ The police found Phillips' body, the tape recorder, and the tape. The tape was the sole piece of evidence against Inciarrano. "Nobody saw Inciarrano go in; nobody saw him go out. . . . The murder weapon was never discovered. There were no fingerprints."¹¹ Inciarrano claimed that he had the right to have the tape suppressed because it had been obtained illegally, even though he admitted it was his voice on the tape.¹² He based his claim on the Florida statute,¹³ which allows tape recording of an "oral communication" only if all parties to the communication consent. As more fully explained in Part III of this article, the Florida courts struggled with this dilemma until the Supreme Court of Florida created a case law exception to the Florida law to keep Inciarrano in jail.¹⁴

This article examines how the Florida courts have interpreted the two party consent requirement of the Florida Security of Communications Act.¹⁵ It concludes that because there are many legitimate reasons for a participant in a conversation to tape the conversation, the action should not carry civil and criminal penalties, and the tape should not be inadmissible because of the interception alone. If it benefits anyone, the two party consent requirement benefits the criminal element. Accordingly, this article argues that the Florida Act should be amended to allow taping upon the consent of one party to the conversation.

Part II of this article illustrates the many reasons for intercepting conversations. Part III examines selected provisions of the Omnibus Crime

7. *Id.*

8. Barry Bearak, *Conviction Upheld in Illegally Recorded Murder*, L.A. TIMES, June 28, 1985, at 22.

9. Dickerson, *supra* note 5, at 5.

10. *Inciarrano v. State*, 447 So. 2d 386, 387 (Fla. 4th Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272 (Fla. 1985); *Privacy for a Murder*, WASH. POST, Aug. 3, 1985, at A20.

11. Statement of the prosecutor, Richard T. Garfield; Bearak, *supra* note 4, at 1.

12. FLA. STAT. § 934.09(9)(a) (1995); Dickerson, *supra* note 5, at 5.

13. FLA. STAT. § 934.03(2)(d).

14. *Inciarrano*, 473 So. 2d at 1273.

15. Chapter 934, *Florida Statutes* is entitled "Security of Communications," and is commonly referred to as the Security of Communications Act. Sections 934.01-.10 of this Act will hereinafter be referred to as the "Florida Act."

Control and Safe Streets Act of 1968,¹⁶ as amended,¹⁷ and selected decisions of the United States Supreme Court to provide background for the balance of the article. Part IV analyzes the Florida Act, and Part V evaluates the privacy provisions of the *Florida Constitution*. Finally, Part VI explains how the two party consent requirement is irrational.

II. WHAT IS THE REASON FOR TAPING?

The reasons for taping or intercepting conversations are many, ranging from blackmail or causing embarrassment, to entertainment, satisfaction of one's prurient interest, gathering information, gathering evidence of a crime or tort, improving workplace security or efficiency, to gathering evidence to use in divorce cases, as well as industrial espionage. In addition, some interception may be inadvertent. Still, some reasons for intercepting conversations are more legitimate than others.

The legitimate reasons include gathering information (possibly to later defend oneself) and gathering evidence of a crime or tort. At the other extreme, certain reasons for taping, such as blackmail and industrial espionage, are crimes or torts, even aside from the Florida Act. The argument made more fully in Part VI of this article is that the legitimate reasons for taping should not carry criminal and civil consequences, especially given the pervasiveness of taping.

Although illegal in Florida, if done by a private party,¹⁸ intercepting conversations is pervasive, as shown by the following examples. The examples involve either nationally known personalities or interceptions in Florida. Some were collected from newspaper articles and others from reported cases.

A. *To Blackmail or Embarrass*

Politics is rife with taping. Politicians are either taping or being taped. While President Nixon taped conversations in the oval office, Presidents Kennedy and Johnson tape recorded conversations as well. President

16. Pub. L. No. 90-351, § 82, STAT. 197 (1968) (current version at 18 U.S.C. §§ 2510-22 (1994)).

17. The 1968 Act was amended by the Electronic Communications Privacy Act of 1986 and by the Communications Assistance for Law Enforcement Act of 1994. The 1968 Act as amended by the 1986 and the 1994 Acts shall hereinafter be referred to as the "Federal Act."

18. FLA. STAT. § 934.03(2)(d). This statute requires all participants to consent to the taping. However, section 934.03(2)(c) of the *Florida Statutes*, allows a police informant who is a party to a conversation to intercept the conversation. FLA. STAT. § 934.03(2)(c).

Kennedy could press a button under the cabinet table to tape record meetings or press a button for his secretary to record telephone calls he selected. The "selected" taping totaled 248 hours of meetings and twelve hours of telephone calls.¹⁹ Gennifer Flowers tape recorded President Clinton "during four separate telephone conversations from December, 1990, when Clinton had just won reelection as governor, to December, 1991, the early weeks of the presidential campaign,"²⁰ and later sold copies of the tapes for \$19.95.²¹ Ross Perot telephoned Colonel Oliver North and offered assistance, all the while taping the call.²² HUD Secretary Henry Cisneros almost lost his job when Linda Medlar, with whom Cisneros had an affair, made available tapes of conversations between herself and Cisneros.²³ Medlar had taped their conversations over a period of almost four years.²⁴

B. *To Entertain or to Satisfy One's Prurient Interest*

Some people seem to enjoy learning private details of someone else's life. The private details are surreptitiously taped or listened to either to entertain or to satisfy one's prurient interest. According to a recent Liz Taylor biographer, Liz's third husband, Michael Todd, taped the sounds of

19. William Safire, *Kennedy's Betrayal of Trust - 260 Hours Worth of Tapes*, N.Y. TIMES, Dec. 28, 1994, at A11. Mr. Safire comments:

Hundreds of people who spoke to the [P]resident with the reasonable expectation of privacy were betrayed. And a nation that was dismayed and infuriated at the revelation of the Nixon taping system in 1973 can see today where that sleazy business began in earnest: in 1962, at the personal direction of John Fitzgerald Kennedy.

Id.

20. William C. Rempel, *Flowers to Market Tapes of Conversations with Clinton*, L.A. TIMES, May 24, 1994, at A18.

21. *Id.*

22. William Safire, *Will Phone Taps for 'Protection' Turn Us Into a Nation of Spies?*, CHI. TRIB., Nov. 13, 1992, at C19.

23. *Cisneros to Remain, Fight Probe*, ORLANDO SENT., Mar. 15, 1995, at A1, A4.

24. *Excerpt from Reno's Letter on Cisneros*, N.Y. TIMES, Mar. 15, 1995, at B9.

The tapes, secretly recorded by Ms. Medlar over four years, showed that he had discussed payments to her that were higher than Mr. Cisneros had publicly acknowledged he had paid. In addition, the tapes indicated he had continued paying her after he joined the Cabinet in early 1993, which he had publicly denied.

David Johnston, *Concluding that Cisneros Lied, Reno Urges a Special Prosecutor*, N.Y. TIMES, Mar. 15, 1995, at A1.

he and Liz making love, “complete with ‘fervid moaning and groaning,’”²⁵ and made copies of the tape for his friends.²⁶

In the 1980s, Anthony LaPorte was convicted of five felony counts under the Florida Act.²⁷ La Porte videotaped models in “modeling-video” sessions involving several changes of clothing. When LaPorte left the room to allow the models to change, he left the video camera running. The resulting videos captured what the models were saying as they undressed and dressed.²⁸

Newspaper articles from January and February of 1995, chronicle a number of such instances. In January 1995, an Orlando, Florida, couple were charged with kidnapping and interception of oral communications, among other charges. They apparently had a practice of finding single women in a parking lot of a local nightclub, propositioning the women, and taking them home. On one occasion, the “thrill-seeking couple kidnapped a woman from a nightclub . . . and forced her to perform sex acts for seven hours while two children slept nearby. . . . At one point, they took a break so that [the female thrill-seeker] could drive to her mother’s house and get a tape recorder to make an audio recording of the event.”²⁹

In January of 1995, in St. Petersburg, Florida, a suspected rapist was arrested. Police found some twenty tapes at the rapist’s home. The alleged rape assault for which the arrest was made was recorded on one videotape with the victim saying, “[n]o, don’t do that. I don’t want this to happen.”³⁰ Apparently, the same videotape shows the rape of another woman.³¹

In February of 1995, an Orlando area man pleaded no contest to unlawful interception of oral communication. The communications occurred at Walt Disney World’s Epcot Center. The man “would angle a video camera under the restroom stall to catch women disrobing and using the facilities.”³² Also in February 1995, a man was looking for a television cable

25. *Bio Paints a Lurid Portrait of a Boozy, Pill-popping Liz*, ORLANDO SENT., Apr. 11, 1995, at A2.

26. *Id.*

27. *LaPorte v. State*, 512 So. 2d 984, 985 (Fla. 2d Dist. Ct. App. 1987), *review denied*, 519 So. 2d 987 (Fla. 1988).

28. *Id.* at 986. LaPorte was convicted of interception of oral communications. *Id.* at 985.

29. Tom Leithauser, *Couple Charged with Rape*, ORLANDO SENT., Jan. 7, 1995, at D1, D4.

30. *Suspect's Video has a Surprise*, ORLANDO SENT., Jan. 17, 1995, at C3.

31. *Id.*

32. *Man Who Taped Women in Restroom Gets Probation*, ORLANDO SENT., Feb. 8, 1995, at C3.

in the attic above an adjoining apartment. The man had crossed through a hole in the fire wall separating the attic above his apartment from the attic above his neighbors' apartment. Once above the neighbors' apartment, the man allegedly disconnected an air conditioning duct and "stole a peek . . . at [the] two neighbors having sex."³³

C. To Gather Information

With today's litigious atmosphere, how would you defend yourself against charges of sexual harassment or other types of impropriety? A tape might be vital where the testimony of witnesses are so conflicting that you know someone is lying. What would have happened if Clarence Thomas or Anita Hill had taped their conversations? A damaging tape would have kept him off the United States Supreme Court. If he had taped a particular conversation that she testified to in detail, he could use the tape to impeach her credibility. A tape of a conversation is often much more accurate than someone testifying as to that person's recollection of what happened. In Florida, you could serve up to five years in prison³⁴ if you tape a conversation without the other person's consent,³⁵ even though it may be the only means of gathering information or later defending yourself.

Scott Bentley was a star place kicker for the Florida State University ("FSU") football team and "kicked four field goals, including a game-winning 22-yarder, in FSU's national championship victory over Nebraska in the Jan. 1[, 1994] Orange Bowl."³⁶ Bentley, who is from Colorado, had seen his father tape conversations in Colorado when he wanted to protect himself. Bentley and his father talked about protecting oneself from charges of date rape. The father said, [in Tallahassee,] "Florida State is the focus of everything. You can be a target. If someone accuses you, how do you defend yourself? I've really talked to Scotty a lot about date-rape over the past couple of years."³⁷ Scott Bentley had a three week relationship with a Florida A&M pre-nursing student, which he described as a "one-night stand,

33. *Intruder Accused of Trying to Watch Neighbors in Bed*, ORLANDO SENT., Feb. 9, 1995, at C3.

34. Under section 775.082(3)(d), a third degree felony is punishable by up to five years imprisonment. FLA. STAT. § 775.082(3)(d) (1995).

35. FLA. STAT. § 934.03(2)(d).

36. Alan Schmadtke, *FSU's Bentley Fined, Penalized in Sex Tape Case*, FT. LAUD. SUN SENT., May 17, 1994, at 1C.

37. Clay Latimer & Curtis Eichelberger, *Rogers Ready to Step it Up; Nuggets Rookie Knows Team Needs Him to Have Big Game; Bentley Sentenced for Illegal Recording*, ROCKY MOUNTAIN NEWS, May 17, 1994, at 6B.

basically,”³⁸ at her apartment in February of 1994, near the end of the relationship. Scott Bentley taped the consensual sexual activity and later played the tape to two other football players and a friend. The woman pressed charges under the Florida statute, which prohibits taping without the prior consent of all parties.³⁹ After admitting he made the tape, Bentley pleaded no contest to a misdemeanor charge and was sentenced to forty hours community service and a \$500 fine. He was also ordered to pay \$150 in court costs and was placed on probation for six months. Scott Bentley stated, “the crime was to protect myself. What I did is legal in 48 states. If I had known it was illegal, I would never have done it. . . . I wanted to protect myself from date rape or potential allegations by her.”⁴⁰

The Florida Act also limits the media’s ability to gather information. In a 1977 case, the media challenged the constitutionality of the Florida Act. In *Shevin v. Sunbeam Television Corporation*,⁴¹ a television station and the *Miami Herald* challenged the Florida Act requirement of obtaining consent of all participants to tape a conversation. The news media claimed that the provision “impaired its news gathering dissemination activities and constituted a prior restraint in violation of the First Amendment,”⁴² alleging that “three basic elements . . . necessitate the use of concealed recording equipment in investigative reporting: accuracy; candidness of person interviewed; and corroboration.”⁴³ Investigation of “consumer fraud, housing discrimination, illegal abortion, [and] corruption of officials,” among other topics, would be substantially impaired without the ability to make concealed recordings.⁴⁴ The Supreme Court of Florida held that the Florida Security of Communications Act was constitutional because the Act did not restrict what the news media could publish.⁴⁵

D. *To Gather Evidence of a Crime or a Tort*

The Florida Act has become a ready tool of law enforcement, allowing officers to gather evidence of a crime. After detaining someone, a police officer might find the need to investigate further or to search a vehicle.

38. Scott Tolley, *Bentley Sentenced for Tape Recording*, PALM BCH. POST, May 17, 1994, at 1C.

39. FLA. STAT. § 934.03(2)(d).

40. *Tolley*, supra note 38, at 1C.

41. 351 So. 2d 723, 725 (Fla. 1977).

42. *Id.* at 725.

43. *Id.*

44. *Id.*

45. *Id.* at 726–27.

Although not under arrest, the officer may suggest that the detainee sit in the back seat of the patrol car for the individual's "safety" or "convenience." And, of course, after arrest, the arrested individual is placed in the back seat of the patrol car for transportation to the police station. While the individual is in the patrol car, the officer may have a tape recorder running, in hopes that the tape will intercept useful information or incriminating statements.

One Florida court considered the following pre-arrest scenario:

Some time after the police stopped the vehicle in which appellant traveled with two other males, the officer asked the driver if he could search the vehicle. When the driver consented to the search, the officer asked the driver and two passengers, one being appellant, if they would sit in the patrol car while he searched the vehicle. According to the officer, he advised these individuals that they did not have to sit in the police vehicle and that they were free to leave if they so desired. The officer admitted that he requested they sit in the patrol car because he wanted to tape record their conversations. The officer's search revealed no contraband, and the officer sent the three men on their way. When the officer listened to the tape recorded conversation, however, he heard one of the males tell the others that the contraband was in his shoe. The officer then radioed this information to the Okeechobee Sheriff's Office and that department later apprehended the three males.⁴⁶

When the Supreme Court of Florida considered a similar pre-arrest situation, it applied article I, section 12 of the *Florida Constitution*⁴⁷ and held that "a person does not have a reasonable expectation of privacy in a police car and . . . any statements intercepted therein may be admissible as evidence."⁴⁸ Thus, because a person in a police car has no expectation of privacy in a police car, any communication made in a police car would not be protected by the Florida Act.

In June 1991, a Sarasota police detective obtained a court order allowing detectives to monitor numbers called into Roberta Jackson's display pager. The detectives intercepted the numbers by using a duplicate pager. Thus, when numbers were displayed on Jackson's pager, they were also

46. *Barrett v. State*, 618 So. 2d 269, 270 (Fla. 4th Dist. Ct. App. 1993), *cause dismissed*, 623 So. 2d 495 (Fla. 1993). The fourth district ruled that the tape recording should have been suppressed. *Id.* at 270. However, *Barrett* is no longer good law. See also *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994).

47. See *infra* notes 144, 153 and accompanying text.

48. *Smith*, 641 So. 2d at 852.

displayed on the detectives' pager. "[T]he numbers included a two- or three-digit code that identified the caller, the caller's telephone number, and the amount of drugs the caller wanted to purchase from Jackson."⁴⁹ After conducting visual surveillance of Jackson in her car, the police searched her car pursuant to a search warrant and arrested Jackson after they found cocaine. In appealing her conviction, Jackson argued that the interception of numbers on the display pager was unconstitutional because the court order had been obtained without following the stringent wiretap procedures of the Florida Act.⁵⁰ The Supreme Court of Florida held that a wiretap order involving a display pager must follow the wiretap procedure of the Florida Act.⁵¹ The court noted, "because the interception of a pager may disclose telephone numbers and coded messages as dialed by the caller, monitoring a pager with a duplicate digital display pager is more intrusive than using a pen register or a trap-and-trace device."⁵²

In early 1995, a would-be hit man and police informant, Peter Laquerre, recorded conversations between himself and a Florida State University second year law school student, Joann Plachy. Plachy claimed a professor made unwanted sexual advances. A few days later a law school secretary accused Plachy of stealing a copy of a law school exam before it was given. Plachy allegedly called Laquerre to hire him to kill the secretary. Plachy stated:

If I don't take this person out of the picture, I'm just screwed. . . . I'm looking at losing my whole law career, and I'm just about a straight-A student. . . . I cannot emphasize how very important it is. It must look like a total accident. . . . I'm talking about a situation like, say, something like there's a one-car accident; the car leaves the road and hits a tree or whatever, and the driver has a broken neck.⁵³

Plachy was arrested on February 20, 1995, and charged with the murder-for-hire scheme.⁵⁴ As more fully explained in Part III of this article, Laquerre's

49. *State v. Jackson*, 650 So. 2d 24, 26 (Fla. 1995).

50. *Id.* at 26.

51. *Id.* at 28.

52. *Id.*

53. Jack Wheaton & Mark Silva, *Student Wanted to Murder School Snitch, Police Say*, *TIMES PICAYUNE*, Feb. 22, 1995, at A9.

54. Sharon Rauch, *A Law Degree to Kill For*, *TALL. DEM.*, Feb. 21, 1995, at 1A.

tape would not run afoul of the Florida Act because Laquerre was a police informant.

E. *To Improve the Workplace*

Apparently, many employers eavesdrop on employees. In a 1993 survey conducted by *Macworld Magazine*, more than twenty-one percent of the 301 businesses surveyed “engaged in searches of employee computer files, voice mail, electronic mail, or other networking communications.”⁵⁵ These searches were primarily conducted to monitor work flow, investigate thefts, or investigate espionage.⁵⁶ An exception to the wiretap statutes allows employers to tap phone and data lines. The exception applies if the “subscriber or user” of the electronic communication service intercepts communications “in the ordinary course of its business.”⁵⁷

A recent example of employer eavesdropping that made headlines occurred in North Miami Beach. A North Miami Beach bank supervisor monitored telephone conversations of employees at the bank. The supervisor allegedly overheard a conversation between William McCarthy, a bank employee, and a potential customer. McCarthy claims that the supervisor “accused him [McCarthy] of trying to steer a prospective loan customer to a competitor,” fired McCarthy when he refused to disclose the potential loan customer’s name, and “challenged McCarthy’s application for unemployment compensation.”⁵⁸

55. *Survey Shows Snooping By Employers Widespread: Millions in the U.S. May Be Subject to Electronic Monitoring on the Job, a Magazine Reports*, ORLANDO SENT., May 23, 1993, at A13.

56. *Id.*

57. FLA. STAT. § 934.02(4)(a)(1) (1995). The business exception was the key in two Florida murder cases. In the two cases, the victims had received calls from the alleged murders while at work, the conversations were monitored on extension phones, and the victims were murdered shortly after the calls. The issue in each case was whether the testimony of the eavesdropper was admissible. *State v. Nova*, 361 So. 2d 411, 412–13 (Fla. 1978); *Horn v. State*, 298 So. 2d 194, 196 (Fla. 1st Dist. Ct. App. 1974), *cert. denied*, 308 So. 2d 117 (Fla. 1975). In *Nova*, the testimony of the eavesdropper, the victim’s supervisor, was held admissible because an earlier call had left the victim “visibly upset,” and the supervisor monitored the second call as the victim’s supervisor. *Nova*, 361 So. 2d at 413. In *Horn*, the court found that a co-worker had monitored the victim’s call out of curiosity and the co-worker’s testimony was therefore inadmissible. *Horn*, 298 So. 2d at 198–99.

The Federal Act contains the same exception. 18 U.S.C. § 2510(5)(a) (1994).

58. *Ex-worker Says Boss Bugged Telephone and Then Fired Him*, ORLANDO SENT., Jan. 4, 1995, at D5.

F. *To Use in Domestic Disputes*

The temptation is great for one spouse to tape the other spouse when the spouses are separated or contemplating divorce. In addition, access makes the installation of an eavesdropping device relatively easy. Considering the Federal Act, courts have split, some holding that the Federal Act covers interspousal taping and others holding that the Federal Act is not applicable to interspousal taping.⁵⁹

In two cases, the Supreme Court of Florida has held that the Florida Act is applicable to interspousal taping. In the first decision, the court ruled that a tape made surreptitiously by one spouse is inadmissible and that one spouse may recover civil damages against the other spouse who surreptitiously recorded a telephone conversation. In *Markham v. Markham*,⁶⁰ the Markhams had two telephone lines in their home. The first line was listed in Thomas Markham's name, and the second line was an extension of a line installed at the Nancy Markham School of Dance several blocks away. Thomas, a recording engineer, attached a tape recorder to the two lines and intercepted a number of telephone calls. Thomas offered several of the taped conversations into evidence in the Markhams' dissolution of marriage action.⁶¹ The Supreme Court of Florida noted that the Florida Act contains no exception for domestic relations cases and affirmed the district court's decision holding the tapes inadmissible.⁶²

In the second case, Mr. and Mrs. Burgess had separated when "Mr. Burgess stole into the family home, climbed into the attic, and spliced an electronic device onto the telephone lines in an effort to intercept and record Mrs. Burgess' telephone conversations. He then played these recordings to neighbors and used them for purposes of gaining an advantage for himself in the dissolution proceedings."⁶³ The court held "that the doctrine of interspousal tort immunity does not bar a civil cause of action for money damages brought by one spouse against the other under section 934.10."⁶⁴

59. Jonathan Niemeyer, *All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Act*, 81 KY. L.J. 237, 253 (1992-93); Cori D. Stephens, Note: *All's Fair: No Remedy Under Title III for Interspousal Surveillance*, 57 FORDHAM L. REV. 1035, 1037 (1989).

60. 265 So. 2d 59 (Fla. 1st Dist. Ct. App. 1972), *aff'd*, 272 So. 2d 813 (Fla. 1973).

61. *Id.* at 60.

62. *Markham*, 272 So. 2d at 814.

63. *Burgess v. Burgess*, 447 So. 2d 220, 221 (Fla. 1984).

64. *Id.* at 223.

G. *To Learn a Competitor's Secrets*

Federal law makes it a crime to manufacture "any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications."⁶⁵ Even so, "spy shops" in a number of cities had been selling illegal "bugs" useful in industrial espionage. A sixteen month investigation ended on April 5, 1995, with United States Customs Service agents raiding spy shops in twenty-four cities across the country. Some of the bugs seized were radio transmitters concealed in pens, calculators, light sockets, telephone jacks, and electric power strips. In addition, some of the bugs could "pick up conversations and transmit them more than a mile away to a receiver the size of a pack of cigarettes."⁶⁶

H. *Inadvertent Interception*

Conversations may be picked up over an AM/FM radio or short wave radio inadvertently. In one Florida case, John Sion, who lived in a tenth floor apartment near Picciolo's Restaurant, woke up one morning at 2:50 a.m., switched on his ham radio receiver, and began reading a book. When he heard a conversation over the radio that seemed to concern a robbery, he began taping it. What he had intercepted was a walkie talkie conversation between officers Chandler and Granger of the Miami Beach Police Department.⁶⁷ When Picciolo's Restaurant opened for business on May 23, 1977, one of the cooks discovered that the floor safe was empty. Even though Granger was not working the May 22, 1977, 11:00 p.m. to 9:00 a.m. shift, another officer testified that he saw Granger at approximately 3:00 a.m. on May 23, 1977, driving a marked police car. Chandler claimed that he and Granger "staged a bogus burglary on the air as a part of a wager to see whether anyone was listening."⁶⁸ The court held that the Florida Act did not prohibit the interception because walkie talkie radio signals did not come

65. 18 U.S.C. § 2512(1)(b) (1994).

66. James C. McKinley, Jr., *U.S. Agents Raid Stores in 24 Cities to Seize Spy Gear*, N.Y. TIMES, Apr. 6, 1995, at A1, B12; John Lantigua, *The Bug Stops Here: Raids Hit Spy Shops*, MIAMI HERALD, Apr. 6, 1995, at 1A, 10A.

67. *Chandler v. State*, 366 So. 2d 64, 66, 70 (Fla. 3d Dist. Ct. App. 1978), cert. denied, 376 So. 2d 1157 (Fla. 1979), aff'd on other grounds, 449 U.S. 560 (1981).

68. *Id.* at 66-67, 70.

within the Act, and because Chandler and Granger claimed to be staging a “bogus burglary,” they had no reasonable expectation of privacy.⁶⁹

III. EAVESDROPPING: SELECTED UNITED STATES SUPREME COURT CASES AND THE FEDERAL ACT

The 1967 United States Supreme Court opinion, *Katz v. United States*,⁷⁰ is the seminal privacy decision of this half of the century. In *Katz*, FBI agents suspected that Charles Katz was telephoning gambling information to persons in other states, in violation of federal law. Based upon visual surveillance, the agents predicted that Katz would use a public telephone booth to make the calls at approximately the same time each morning. The agents attached an electronic listening and recording device to the outside of the telephone booth and recorded six conversations, approximately three minutes long. During the conversations, Katz was visible through the glass panels of the telephone booth. The tapes were admitted at trial, and Katz was convicted.⁷¹

The issue in the United States Supreme Court was “whether the search and seizure conducted in this case complied with constitutional standards.”⁷² The Court held that “[t]he Government’s activities in electronically listening to and recording [Katz’s] words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”⁷³ The Court reasoned,

the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in

69. *Id.* at 70. At the time the case was decided, the Florida Act only covered those wire communications transmitted by “wire, cable, or other like connection.” *Id.* The Florida Act was subsequently amended to include protection for radio communications as an “electronic communication” but there is an exception for any radio communication “readily accessible to the general public.” FLA. STAT. § 934.02(12), .03(2)(h)(1) (1995).

70. 389 U.S. 347 (1967).

71. *Id.* at 354 n.14.

72. *Id.* at 354.

73. *Id.* at 353.

a telephone booth may rely upon the protection of the Fourth Amendment.⁷⁴

The Court noted that the interception would have been constitutional if the agents had obtained a warrant.⁷⁵

When later courts have had to decide whether the interception of a communication is constitutional, most have used the two-part test from Justice Harlan's concurrence, which is as follows:

[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.⁷⁶

Katz set forth the privacy framework in the context of search and seizure and led to the passage of the Omnibus Crime Control and Safe Streets Act of 1968 [hereinafter the "1968 Act"]. The 1968 Act filled in the *Katz* framework. The introductory language to Title III of the 1968 Act states:

In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.⁷⁷

74. *Id.* at 351–52 (citations omitted).

75. *Katz*, 389 U.S. at 354.

76. *Id.* at 361 (Harlan, J., concurring) (citations omitted).

77. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, Pub. L. No. 90-351, § 82, STAT. 197 (1968), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 237, 253.

In passing the 1968 Act, Congress attempted to prevent the interception of oral and wire communications without the consent of at least one party to the communication. The Act required a court order to intercept a communication without the consent of any of the parties to the conversation.⁷⁸ Evidence obtained from unauthorized interception was inadmissible in court. The Act also provided criminal penalties for its violation and authorized civil damages.⁷⁹

The Federal Act generally protects wire, electronic, and oral communications from interception, and the communications, once intercepted, are protected from being disclosed to others.⁸⁰ Wire and electronic communications are not protected if they are “readily accessible to the general public.”⁸¹ Harlan’s two part test from *Katz* also comprises part of the definition of an “oral communication” under the Federal Act. Oral communications are protected if “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”⁸² Two exceptions to the Federal Act⁸³ allow a law enforcement officer or informant participating in the conversation, and a private party⁸⁴ to the conversation to record the conversation. Absent the consent of a participant, interception and disclosure may be done only after obtaining a court order.⁸⁵ Unlawfully intercepted communications are inadmissible,⁸⁶ and the person intercepting or disclosing the communications in violation of the Federal Act may be subject to fine, imprisonment, and civil damages.⁸⁷

In the Plachy murder-for-hire scheme outlined in Part II, the would be hit man, Peter Laquerre, was working as an informant for the Florida Department of Law Enforcement (“FDLE”), allowing the FDLE to tape conversations between himself and Plachy.⁸⁸ Informants are often used by police to gather information. The informant meeting with a suspect is often fitted with a “bug,” located on the informant’s person, which transmits the

78. *Id.* at 253.

79. *Id.* at 253–54.

80. *Id.* at 253.

81. 18 U.S.C. § 2511(2)(g)(i) (1994).

82. *Id.* § 2510(2) (1994).

83. *Id.* § 2511(2)(c)–(d).

84. The private party exception applies “unless such communication is intercepted for the purpose of committing any criminal or tortious act . . .” *Id.* § 2511(2)(d).

85. *Id.* §§ 2516, 2517 (1994).

86. *Id.* § 2515 (1994).

87. *Id.* §§ 2511(4)–(5), 2520 (1994).

88. Wheaton & Silva, *supra* note 53, at A9.

conversation between the suspect and the informant, to an officer located at a distance. Under the Federal and Florida Act, an informant can intercept a conversation.⁸⁹ Although the constitutionality of the use of informants to gather information has been questioned, the United States Supreme Court has never held their use to be unconstitutional.⁹⁰

The Federal Act preempted regulation of interception of communications by the states. Thus, the Florida Act must provide at least as much protection against interception of communications as does the Federal Act. In addition, the Florida Act can provide more protection against interception of communications than does the Federal Act.⁹¹ In one major respect, the Florida Act does provide more protection than the Federal Act. Florida requires *all* participants to consent before a private party may tape a conversation even though the Federal Act only requires one party consent.

IV. THE FLORIDA ACT

In many respects, the Florida Act closely follows the Federal Act. The Florida Act also generally protects wire, electronic, and oral communications from interception, and the communications, once intercepted, are protected from being disclosed to others. Wire and electronic communications are not protected if they are "readily accessible to the general public,"⁹² and oral communications are protected if "uttered by a person exhibiting an expectation that such communication is not subject to interception under circum-

89. FLA. STAT. § 934.03(2)(c) provides:

It is lawful under ss. 934.03–934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

18 U.S.C. § 2511(2)(c) provides:

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

90. *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. White*, 401 U.S. 745 (1971) (plurality decision), *cert. denied*, 406 U.S. 962 (1972); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952).

91. *State v. Rivers*, 660 So. 2d 1360, 1362 (Fla. 1995), *cert. denied*, 116 S. Ct. 1019 (1996).

92. FLA. STAT. § 934.03(2)(h)(1).

stances justifying such expectation.”⁹³ Two exceptions to the Florida Act⁹⁴ allow conversations to be recorded when either a law enforcement officer or informant is participating in the conversation, or where a private party to the conversation has obtained prior consent by the other parties involved in the conversation.⁹⁵ If a law enforcement officer or informant is a participant, only the law enforcement officer or informant need consent. In contrast to the Federal Act, the Florida Act requires all private parties to consent, if only private parties are participants. Absent consent, interception and disclosure may be done only after obtaining a court order.⁹⁶ The Florida Act also makes it unlawful “to intercept any communication for the purpose of committing any criminal act.”⁹⁷ Unlawfully intercepted communications are inadmissible,⁹⁸ and the person intercepting or disclosing the communications in violation of the Florida Act is guilty of a third degree felony punishable by not more than five years imprisonment or a \$5000 fine.⁹⁹ The person may also be subject to statutory damages of the greater of \$100 per day or \$10,000 in punitive damages, reasonable attorneys’ fees, and court costs.¹⁰⁰ The Florida Act contains a good faith defense not included in the Federal Act:

(2) A good faith reliance on:

....

(b) A good faith determination that federal or Florida law permitted the conduct complained of shall constitute a complete defense to any civil or criminal, or administrative action arising out of such conduct under the laws of this state.¹⁰¹

93. *Id.* § 934.02(2).

94. *Id.* § 934.03(2)(c)–(d). For the content of subsection (2)(c), *see supra* text accompanying note 89. Section 934.03(2)(d) provides:

It is lawful under §§ 934.03–934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.

FLA. STAT. § 934.03(2)(d).

95. FLA. STAT. § 934.03(2)(c).

96. *Id.* §§ 934.07–.08 (1995).

97. *Id.* § 934.03(2)(e).

98. *Id.* § 934.06.

99. *Id.* §§ 775.082(3)(d), .083(1)(c) (1995), 934.03(4)(a).

100. FLA. STAT. § 934.10(1) (1995).

101. *Id.* § 934.10(2)(b). Although effective October 1, 1989, the ambiguous wording of the good faith exception has received only very slight attention. Only two reported cases have referenced the good faith exception. *Wood v. State*, 654 So. 2d 218 (Fla. 1st Dist. Ct. App.

This article opened with the facts from *Inciarrano*, a case in which the murder victim taped his own murder. Prior to *Inciarrano*, the admissibility of surreptitious tapings had been the subject of *State v. Walls*,¹⁰² an extortion case, and *State v. Tsavaris*,¹⁰³ a murder case. The taping in those cases would have been admissible under the Federal Act because one of the participants consented to the taping. In *Walls* and *Tsavaris*, the Supreme Court of Florida applied the plain language of the Florida Act and held that the tapings were inadmissible. This portion of the article will first review *Walls* and *Tsavaris* and will examine how the Florida courts dealt with *Inciarrano*.

A. *State v. Walls*

In *Walls*, Harold Walls and Stanley Gerstenfeld had been charged with extortion.¹⁰⁴ Walls and Gerstenfeld allegedly threatened Francis Antel in Antel's home on February 19, 1975. Antel had recorded the conversation between himself and the two suspects. Although Antel was ready to testify as to the contents of the conversation at trial, the State wanted to introduce the taping to bolster Antel's testimony.¹⁰⁵ The Supreme Court of Florida ruled the applicable portions of the Security of Communications Act constitutional and affirmed the trial court's order suppressing the tape.¹⁰⁶

1995); *Reliance Ins. Co. v. Lazzara Oil Co.*, 601 So. 2d 1241 (Fla. 2d Dist. Ct. App. 1992). The *Reliance* court noted that the exception was not applicable because the alleged recordings were made before the effective date of the exception. *Reliance*, 601 So. 2d at 1242 n.1. In *Wood*, Kevin Earl Wood had previously been involved in a federal lawsuit, and a state divorce and custody case and had taped two conversations in connection with those cases. *Wood*, 654 So. 2d at 219. He was later convicted of unlawful interception of communications. *Id.* At his trial, he attempted to introduce a good faith defense under section 934.10(2)(b) of the *Florida Statutes*. The trial court refused to allow testimony on the good faith defense, but the defense was allowed to proffer certain information. The proffer showed that, unable to initially afford an attorney, Wood researched case law and spoke with people involved in amending the Florida Act to include the good faith exception. When Wood finally obtained an attorney, the attorney "agreed with his interpretation of the Florida wire-tapping law, which was that if a federal law permitted the activity in question, the state law did so also." *Id.* On appeal, the court reversed and remanded for a new trial to allow evidence as to whether Wood "acted in good-faith reliance on a good-faith determination." *Id.* at 220.

Does the good faith exception in effect amend the Florida Act to allow a private party participant to record a conversation if the party has first obtained a legal opinion from an attorney?

102. 356 So. 2d 294 (Fla. 1978).

103. 394 So. 2d 418 (Fla. 1981), *review denied*, 424 So. 2d 763 (Fla. 1983).

104. *Walls*, 356 So. 2d at 295.

105. *Id.*

106. *Id.* at 297.

The language of the statutes in question is clear and unambiguous, and no exception for the situation we have before us is provided. This Court cannot substitute its judgment for that of the Legislature and create an exception which would encompass the instant circumstances. . . . *The function of this Court is to interpret the law and is neither to legislate nor determine the wisdom of the policy of the Legislature.*¹⁰⁷

B. Tsavaris v. Scruggs

In *Tsavaris*, Dr. Louis J. Tsavaris, a psychiatrist, was charged with the first degree murder of one of his patients and his alleged lover, Cassandra Burton.¹⁰⁸ On April 19, 1975, Dr. Tsavaris called an ambulance to Burton's apartment. Burton was already dead when the ambulance arrived. Initially, Dr. Tsavaris suggested that Burton had died of a drug overdose and emphasized that he and Burton were no more than patient and psychiatrist.¹⁰⁹

The next day, however, a friend of Miss Burton told a sheriff's deputy that Miss Burton and Dr. Tsavaris had been having an affair; that she had become pregnant; and that she had undergone an abortion only four weeks earlier. According to the deputy's informant, Miss Burton had not wanted the abortion, but Dr. Tsavaris insisted; the couple's relationship was a stormy one, and they had recently quarreled over Miss Burton's demand that Tsavaris obtain a divorce in order to marry her.¹¹⁰

On Sunday, April 20, 1975, Detective Poindexter of the Hillsborough County Sheriff's Department was conferring with Dr. Feegel at the morgue. Feegel was the forensic pathologist who was performing Burton's autopsy. Poindexter had told Feegel about the alleged relationship between Tsavaris and Burton, and Burton's abortion. Dr. Tsavaris called for the autopsy results and Feegel took the call on speaker phone. After Dr. Tsavaris identified himself, Feegel and Poindexter exchanged glances and Feegel turned on a tape recorder, which would pick up sounds in the room. When Feegel explained that he did not have the results of the autopsy, Tsavaris asked if he could call back and Feegel suggested Tsavaris call at 1:30.

107. *Id.* at 296 (emphasis added) (citations omitted).

108. *Tsavaris v. Scruggs*, 360 So. 2d 745, 747 (Fla. 1977).

109. *Id.* at 747-48.

110. *Id.* at 748.

Tsavaris called two more times that day, and each time the sheriff's officers recorded the conversations.¹¹¹ Dr. John Feegel testified at trial that Burton died from manual strangulation.

Although he found no bruises or other evidence of strangulation on the skin of the neck, he stated that a strangulation can occur without leaving marks on the neck.

Feegel apprised the court and jury of a technique of reducing the blood flow to the brain to enhance pleasure during a sexual experience. This technique . . . involves partial strangulation. The technique is also used by cardiologists to change or stop heart rhythm. It is a dangerous procedure to be used only under controlled conditions, since the loss of oxygen to the brain (which is what increases sexual enjoyment) can lead to unconsciousness, and heart stoppage can also occur. There [is] some indication that [Tsavaris] was familiar with this technique, and there was testimony that he had once said he knew how to strangle a person without leaving marks. And there was evidence found by Feegel that Burton had engaged in sexual activity shortly before her death.¹¹²

While the autopsy was in progress, Dr. Tsavaris called the morgue to inquire about the results of the autopsy and reiterated his claim that he only knew the deceased professionally. He was told to call back later. When Dr. Tsavaris called the second time, he was told that the autopsy was not complete but that the pathologist had concluded that an abortion had recently been performed. He denied having any knowledge of the abortion. By the time a third telephone call came from Dr. Tsavaris, the medical examiners had satisfied themselves that Miss Burton's death was caused by strangulation. This was kept from Dr. Tsavaris, however, who was told instead that the official report might be inconclusive because no cause of death had been discovered. At this point, the person at the other end of the line said, he "could tell the change in Tsavaris' voice. I could sense the relief."¹¹³

111. *State v. Tsavaris*, 382 So. 2d 56, 60 (Fla. 2d Dist. Ct. App. 1980), *review denied*, 424 So. 2d 763 (Fla. 1983).

112. *Tsavaris v. State*, 414 So. 2d 1087, 1088 (Fla. 2d Dist. Ct. App. 1982), *review denied*, 424 So. 2d 763 (Fla. 1983).

113. *Tsavaris*, 360 So. 2d at 748.

The trial judge suppressed Feegel's tape.¹¹⁴ The Second District Court of Appeals affirmed and certified the following question to the Supreme Court of Florida: "[d]oes the recording of a conversation by one of the participants constitute the interception of a wire or oral communication within the meaning of chapter 934 Florida Statutes (1979)."¹¹⁵ The Supreme Court of Florida held that the recording was made in violation of the Florida statute requiring all parties to consent to the recording of a conversation.¹¹⁶ In reaching its decision, the court noted that the Florida statute had been amended in 1974 to require consent of all parties prior to an interception.¹¹⁷

On the floor of the Florida House of Representatives, the only recorded debate on the two-party consent requirement of section 934.03(2)(d) was this comment by Representative Shreve:

'[What this bill does] is to prevent, make it illegal, for a person to record a conversation, even though he's a party to it, without the other person's consent.'

With no further debate, the bill passed the House 109-1.¹¹⁸

The court rejected the district court's interpretation of "interception" to mean an interception by wiretap of the conversation before reaching the intended recipient.¹¹⁹ Justice Alderman, concurring in part and dissenting in part, would have accepted the district court's interpretation of "interception."¹²⁰ He also noted the seriousness of the offense of interception of communications to which Antel and Feegel could be subject, considering that the tapings were evidence of extortion and murder.¹²¹

I cannot believe that the legislature intended to brand as a third-degree felon the victim of extortionary threats, who, while in his home, electronically records the threats made against him. *E.g. State v. Walls*. Likewise, I do not believe the legislature intended that a public-spirited citizen like Dr. Feegel, who, in the course of

114. *State v. Tsavaris*, 394 So. 2d 418, 420 (Fla. 1981).

115. *Id.*

116. *Id.* at 427.

117. *Id.* at 422.

118. *Id.* (citations omitted).

119. *Tsavaris*, 394 So. 2d at 422.

120. *Id.* at 430 (Alderman, J., concurring in part and dissenting in part).

121. *Id.* at 432.

his employment as medical examiner, records a lawfully received telephone communication relevant to a pending murder investigation, should be subjected to the possibility of criminal prosecution. . . .

The majority says that the legislature intended that for this public-spirited action Dr. Feegel is guilty of a third-degree felony. Surely, the legislature did not intend such an absurd result.¹²²

C. State v. Inciarrano

The trial judge denied Inciarrano's motion to suppress.¹²³ Inciarrano pleaded no contest and appealed the denial of his motion to suppress. On appeal, the Fourth District Court of Appeal, feeling constrained by the plain wording of the statutes and prior case law, reversed.¹²⁴ The Supreme Court of Florida then had to decide whether to create a case law exception to the Florida statutes or to let a cold-blooded murderer go free. The court phrased the issue as "whether the tape recording made by a victim of his own murder must be excluded from evidence pursuant to chapter 934,"¹²⁵ and held "that under the circumstances of this case the subject tape recording does not fall within the statutory proscription of chapter 934."¹²⁶ The court concluded that the statutes did not apply because Inciarrano had no reasonable expectation of privacy.¹²⁷ This conclusion was unsupported by any analysis to offer guidance in future cases.¹²⁸

122. *Id.*

123. The definition of "oral communication" is "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." FLA. STAT. § 934.02(2) (1995). In reaching its decision, the trial court noted "the quasi-public nature of the premises within which the conversations occurred, the physical proximity and accessibility of the premises to bystanders, and the location and visibility to the unaided eye of the microphone used to record the conversations." *State v. Inciarrano*, 473 So. 2d 1272, 1274 (Fla. 1985).

124. *Inciarrano v. State*, 447 So. 2d 386, 390 (Fla. 4th Dist. Ct. App. 1984), *quashed by* 473 So. 2d 1272 (Fla. 1985).

125. *Inciarrano*, 473 So. 2d at 1273.

126. *Id.* at 1274.

127. *Id.* at 1276.

128. *Id.* at 1275. Four Supreme Court of Florida Justices joined in the opinion and three concurred, two joining in one concurrence and one authoring another concurrence. *Id.* at 1276.

Inciarrano went to the victim's office with the intent to do him harm. He did not go as a patient. The district court, in the present case, correctly stated:

One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises. Thus, here, if appellant ever had a privilege, it dissolved in the sound of gunfire.¹²⁹

Accordingly, we hold that because Inciarrano had no reasonable expectation of privacy, the exclusionary rule of section 934.06 does not apply.¹³⁰

The two concurrences "flesh out" the majority opinion, though in quite different ways. Justice Overton wrote:

I concur and write to emphasize that when an individual enters someone else's home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply. It is a different question, however, when the individual whose conversation is being recorded is in his own home or office.¹³¹

In his concurrence, Justice Ehrlich is much more critical of the majority's reasoning:

Privacy rights attach to individuals, not to actions . . . , [T]o hold, as the majority does, that the commission of a criminal act waives a privacy right requires an entirely new legal definition of privacy rights which would, in turn, shake the foundation of fourth amendment analysis. . . . It would be more judicially honest to admit the error and recede from *Walls* and *Tsavaris* and to hold that the statute is inapplicable. The victim no more "intercepted" the conversation than he "intercepted" the bullets that ended his life. . . .

129. *Inciarrano*, 473 So. 2d at 1275–76 (citing *Inciarrano v. State*, 447 So. 2d at 389).

130. *Id.* at 1276.

131. *Id.* (Overton, J., concurring).

If criminal acts waive privacy rights, as the majority implies, police have the right and duty to intrude without a warrant into a bedroom where the owner/resident is smoking marijuana, reasoning that the fourth amendment protection has “gone up in smoke.”¹³²

What Justice Ehrlich seems to suggest is that Florida interprets its statute as requiring “all of the parties to the communication [to] have given prior consent to such interception,”¹³³ in order to allow a participant to a conversation to lawfully record the conversation.

D. State v. Walls, Tsavaris v. Scruggs, and State v. Inciarrano

Inciarrano was a very difficult case for the Supreme Court of Florida. If the court applied the plain language of the statute, then the tape recording of Inciarrano murdering Trimble would have been inadmissible. The available evidence was much different in *Inciarrano* than in *Walls* and *Tsavaris*. In *Walls* and *Tsavaris*, at least one party to the conversation, other than the defendant, could testify, and in *Tsavaris*, there was documentary and medical evidence. There was no other evidence in *Inciarrano* to tie Inciarrano to Trimble’s murder except for the tape recording. Inciarrano admitted it was his voice on the tape. Faced with a difficult decision, the Supreme Court of Florida created a case law exception to the plainly worded Florida statute. The *Inciarrano* majority decided that the tape was admissible because Inciarrano had no expectation of privacy. True, the Florida statute, like the Federal Act, defines an “oral communication” as a conversation in which the participants have a justified expectation of privacy. But why did Inciarrano have no expectation of privacy? Was it because he was committing a crime, or was it because of the physical surroundings—that Inciarrano and Trimble were in *an office*, subject to being interrupted at any time, or was it because it was *Trimble’s office*? The court never adequately explained its rationale for deciding that Trimble had no expectation of privacy.

E. People, Not Places

*Katz v. United States*¹³⁴ changed prior search and seizure law to protect people, not places. The Supreme Court of Florida, with little analysis, has ruled that a suspect has a reasonable expectation of privacy recognized by

132. *Id.* at 1277 (Ehrlich, J., concurring).

133. FLA. STAT. § 934.03(2)(d) (1995).

134. 389 U.S. 347 (1967). See discussion *supra* pp. 444–50.

society in the suspect's home (*Mozo*),¹³⁵ but not in a private office (*Inciarrano*).¹³⁶ Contrary to *Katz*, the court seems to be protecting places, not people. The Florida Act should be interpreted consistently with *Katz* to make a person's privacy depend on the person's reasonable expectation of privacy, as recognized by society, and not on the person's location. In interpreting the Florida Act, the Florida courts have considered conversations originating in a variety of locations. These locations range from the home (*Wall* and *Mozo*), to the office (*Inciarrano*), to the patrol car (*Smith*),¹³⁷ to the jail. The First District Court of Appeal of Florida created a case law exception to the Florida Security of Communications Act to allow a prison guard to monitor an inmate's outgoing call.¹³⁸ In *Katz*, the United States Supreme Court recognized an expectation of privacy in a glass paneled telephone booth and, in dicta, said that an expectation of privacy could apply to other locations such as "in a business office, in a friend's apartment, or in a taxicab."¹³⁹ In *Mozo*, the Florida Supreme Court recognized that the Mozos had an expectation of privacy to talk on a cordless phone in their own apartment without being intercepted.¹⁴⁰ *Inciarrano* had no expectation of privacy in Trimble's office, nor did Smith in a patrol car, nor did prisoners in jail, except perhaps if a prisoner had recently invoked his right to an attorney.¹⁴¹ If Floridians have any expectation of privacy,

135. See *infra* notes 149–51 and accompanying text.

136. See *supra* notes 123–33 and accompanying text.

137. See *supra* notes 48–49 and accompanying text.

138. In *Pires v. Wainwright*, 419 So. 2d 358, 359 (Fla. 1st Dist. Ct. App. 1982), a guard monitored Pires' telephone call to someone outside the prison. Pires, an inmate at Union Correctional Institute, was calling to arrange an escape and was disciplined because of the information learned by the monitoring officer. The court found that society's interest in prison security outweighed Pires' expectation of privacy and created a case law exception to the Florida Security of Communications Act. *Id.* at 359. "[W]e hold there is an exception to the Security of Communications Act permitting prison officials to wiretap telephone calls from prisoners incarcerated in our prisons." *Id.*

139. *Katz*, 389 U.S. at 352 (citations omitted).

140. *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995).

141. In *State v. Calhoun*, 479 So. 2d 241, 242–43 (Fla. 4th Dist. Ct. App. 1985), David and McCall Calhoun, brothers, were in jail. When the brothers were placed in an interview room, the officers monitored their conversation. When McCall was removed, an officer again gave David his Miranda rights and David requested his public defender. Upon denying David his request, McCall was placed back in the interview room with David. The officers both video and audio taped their fifteen minute conversation. The court held that the videotape should have been excluded. *Id.* at 245. The court based its decision on sections 12 and 23 of article I of the *Florida Constitution*, the Florida Security of Communications Act, David's Fifth Amendment right to remain silent and his Sixth Amendment right to an attorney. *Id.*

which will be recognized by the Supreme Court of Florida, it is apparently only in one's own home.

Thus far, Florida courts have not recognized that it is possible to have a reasonable expectation of privacy in a location other than one's home. Apparently, the conversation between Inciarrano and Trimble was private. A neighbor did hear gunshots, but no one heard the sound of their voices nor saw Inciarrano enter or exit Trimble's office. Even ruling that Inciarrano had no expectation of privacy because he was in Trimble's office and not in his own office, is contrary to *Katz*. If Trimble had gone to Inciarrano's office instead, but still had recorded his own murder, the court probably would have ruled that Inciarrano had no expectation of privacy because it was an office and not a home. The real problem with *Inciarrano* is that it was such a difficult case because of the two party consent requirement of the Florida Act.

V. FLORIDA—CONSTITUTIONAL PRIVACY PROVISIONS

This section examines the two privacy provisions of the *Florida Constitution* and their applicability to protecting communications. Article I, section 12 of the *Florida Constitution*, Florida's search and seizure provision, prohibits "unreasonable interception of private communications by any means" and article I, section 23, contains an explicit right to privacy.¹⁴² In 1968, article I, section 12 of the *Florida Constitution* provided:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing

A jailhouse conversation may be overheard if a suspect's voice is so loud that it carries through a closed door. *Taylor v. State*, 292 So. 2d 375, 376 (Fla. 1st Dist. Ct. App.), *cert. denied*, 298 So. 2d 415 (Fla. 1974). Taylor was in a line up room being used as a conference room when he said in a loud voice: "[t]hat mother ... couldn't identify me; I had a stocking over my face." *Id.* at 376. Two officers heard the statement through the closed door. The trial court had allowed testimony about the statement into evidence and the appellate court affirmed, ruling that overhearing the statement was not in violation of the Florida Security of Communications Act. *Id.* at 377.

142. Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549, 629 (1993).

or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.¹⁴³

In 1980, article I, section 23, was added to the *Florida Constitution*.¹⁴⁴ Article I, section 23 provides:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.¹⁴⁵

In *State v. Sarmiento*,¹⁴⁶ a Supreme Court of Florida landmark decision, the issue before the court was "whether the warrantless, electronic interception by state agents of a conversation between defendant and an undercover police officer in defendant's home is an unreasonable interception of defendant's private communications in violation of article I, section 12, Florida Constitution."¹⁴⁷ The court concluded that the interception was unreasonable, even though section 934.03(2)(c) allowed interception by a law enforcement officer or informant.¹⁴⁸ "Our response to this contention is simple; insofar as that statute authorizes the warrantless interception of a private conversation conducted in the home, it is unconstitutional and unenforceable."¹⁴⁹ Thus, the court interpreted the *Florida Constitution* to provide more protection than the *United States Constitution*.

Although *subsequent* decisions limited *Sarmiento's* ban on the use of informants to the home,¹⁵⁰ article I, section 12, was amended in 1982,¹⁵¹ to

143. *Id.* at 629.

144. *Id.* at 635 (citations omitted).

145. *Id.*

146. 397 So. 2d 643 (Fla. 1981).

147. *Id.* at 644.

148. *Id.* at 645.

149. *Id.*

150. The right of privacy does not extend to one's private business office. For similar cases involving failure to extend the right of privacy, *see, eg.*, *Morningstar v. State*, 428 So. 2d 220 (Fla. 1982), *cert. denied*, 464 U.S. 821 (1983) (discussing privacy in a private business office); *Zacke v. State*, 418 So. 2d 1118 (Fla. 5th Dist. Ct. App. 1982), *review denied*, 426 So. 2d 29 (Fla. 1983) (discussing privacy in a suspect's back yard); *State v. Vanyo*, 417 So. 2d 1104 (Fla. 4th Dist. Ct. App. 1982) (discussing privacy in a parking lot); *Ruiz v. State*, 416 So. 2d 32 (Fla. 5th Dist. Ct. App. 1982) (discussing privacy in a motel room); *Miller v. State*, 411 So. 2d 944 (Fla. 4th Dist. Ct. App.), *review denied*, 419 So. 2d 1199 (Fla. 1982) (discussing privacy in a suspect's truck); *Hurst v. State*, 409 So. 2d 1059 (Fla. 1st Dist. Ct.

do away with *Sarmiento* by appending the following two sentences to the end of the provision:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.¹⁵²

Thus, after the effective date of the amendment, an informant or police officer would be able to tape a conversation, even if the conversation occurred in the suspect's home.

A suspect arguing that an intercepted communication should be suppressed would have no better luck relying on article I, section 23, than relying on article I, section 12. The Supreme Court of Florida has held that article I, section 23, does not expand the protection afforded a suspect in the search and seizure context. "[O]ur right of privacy provision, article I, section 23, does not modify the applicability of article I, section 12, particularly since section 23 was adopted prior to the present section 12."¹⁵³ The decision thus limits the protection of article I, section 23, against government intrusion to situations other than those involving search and seizure.

Since *Sarmiento*, the Supreme Court of Florida has been loath to protect communications under either of the *Florida Constitution's* privacy provisions. This is so even though either or both of the provisions arguably could provide more protection than the Florida Act. In an April 1995 cordless telephone case, *Mozo*,¹⁵⁴ the court used convoluted reasoning to base its holding on the Florida Act rather than on sections 12 or 23 of article I of the *Florida Constitution*, as had the lower court. "[W]e adhere to the settled

App. 1982) (discussing privacy in an informant's home); *Chiarenza v. State*, 406 So. 2d 66 (Fla. 4th Dist. Ct. App. 1981), *review denied*, 413 So. 2d 875 (Fla. 1982) (discussing privacy in a motel room); *Padgett v. State*, 404 So. 2d 151 (Fla. 1st Dist. Ct. App. 1981) (discussing privacy in a restaurant, a truck, and an outdoor setting); *Pittman v. State*, 397 So. 2d 1205 (Fla. 1st Dist. Ct. App.), *review denied*, 407 So. 2d 1105 (Fla. 1981). The right of privacy did extend to the suspect's apartment. *Copeland v. State*, 435 So. 2d 842 (Fla. 2d Dist. Ct. App. 1983) (application of amendment to article I, section 12, prospective in effect), *review denied*, 443 So. 2d 980 (Fla. 1983).

151. Little & Lohr, *supra* note 142, at 629.

152. *Id.*

153. *State v. Jimeno*, 588 So. 2d 233, 233 (Fla. 1991).

154. 655 So. 2d 1115 (Fla. 1995).

principle of constitutional law that courts should endeavor to implement the legislative intent of statutes and avoid constitutional issues.”¹⁵⁵

Mozo involved the following facts. In 1991, in Plantation, Florida, police detectives were using a scanner to intercept cordless telephone calls near an apartment complex. When they picked up a suspicious conversation, they continued to monitor the same radio frequency and taped calls. They obtained a search warrant for the Mozos’ apartment in the complex based on the intercepted information and the unusual amount of activity observed at the apartment. The Mozos were arrested after drugs and drug paraphernalia were found in the search. When their motion to suppress was denied, they pled nolo contendere, reserving their right to appeal the denial of their motion to suppress.¹⁵⁶ On appeal, the Supreme Court of Florida held that “oral communications conducted over a cordless phone within the privacy of one’s own home are protected by Florida’s Security of Communications Act” because the Mozos had a reasonable expectation of privacy that cordless telephone calls originating in their home would not be intercepted.¹⁵⁷ “Oral communication” in the Florida Act is defined as:

any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.¹⁵⁸

Two concurring justices would have based the decision on article I, section 23 of the *Florida Constitution*, rather than the Florida Act. They noted that the definition of an “electronic communication” in the Florida Act specifically excludes “[t]he radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.”¹⁵⁹

[B]ecause cordless telephone communications are expressly excluded from the definition of electronic communications, it makes little sense to construe the definition of oral communications as including cordless telephone communications. Further, the Florida

155. *Id.* at 1117.

156. *Id.* at 1116.

157. *Id.* at 1117.

158. FLA. STAT. § 934.02(2) (1995).

159. *Id.* § 934.02(12)(a).

Act was patterned after federal legislation, and it is clear from the legislative history that Congress intended to exclude cordless telephone communications from the purview of the federal Act.¹⁶⁰

It seems more appropriate to base the decision on an available constitutional provision, as the concurring justices would have, than on tortured language of the Florida Act.

Aside from the lack of a sound statutory basis for its decision, *Mozo* provides little guidance for future decisions involving cordless telephones. The court ruled that the interception of the cordless telephone conversation occurred where it “originated” and that the Mozos had a reasonable expectation of privacy in their own home.¹⁶¹ The court again seems to be protecting places, not people, which is contrary to *Katz*. The other problem was in the ruling that the conversations originated in the Mozos’ home. Although the court did not explain why this was so, the conversations apparently originated in the Mozos’ home because that was the end of the conversation in which the officers were interested. What if the other party had called the Mozos first? What if the other end of the conversation was not in a home? If the officers had intercepted what the Mozos were saying by accident, only after conducting surveillance of an alleged drug buyer calling from a pay phone, would the Mozos’ conversations still be protected?

VI. TWO-PARTY CONSENT

The Florida Act should be amended to allow taping upon the consent of one party to the conversation. The Florida Act two-party consent requirement has caused the Florida courts to legislate in difficult cases. In *Walls*, the Supreme Court of Florida emphatically declared that it should not legislate.¹⁶² Even so, it and the lower courts have done so in hard cases like *Inciarrano*. The *Inciarrano* court ruled that, since *Inciarrano* was in Trimble’s office, *Inciarrano* had no reasonable expectation of privacy.¹⁶³ As explained in this portion of the article, the reasons for allowing taping on the consent of one participant far outweigh the reasons for requiring all participants to consent.

160. *Mozo*, 655 So. 2d at 1117 (Grimes, C.J., concurring).

161. *Id.*

162. *Walls*, 356 So. 2d at 296.

163. *Inciarrano*, 473 So. 2d. at 1275–76.

The principle arguments supporting two party consent are that surreptitious taping will have a chilling effect on conversation and that it is unfair. Those who focus on the chilling effect emphasize that surreptitious taping will make people feel that they cannot say what they really mean, let off steam, complain, tell jokes, or criticize without running afoul of the "thought police." "Big brother" will be monitoring what you say and you will be punished if your speech is not politically correct. Another facet of the argument is that taping without the other person's consent is ethically and morally wrong. There must be some devious purpose if one has to tape without receiving the other party's consent. Why can't you just ask for consent if you want to gather information or have the taping serve as a memory aid? One discovering later that the conversation has been taped will regard the taping as a betrayal of confidence.

There are many legitimate reasons for allowing one participant to tape. Examples include aiding one's memory, having an accurate record, gathering information of a crime or tort, and defending oneself. After all, how else could you protect yourself against charges such as sexual harassment or employment discrimination? It is irrational to allow someone to testify about a conversation but not allow a tape recording of the same conversation to be admitted into evidence. A tape recording is much more accurate than someone testifying as to that person's recollection of what happened because it captures statements in context. In addition, a tape may be vital where the testimony of witnesses is so conflicting that you know someone is lying. What would have happened if Clarence Thomas or Anita Hill had taped their conversations?

The statute requiring two party consent follows someone's perceived idea of morality and sweeps too broadly, potentially capturing public-minded citizens like Antel and Feegel within its grasp. The ambiguous "good faith" defense is not enough to protect the person with a legitimate reason to tape. Wiretapping and eavesdropping statutes are the only "search and seizure" proscription against private action. Otherwise, state action has to be involved to have evidence excluded. Criminals like Walls, Tsavaris, and Inciarrano are the ones to benefit if the plain language of the Florida Act is followed. Walls, Tsavaris, and Inciarrano could have sued Antel, Feegel, and Trimble's estate for civil damages, and Walls and Tsavaris could have pressed for third degree felony charges. Public figures, and people such as Walls, Tsavaris, and Inciarrano, who have the right to be distrustful that a confidence will be betrayed, are the ones who will be more careful anyway and will perhaps guard themselves against surreptitious interception. Otherwise, if there is nothing illegal taking place, the likelihood of someone

taping a private conversation is small. It is usually too cumbersome to set up a taping and it is too difficult to infiltrate a group and gain the group's confidence. The risk that someone will tape is approximately the same or less than the risk that the party will divulge the contents of a confidential conversation.

In Florida, the private party who tapes a conversation is likely to be punished much more severely than a police officer or an informant. A police officer is allowed to tape a conversation and to have the conversation admitted into evidence if the police officer is a party to the conversation or an informant/participant has consented to the taping.¹⁶⁴ In contrast, a private party is prohibited from taping without all participants' consent, and a conversation taped with only one party consent is inadmissible. This, in effect, sanctions the entrance of big brother into the conversation, but allows someone taping a conversation for innocent reasons to be prosecuted for the taping.

Some people foolishly trust the other party to the conversation not to record the conversation, and they have the unpleasant surprise later of learning that the conversation was recorded. Other people, who may or may not have something to hide, are shrewd enough to know that things that are not said cannot be taped. In 1990, in California, a daughter testified from her repressed memory that years before she had seen her father murder her best friend, then eight. The father was tried and convicted.¹⁶⁵ Before trial, the daughter went to visit the father in prison. In the prison visitation room, the daughter asked the father to admit he had murdered her friend.¹⁶⁶ The father pointed to the sign on the wall, "Conversations May Be Monitored" and refused to answer.¹⁶⁷ At trial, the daughter was allowed to testify about her father's refusal to answer. On April 4, 1995, a federal judge ruled that the conviction could not stand.¹⁶⁸ One of the errors ruled reversible by the judge was the admittance into evidence of comments on the father's refusal to answer the daughter's question.¹⁶⁹

Why single out audio taping for statutory protection and not also protect against videotaping? There are certain situations in which videotaping is

164. FLA. STAT. § 934.03(2)(a)(3)(c) (1995).

165. *Franklin v. Duncan*, 884 F. Supp. 1435, 1438 (N.D. Cal.), *aff'd*, 70 F.3d 75 (9th Cir. 1995).

166. Tamar Lewin, *Judge Upsets Murder Conviction Focused on 'Repressed Memory'*, N.Y. TIMES, Apr. 5, 1995, at A18.

167. *Franklin*, 884 F. Supp. at 1445.

168. Lewin, *supra* note 166, at A18.

169. *Id.*

more invidious than audio taping. Scott Bentley's taping of consensual sexual activity was prosecuted criminally, whereas a videotaping of the same event may not have had attendant criminal charges. If the reason for the taping is one's prurient interest, a videotaping of a romantic episode may be much worse than the audio tape. The section of Part II of this article entitled "*To Entertain or to Satisfy One's Prurient Interest*" contains a number of "revealing" incidents which were taped or videotaped. Although an audiotape of the incidents was certainly an invasion of privacy, a videotaped picture of the incidents would be an even more serious invasion of privacy.

Does the all party consent requirement coincide with the public's expectations? Many individuals in all party consent states may not realize the state has such a requirement. Thus, they may inadvertently subject themselves to being prosecuted and to being sued civilly. For most other crimes with similarly severe punishment, there is at least a feeling that the action is wrong. In contrast, participant taping of a conversation may be entirely innocent. People's idea of morality is changing. Surreptitious taping is not perceived by many to be wrong. This is the electronic age. Like Scott Bentley, most people would not imagine that clicking on a tape recorder without asking the other person for consent would be illegal. For an action that many people do not realize is illegal, the punishment is severe. Disclosure of taped material is also illegal and carries the same penalties. Thus, Gennifer Flowers may have legally recorded her conversations with President Clinton, but she could face criminal charges if she sold her tapes in Florida.

Why does Florida need interception of communications dealt with both criminally and civilly? Most "bad" interception is already dealt with in other criminal statutes, or there is a tort action available. For example, an individual may be charged with blackmail or sued for invasion of privacy. The Florida Act forces the courts to legislate in the difficult cases. Because it is very difficult to draw the line between legitimate and illegitimate reasons for taping, it would be almost impossible to draft an appropriate statute.

VII. CONCLUSION

The two-party consent requirement is irrational and the statute should be amended to eliminate it. The rationale supporting the two-party consent requirement is far outstripped by the reasons, detailed above, for eliminating it. In Florida, it is a third degree felony for a private party to tape a conversation unless all participants consent. Any tape made without the consent of

all participants is inadmissible and a nonconsenting party can recover civil damages from the person who taped the conversation.

Presumably, all parties are required to consent because surreptitious taping may be considered unfair. Another reason given is that allowing surreptitious taping may have a chilling effect on conversation. The broad sweep of the two party consent requirement has caught up many unsuspecting, otherwise-innocent people within its grasp. The requirement forecloses taping for legitimate reasons such as gathering information (possibly to later defend oneself) and gathering evidence of a tort or crime.

In contrast, criminals, like Walls, Tsavaris, and Inciarrano, stand to benefit from it. *Inciarrano* is an example of a difficult case, in which the application of the two-party consent requirement could have allowed the only evidence of a murder to be suppressed. Thus, a court faced with a similarly difficult case would probably enlarge the case law exception created by *Inciarrano*.

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I. INTRODUCTION

The District Courts of Appeal in Florida have recently been confronted with the issue of whether the economic loss rule ("ELR") should bar recovery of economic losses suffered from independent fraud in the inducement claims. Every court which has faced this issue, other than the Second District Court of Appeal, has concluded that the ELR should not bar tort recovery for fraud in the inducement claims.¹ This article explores the conflicting application of the

1. Following the writing of this article and immediately prior to publication, the Supreme Court of Florida decided this issue. Where possible, the author has incorporated the holding of this recent decision into the discussion of this article.

ELR in Florida courts to intentional, independent torts, such as fraud in the inducement, and the issues which ultimately led to the Supreme Court of Florida's decision that the ELR will not bar such claims.

Part II of this article briefly explores the history of the ELR. In order to provide a more thorough understanding of the ELR, Part II is broken down into subsections which discuss the elements of the ELR, exceptions to the ELR, and the reasons for the ELR's existence. Part III provides an overview of the independent, intentional tort exception to Florida's ELR by concentrating on the factors which define these torts and more specifically concentrates on the tort of fraud in the inducement. Part IV evaluates the ELR and fraud in the inducement as they have been applied in recent 1995 and 1996 cases. Finally, Part V concludes with an analysis of the reasons why the ELR has not been expanded to bar fraud in the inducement claims.

II. BRIEF HISTORY OF FLORIDA'S ECONOMIC LOSS RULE

The question most often asked in discussions on Florida's ELR is, what does it do? Although the parameters of the ELR are hazy, stated simply, the ELR prohibits recovery in tort for economic damages arising under contracts for goods or services, unless there is personal injury or damage to other property.² Despite the specific language of the ELR, there is no clear answer that explains exactly how the ELR should be applied. As one commentator wrote, "it is clear that judges, lawyers, and commercial clients alike are all desperately struggling to define the parameters of the economic loss [rule]."³ In order to thoroughly understand the fundamentals of the ELR, an analysis of each element of the ELR is required.

A. *Elements of the Rule*

The first part of the ELR prohibits tort recovery for contracted goods or services.⁴ Tort recovery is an alternative form of recovery that a party to a contract may seek instead of relying upon a breach of contract form of recovery.⁵ Florida courts have distinguished between unintentional torts, i.e.

2. *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*, 620 So. 2d 1244, 1245 (Fla. 1993).

3. Paul J. Schweip, *The Economic Loss Rule Outbreak: The Monster That Ate Commercial Torts*, 69 FLA. B.J. 34, 34 (Nov. 1995).

4. *Casa Clara*, 620 So. 2d at 1245 (citations omitted).

5. *See AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180, 181-82 (Fla. 1987) (holding that parties to a contract can only seek tort damages if conduct occurs that establishes a tort that is distinguishable from or independent of the breach of contract). *See also* *Atkinson v.*

negligence, and intentional tort claims.⁶ Until recently, negligence was the only tort claim barred by the ELR, when unaccompanied by damage to other property or bodily injury.⁷ However, in the landmark case, *Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.*,⁸ the Supreme Court of Florida strictly applied the ELR and refused to observe a previous exception, which had permitted negligence claims by those not in privity with the contracting parties, in the absence of any other remedy.⁹ Presently, the ELR bars negligence claims and certain intertwined intentional tort claims for contracted goods or services, even by parties lacking privity.¹⁰

The second part of the ELR provides exceptions which allow tort recovery for contracted goods and services when there is personal injury and/or other property damage.¹¹ While personal injury is easily recognizable, "other property" has defied easy description.¹² The courts in *East River Steamship*

Orkin Exterminating Co., 625 P.2d 505, 511 (Kan. Ct. App.), *aff'd*, 634 P.2d 1071 (Kan. 1981) (explaining that the difference between a tort and a contract action is that a breach of contract is a failure to perform a duty arising under or imposed by an agreement; whereas, a tort is a violation of a duty imposed by law).

6. *See* *Serina v. Albertson's, Inc.*, 744 F. Supp. 1113, 1116 (M.D. Fla. 1990).

7. *See Casa Clara*, 620 So. 2d at 1246; *see also* *Sandarac Ass'n Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1352 (Fla. 2d Dist. Ct. App. 1992). In *Sandarac*, the court explained that historically the courts have limited the interest protected in negligence to interests concerning the safety of one's person and property. *Id.* The court stated that to allow an exception to the ELR by allowing recovery for negligence claims would be to allow an actual expansion of negligence law to protect interests not traditionally protected in negligence law. *Id.*

8. *Casa Clara*, 620 So. 2d at 1244.

9. *Id.* at 1248 (overruling *Latite Roofing Co. v. Urbanek*, 528 So. 2d 1381 (Fla. 4th Dist. Ct. App. 1988)). In *Latite*, the defendant/appellant, Latite Roofing Co., was the roofing contractor on the construction of a shopping center. Latite constructed most of the roof area on the shopping center before being compelled to stop work. The plaintiffs/appellees, Urbanek and Kohl, purchased the center after work had been stopped and before Latite finished construction. Urbanek and Kohl sued Latite seeking damages for the negligent construction and installation of the roof. Relying on the Supreme Court of Florida's decision in *AFM*, the court held that use of the ELR to bar tort claims for only economic loss applies only when there are alternative theories of recovery better suited to compensate the damaged party for a peculiar kind of loss. *Latite*, 528 So. 2d at 1383. The court explained that due to the fact that the parties lacked privity, no alternate theory of recovery existed and, therefore, the ELR could not bar recovery for the plaintiffs' pure economic loss. *Id.* at 1382-83.

10. *See Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198, 1199-200 (11th Cir. 1994).

11. *Casa Clara*, 620 So. 2d at 1245 (citations omitted).

12. *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 9 (Fla. 5th Dist. Ct. App. 1994). The court stated: "[w]hat constitutes damage to 'other property' is sometimes a puzzling circumstance to determine in resolution of economic loss cases." *Id.*

Corp. v. Transamerica Delaval, Inc.,¹³ and *Casa Clara*¹⁴ have attempted a practical definition.

In *East River*, the United States Supreme Court was asked to decide “whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss.”¹⁵ In this case, a shipbuilder contracted with the respondent to design, manufacture, and supervise the installation of turbines in four supertankers. After the ships were built, the turbines on all supertankers malfunctioned due to design and manufacturing defects. The Supreme Court held since each turbine was supplied as an integrated package, regarded as a single unit, the product only damaged itself.¹⁶

Initially, damage to other property provided a narrow exception to the ELR.¹⁷ In *Casa Clara*,¹⁸ however, the Supreme Court of Florida strictly applied the ELR to bar recovery of economic losses to condominium owners whose condominiums were built with defective concrete.¹⁹ The concrete supplied by the defendant, Toppino, contained a high content of salt that caused the reinforcing steel inserted in the concrete to rust, which, in turn caused the concrete to rust and break off.²⁰ The plaintiffs owned condominium units and single-family homes built with, and allegedly damaged by, the concrete.²¹ The Supreme Court of Florida was confronted with the issue of “whether a homeowner [could] recover for purely economic losses from a concrete supplier under a negligence theory.”²²

In its landmark decision, the Supreme Court of Florida held that because there were no personal injuries and no other property was damaged, the homeowners could not recover in tort.²³ The court explained the damage to

13. 476 U.S. 858, 867 (1986). *East River* was a landmark case that involved an admiralty action concerning products liability and the ELR. *Id.* at 858.

14. *Casa Clara*, 620 So. 2d at 1244.

15. *East River*, 476 U.S. at 859.

16. *Id.* at 867. The Supreme Court stated “[s]ince all but the very simplest of machines have component parts, [a contrary] holding would require a finding of ‘property damage’ in virtually every case where a product damages itself.” *Id.*

17. *Casa Clara*, 620 So. 2d at 1244.

18. *Id.*

19. *Id.* at 1245.

20. *Id.*

21. *Id.*

22. *Casa Clara*, 620 So. 2d at 1245.

23. *Id.* at 1247. *Casa Clara* is a landmark case not only because the Supreme Court of Florida failed to apply the other property exception, but also because the homeowners were not in privity with the defendant and they lacked contractual remedies. *Id.*

other property exception by stating “[t]he character of a loss determines the appropriate remedies, and, to determine the character of a loss, one must look to the product purchased by the plaintiff, not the product sold by the defendant.”²⁴ The Supreme Court of Florida further explained that since the concrete was an essential part of the house, which the buyers had bargained for, the concrete did not injure “other” property; therefore, the other property exception did not apply.²⁵ As can be identified from the above descriptions, both of these cases have held that when pure economic loss is suffered due to one component of an integrated product injuring another component, the ELR will apply.

B. *Rationale*

The ELR is based on both policy and practical considerations. The policy underlying the ELR is that parties have the power and should protect against the risk of economic loss, from breach of contract based on failure of the product or services to perform as expected, during contract negotiations through warranty provisions and price adjustments.²⁶ Then, in the event of a breach, the parties should recover based on the provisions which were bargained for, rather than attempting to recover under tort law after the breach.²⁷

The practical basis for the ELR is judicial economy.²⁸ Some justices may view the ELR as a tool to clear their dockets because the ELR is a bright line rule and it can be applied as a matter of law, rather than when the courts become bogged down with the prima facie elements of torts.²⁹ Justices are reluctant to find an exception to the ELR for independent torts, such as fraud in the inducement, because cases can be expedited faster when causes of action are a matter of law.³⁰

24. *Id.* (citations omitted).

25. *Id.*

26. See *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899, 901 (Fla. 1987); *Casa Clara*, 620 So. 2d at 1246 (“The rule is ‘the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby encourages citizens to avoid causing physical harm to others.’”) (citations omitted). See also *Strickland-Collins Constr. v. Barnett Bank*, 545 So. 2d 476, 477 (Fla. 2d Dist. Ct. App. 1989) (holding Florida will not create a tort duty allowing for economic loss recovery, “where the litigants have allocated the various risks of their bargain by contract.”).

27. *Id.*

28. Interview with Theresa Montalbano Bennett, Esquire, in Ft. Lauderdale, Fla. (June 6, 1996).

29. *Id.*

30. *Id.*

The cases that have invoked the ELR have consistently demonstrated the rationale that contract negotiations and warranty law are the appropriate vehicles to remedy breaches that result in purely economic loss. This rule is a fairly recent development of contract law, in that, the United States Supreme Court laid its foundation only ten years ago in *East River*.³¹ Shortly after the United States Supreme Court articulated the rule in 1986, the Supreme Court of Florida added the rule to Florida common law in 1987 in the *Florida Power & Light v. Westinghouse Electric Corp.* decision.³² However, in *Florida Power & Light*,³³ the Supreme Court of Florida acknowledged that the doctrine was “not a new principle of law in Florida,” but rather stemmed from the fundamental privity requirements of contract claims.³⁴

In *Florida Power & Light*, the Supreme Court of Florida rejected the negligence claim of Florida Power & Light (“FPL”), which arose out of a contract between FPL and the defendant, Westinghouse Electric Corporation. (“Westinghouse”).³⁵ FPL brought suit claiming Westinghouse was liable for breach of express warranties in the contract and for negligence.³⁶ The Court dismissed FPL’s tort claim on the ground that Westinghouse had no duty under either a negligence or a strict products liability theory to prevent a product from causing economic loss only.³⁷

The *Florida Power & Light* court looked to the seminal United States Supreme Court ELR case, *East River*, for guidance.³⁸ In *East River*,³⁹ the United States Supreme Court held that, “[d]amage to a product itself is most naturally understood as a warranty claim.”⁴⁰ The Supreme Court examined the policy grounds for the ELR and noted “we must determine whether injury to a

31. *East River*, 476 U.S. at 858.

32. *Florida Power & Light*, 510 So. 2d at 902.

33. *Id.* at 899.

34. *Id.* at 902. See also *Pulte Home Corp. v. Osrose Wood Preserving, Inc.*, 60 F.3d 734, 739–40 (11th Cir. 1995) (explaining the court’s 1987 decision in *Florida Power & Light*). In *Florida Power & Light*, the court stated, “the economic loss rule has a long, historic basis originating with the privity doctrine, which precluded recovery of economic losses outside a contractual setting.” *Florida Power & Light*, 510 So. 2d at 902.

35. *Florida Power & Light*, 510 So. 2d at 902. FPL and Westinghouse entered into a contract, whereby, FPL was to purchase six steam generators from Westinghouse. *Id.* at 900. FPL discovered leaks in the generators and brought suit. *Id.*

36. *Id.*

37. *Id.* at 901–02 (citing *East River*, 476 U.S. at 858).

38. *Florida Power & Light*, 510 So. 2d at 901.

39. *East River*, 476 U.S. at 858. The plaintiff purchased turbines which were found to be defective resulting in damage to only the turbines themselves. *Id.* at 860.

40. *Id.* at 872.

product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts.”⁴¹ The Supreme Court determined that warranty law provides the purchaser with the benefit of his/her bargain and thus, sufficiently protects the public’s interests.⁴² Based on this analysis, the *East River* court determined that when the only injury claimed is economic loss, whether stated in strict liability or negligence, there shall be no products liability claim.⁴³ The Supreme Court noted to hold otherwise would be to allow “contract law to drown in a sea of tort.”⁴⁴

Since the *Florida Power & Light* decision, the ELR has been debated and expanded into a variety of contexts.⁴⁵ In *AFM Corp. v. Southern Bell*,⁴⁶ the Supreme Court of Florida framed the issue as: “Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?”⁴⁷ The Supreme Court of Florida, relying on the decisions of *Florida Power & Light* and *East River*, concluded that “without some conduct resulting in personal injury or other property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.”⁴⁸

Following *AFM Corp.*, the Supreme Court of Florida made a landmark decision by a four to three vote in *Casa Clara*.⁴⁹ As one commentator of the ELR stated after the *Casa Clara* decision was handed down, the Supreme Court of Florida “[is] put[ting] its foot forcefully down on the rule’s accelerator pedal, ensuring its speedy romp through commercial torts.”⁵⁰

41. *Id.* at 859.

42. *Id.* at 873.

43. *East River*, 476 U.S. at 876.

44. *Id.* at 866 (citations omitted).

45. See *Pulte*, 60 F.3d at 740 (citing *AFM Corp.*, 515 So. 2d at 180) (extending the ELR to contracts for services); *Sandarac Ass’n v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1355 (Fla. 2d Dist. Ct. App. 1992) (holding that a condominium association could not sue the general contractor or architects in negligence for defects in the condominium’s common areas); *Strickland-Collins Constr. v. Barnett Bank of Naples*, 545 So. 2d 476, 477 (Fla. 2d Dist. Ct. App. 1989) (holding that the ELR bars a general contractor’s negligence claim against a bank for misapplication of funds from a construction loan).

46. *AFM Corp.*, 515 So. 2d at 180.

47. *Id.* *AFM Corp.* contracted with Southern Bell for advertising in the yellow pages. *Id.* When the yellow pages were distributed, AFM’s advertisement was printed incorrectly and, after some other compounded problems, AFM chose to sue solely on a tort theory and not on any contractual theories. *Id.* at 180-81.

48. *Id.* at 181-82.

49. *Casa Clara*, 620 So. 2d at 1244.

50. Schweip, *supra* note 3, at 38.

Casa Clara fueled the ELR in two distinct ways.⁵¹ First, *Casa Clara* extinguished negligence claims for contracted goods and services, including claims by plaintiffs not in privity with the defendant.⁵² This can be illustrated by the fact that the plaintiffs in *Casa Clara* had no contract with the defendant because they had bought their homes under contracts with various developers.⁵³ Nevertheless, the Supreme Court of Florida invoked the ELR, reiterating the already familiar rationale that contract principles are more appropriate than tort principles for recovering economic loss without an accompanying physical injury or damage to other property.⁵⁴

Second, *Casa Clara* distinguished the “other property” exception to the ELR by eliminating components of a product.⁵⁵ For example, the court determined that because the plaintiffs had bargained for their condominiums and single family homes, and not the condo’s and home’s various components, the concrete, which made up the buildings, was “an integral part of the finished product”⁵⁶ As a result, the court held that the concrete only damaged itself.⁵⁷ “*Casa Clara* explained many cases that preceded it and tried to state, with some finality, the extent of the ELR.”⁵⁸ However, the courts continue to struggle for a consistent application of the ELR.⁵⁹

51. See *Casa Clara*, 620 So. 2d at 1246.

52. *Id.* at 1247.

53. *Id.* at 1245.

54. See *id.* The majority overlooked the fact that the parties lacked privity and, therefore, there existed no opportunity for the parties to engage in negotiations and bargaining. *Id.* The dissent stated “[t]he rationale of the economic loss rule is that parties who have bargained for the distribution of risk of loss should not be permitted to circumvent their bargain after loss occurs to the property that was the subject of the bargain.” *Casa Clara*, 620 So. 2d at 1248. (Shaw, J., dissenting). The dissent felt that the ELR could not and should not apply in this situation because the “key premise underlying the [ELR] is that parties in a business context have the ability to allocate economic risks and remedies as part of their contractual negotiations” and that premise did not exist in *Casa Clara*. *Id.* at 1248. (Barkett, C.J., dissenting). While Justice Shaw in the dissent agreed with the majority, that parties who have freely bargained and entered a contract pertaining to a particular subject matter should be held to the terms of that contract, including the distribution of losses, Justice Shaw stated “the theory is stretched when it is used to deny a cause of action to an innocent third party who the defendant knew or should have known would be injured by the tortious conduct.” *Id.* at 1249 (Shaw, J., dissenting).

55. *Id.* at 1247.

56. *Id.*

57. *Casa Clara*, 620 So. 2d at 1247.

58. Daniel M. Bachi and Bard D. Rockenbach, *The Practical Limitations of the Economic Loss Rule*, 69 FLA. B.J. 89, 89 (Nov. 1995) (citations omitted).

59. See *id.*

C. *Exceptions to Florida's Economic Loss Rule*

Although the ELR provides two exceptions on its face, personal injury and other property damage, Florida courts have found additional exceptions in certain circumstances.⁶⁰ In *Sandarac Ass'n v. W.R. Frizzell Architects, Inc.*, the Second District Court of Appeal of Florida stated “[l]awyers and judges alike have found it difficult to determine when the rule applies and when an exception is appropriate.”⁶¹ However, the *Sandarac* court recognized three exceptions to the general rules of negligence in order to permit recovery for economic loss that would otherwise be barred under the ELR.⁶² The *Sandarac* court recognized recovery of economic damages arising from negligent actions by attorneys, abstractors, and accountants.⁶³

These exceptions are recognized by other Florida courts as well. For example, in *First Florida Bank v. Max Mitchell & Co.*,⁶⁴ the Supreme Court of Florida indicated that it will not apply the ELR or require privity for a claim against an accountant.⁶⁵ Similarly, in *First American Title Insurance Co. v. First Title Service Co. of the Florida Keys*,⁶⁶ the court addressed a claim by a party not in privity with an abstract company for negligent preparation of an abstract.⁶⁷ The *First American* court found that the plaintiff was a third party beneficiary of the abstractor's employment contract and limited liability to parties to the abstract transaction and intended and known third party beneficiaries, rather than to all foreseeable injured parties.⁶⁸ The patterns of exceptions recognized in these cases suggest that concurrent breach of contract and

60. *Sandarac Ass'n v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349, 1352 (Fla. 2d Dist. Ct. App. 1992) (citing *First Florida Bank, N.A. v. Max Mitchell & Co.*, 558 So. 2d 9 (Fla. 1990); *First Am. Title Ins. Co. v. First Title Serv. Co. of the Fla. Keys*, 457 So. 2d 467 (Fla. 1984)); *see also* *Southland Constr., Inc. v. Richeson Corp.*, 642 So. 2d 5, 8 (Fla. 5th Dist. Ct. App. 1994) (explaining that an engineer, who knew the tractor would be damaged if he negligently performed, is liable in tort even though there is no contract between the parties).

61. *Sandarac Ass'n*, 609 So. 2d at 1352.

62. *Id.* at 1353.

63. *Id.* The court explained that “[u]nder restricted circumstances, attorneys, abstractors, and accountants may be liable to specific plaintiffs for economic damages arising from their negligent performance of professional services.” *Id.* (*See infra* note 69 for examples of cases which found these exceptions).

64. *First Florida Bank*, 558 So. 2d at 9.

65. *Id.* at 14.

66. *First Am. Title Ins. Co. v. First Title Serv. Co. of the Fla. Keys*, 457 So. 2d 467 (Fla. 1984).

67. *Id.* at 468.

68. *Id.* at 473.

negligence claims may be permitted where the breaching party has a higher degree of care and foreseeable third parties may be harmed by the breach.⁶⁹

D. *The Independent Tort Exception to Florida's Economic Loss Rule*

When there is a breach of contract claim for goods and services, the initial question is whether the plaintiff put at issue an intentional tort claim.⁷⁰ Since the ELR bars all negligence claims for contracted goods and services, the only viable application for the independent tort exception occurs when an intentional tort is at issue.⁷¹ To constitute a viable independent tort claim, the intentional tort must not be intertwined with the breach of contract.⁷² An independent tort claim "must be based on 'some additional conduct' beyond the conduct constituting a breach of contract."⁷³ In other words, "[a] tort is independent of a breach of contract if the facts comprising the breach are not relied upon to establish the elements of the tort."⁷⁴

Some of the intentional torts which have provided an additional exception to the ELR, and which have been considered independent of contractual duties, include: fraud; fraud in the inducement; intentional interference with an existing contract; civil theft; deceit; and other torts which require proof of intent.⁷⁵ In order to fully understand the relationship between the ELR and

69. The following cases discuss exceptions to the ELR where the cited parties had a higher degree of care: *Southland Constr.*, 642 So. 2d at 5 (engineer); *Angel, Cohen and Rogovin v. Overson Inv., N.V.*, 512 So. 2d 192 (Fla. 1987) (attorney); *McElvy, Jennewein, Stefany, Howard, Inc. v. Arlington Elec., Inc.*, 582 So. 2d 47, 49-50 (Fla. 2d Dist. Ct. App.), *cause dismissed*, *Arlington Elec., Inc. v. McElvy, Jennewein, Stefany, Howard, Inc.*, 587 So. 2d 1327 (1991) (architects); *Bay Garden Manor Condominium, Ass'n v. James D. Marks, Assocs.*, 576 So. 2d 744 (Fla. 3d Dist. Ct. App. 1991) (engineers); *First State Savings Bank v. Albright & Assocs. of Ocala*, 561 So. 2d 1326 (Fla. 5th Dist. Ct. App.), *review denied*, 576 So. 2d 284 (Fla. 1990) (real estate appraiser); *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So. 2d 315 (Fla. 3d Dist. Ct. App. 1985) (attorney).

70. *SFC Valve Corp. v. Wright Mach. Corp.*, 883 F. Supp. 710, 716 (S.D. Fla. 1995) (citing *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So. 2d 252, 255 (Fla. 3d Dist. Ct. App. 1993)). Throughout this article, when independent torts are discussed in the context of courts allowing an exception to the ELR, the author refers to intentional, independent torts.

71. *See Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198, 1199 (11th Cir. 1994).

72. *See id.* at 1200 (citing *Serena v. Albertson's Inc.*, 744 F. Supp. 1113 (M.D. Fla. 1990)).

73. *Petitioner's Initial Brief* at 19; *Woodson v. Martin*, 677 So. 2d 842 (Fla.), *quashed*, No. 87,057, 1996 WL 600478 (Fla. Oct. 17, 1996) (citations omitted).

74. *SFC Valve Corp.*, 883 F. Supp. at 716.

75. *See McAbee v. Edwards*, 340 So. 2d 1167, 1169 (Fla. 4th Dist. Ct. App. 1976) (recognizing a malpractice claim for the economic damages of an intended beneficiary negligently omitted from the will); *see also Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714, 723 (Fla. 3d

fraud, an in-depth look at the elements used to determine independent torts is necessary.

III. INDEPENDENT TORTS AND FLORIDA'S ECONOMIC LOSS RULE

The independent tort doctrine provides that in order to plead a tort claim in an action arising out of a contract, "there must be a tort 'distinguishable from or independent of [the] breach of contract.'"⁷⁶ One reason for this doctrine is that contract remedies were intentionally created to provide relief for breaches of contract.⁷⁷ Since breaches of contract create strict liability, there is no justification for fault or conduct based claims when either the duty or resulting damage arises from the contractual relationship.⁷⁸ Conversely, when the source of duty and/or damages falls outside the contract, then contract remedies do not make the non-breaching party whole and an independent tort exists.⁷⁹ When determining whether a cause of action arose out of contract or tort, the dividing line is not always clear. "[A] tort is ordinarily a violation of a duty imposed by law, independent of contract, though it may sometimes have relation to obligations growing out of, or coincident with, a contract."⁸⁰ This creates the recurring difficulty courts face in determining the existence of an independent tort.

A. *Factors Defining Independent Torts*

1. Duty

One of the reasons why the application of the ELR is so confusing is because duties exist in both tort law and contract law.⁸¹ As noted above, a tort

Dist. Ct. App. 1972), *cert. denied*, 285 So. 2d 18 (Fla. 1973) (noting that deceit is an intentional tort recognized by the common law); *Brass v. NCR Corp.*, 826 F. Supp. 1427, 1428 (S.D. Fla. 1993) (finding that the ELR does not bar fraud in the inducement). *Contra Woodson v. Martin*, 663 So. 2d 1327, 1329 (Fla. 2d Dist. Ct. App. 1995) (holding that the ELR bars fraud in the inducement claims).

76. *AFM Corp.*, 515 So. 2d at 181 (citations omitted).

77. *See Florida Power & Light*, 510 So. 2d at 901.

78. *See id.*

79. *See Brass*, 826 F. Supp. at 1428 (citing *AFM Corp.*, 515 So. 2d at 180).

80. FLA. JUR. 2d *Torts* § 7 (1995).

81. *See Casa Clara*, 620 So. 2d at 1246. In *Casa Clara*, the court explained the difference between a duty in tort and a contractual duty by stating:

The purpose of a duty in tort is to protect society's interest in being free from harm, . . . and the cost of protecting society from harm is borne by society in general. Contractual duties, on the other hand, come from society's interest in performance of promises. When only economic harm is involved, the question becomes

duty must be independent of the contract duty in order for an exception to the ELR to apply.⁸² Factors which make a duty in tort independent of a duty in contract depend upon the nature of the underlying tort or contract.⁸³ The Fourth District Court of Appeal of Florida recently stated:

If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. . . . If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort.⁸⁴

In certain cases, duties may merge, making it difficult to determine whether failure to perform the duty amounts to a breach of contract or an independent tort. For example, the duty of good faith and fair dealing exists both in the creation of the contract and in the performance of the contract.⁸⁵ If the duty of good faith and fair dealing was breached before the contract was entered into, then an independent tort has been found to exist.⁸⁶ On the other hand, if the duty is breached once the contract has been entered into, then a breach of contract has been committed.⁸⁷

'whether the consuming public as a whole should bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies.'

Id. at 1246-47 (citations omitted).

82. *AFM Corp.*, 515 So. 2d at 181.

83. *See Jarmco, Inc. v. Polygard, Inc.*, 668 So. 2d 300, 303 (Fla. 4th Dist. Ct. App. 1996).

84. *Terminix Int'l Co. v. Michaels*, 668 So. 2d 1013, 1014 (Fla. 4th Dist. Ct. App. 1996) (citations omitted).

85. *Cf. Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985). *Johnson* involved an action for breach of contract and fraud regarding the purchase of a home which, the buyers learned after they purchased it, had a defective roof. One of the issues presented for review was whether the sellers, who were aware of the problems regarding the roof, had a duty to disclose the problems to the buyers. The *Johnson* court held that the sellers had a duty to disclose the defective roof because the doctrine of caveat emptor was not in tune with the times and did not conform with current notions of justice, equity, and fair dealing. *Id.* at 628. By eliminating the doctrine of caveat emptor, the court held that the seller had a duty of good faith and fair dealing to disclose material defects, which the seller had knowledge of, both before entering the contract and after entering the contract. *See id.*

86. *See id.* at 625.

87. *Id.*

Florida courts have long recognized that there are independent torts which impose tort duties on parties outside of their contractual duties.⁸⁸ One example of a tort which the Florida courts hold imposes duties independent of contractual duties is civil theft.⁸⁹ In *Burke v. Napieracz*,⁹⁰ the court declined to allow the ELR to bar the plaintiff's civil theft claim because the court refused to abolish a legislatively created tort designed to extend a civil remedy to those harmed by alleged criminal activity.⁹¹ In sum, the ELR "means that in certain kinds of cases, . . . no tort duty is imposed on the defendant to avoid economic harm to the plaintiff."⁹² Outside of those cases, the existence of tort duties, such as civil theft, remain independent of contractual duties.⁹³

2. Damages

When a tort claim is based on damages, which cannot be recovered from a breach of contract claim, "an issue of fact remains as to whether the [p]laintiff suffered extra-contractual damages."⁹⁴ "Only two jurisdictions other than Florida . . . have used damages to define whether an independent tort exists."⁹⁵ For example, in *Grace Petroleum Corp. v. Williamson*,⁹⁶ the Twelfth District Court of Appeals of Texas reversed an exemplary damages award based on concurrent claims for breach of contract and fraudulent misrepresentation on the grounds that the fraudulent misrepresentation claim lacked damages distinct from those found under the breach of contract.⁹⁷ The court noted that in order to determine whether the plaintiff could recover on an asserted tort

88. Brief of Amicus Curiae Florida Consumer Action Network in Support of Position of Respondents at 11, *HTP, Ltd. v. Lineas Areas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995) (No. 94-2779), *approved*, No. 86, 913, 1996 WL 600501 (Fla. Oct. 17, 1996) [hereinafter Brief of Amicus Curiae] (giving examples such as conversion, slander of title, defamation, and civil theft).

89. *Burke v. Napieracz*, 674 So. 2d 756 (Fla. 1st Dist. Ct. App. 1996).

90. *Id.*

91. *Id.* at 758.

92. See Brief of Amicus Curiae at 11, *HTP, Ltd.* (No. 94-2779).

93. *Id.*

94. Petitioner's Initial Brief at 29, *Woodson* (No. 87-057) (citing *Burton v. Linotype, Co.*, 556 So. 2d 1126 (Fla. 3d Dist. Ct. App. 1989)).

95. Theresa Montalbano Bennett, *Lies and Broken Promises: Fraud and the Economic Loss Rule After Woodson v. Martin*, 74 FLA. B.J. 46, 48 (1996) (citing *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991); *Jim Walters Homes, Inc. v. Reed*, 711 S.W. 2d 617, 618 (Tex. 1986)).

96. 906 S.W.2d 66 (Tex. Ct. App. 1995).

97. *Id.* at 68.

theory, it had to “examine the *nature* of the plaintiff’s *loss*, because the nature of the injury most often determines which duty has been breached.”⁹⁸

The ELR does not always act to bar recovery of pure economic loss.⁹⁹ When an independent tort claim is alleged, outside a breach of contract, courts have held that if the damages sought are distinct from damages within the breach of contract, the plaintiff may recover regardless of whether the damages are purely economic.¹⁰⁰

3. Time

The most obvious way to distinguish an independent tort from a breach of contract is by determining when the alleged independent tort took place.¹⁰¹ Typically, causes of action which arise before entering into a contract constitute independent torts because no duty has yet been created under contract.¹⁰² Therefore, the duty which has been breached lies in tort.¹⁰³ For example, fraud in the inducement occurs prior to entering a contract because it occurs prior to the formation of the contract. Therefore, no contractual duty is breached when fraud in the inducement occurs.

On the other hand, once a contract has been entered into, it becomes more difficult to distinguish between contractual duties and independent tort duties since there are duties under contracts which also arise under common law.¹⁰⁴ For example, fraud in the performance of a contract is not an independent tort because the duty owed arose out of the duties set forth in the contract.¹⁰⁵

One case which clearly illustrates the time element is *Hoseline, Inc. v. U.S.A. Diversified*.¹⁰⁶ In *Hoseline*,¹⁰⁷ the appellee, Hoseline, entered into a contract with appellant, USA Diversified (“USA”), in which USA agreed to

98. *Id.* (citations omitted).

99. Brief of Amicus Curiae, at 11, *HTP Ltd.* (No. 94-2779).

100. *See id.* (citing *McAbee v. Edwards*, 340 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1976); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)).

101. *See Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1237 (N.D. Fla. 1991).

102. *See Leisure Founders, Inc. v. CUC Int’l, Inc.*, 833 F. Supp. 1562, 1572 (S.D. Fla. 1993) (holding fraud in the inducement claims do not fall within the scope of the ELR because they involve precontractual conduct which is distinct from conduct constituting breach of contract).

103. *See id.*

104. *Id.*

105. *See Williams Elec. Co.*, 772 F. Supp. at 1237 (explaining that fraud in the performance is distinct from fraud in the inducement).

106. *Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198 (11th Cir. 1994).

107. *Id.*

ship certain quantities of wire harness loom to Hoseline.¹⁰⁸ Hoseline discovered that USA had been undershipping the loom forty-five to fifty percent.¹⁰⁹ Hoseline demanded a refund, but USA refused.¹¹⁰ Hoseline then filed suit alleging breach of contract and common law fraud and civil theft.¹¹¹ The Eleventh Circuit rejected Hoseline's civil theft and fraud claims based on the ELR and held that since both claims arose out of USA's breach of their contractual duties, Hoseline could not recover in tort.¹¹²

Hoseline demonstrates the importance of establishing a timeline. Timelines help to separate when a duty has been breached, since it may be more difficult to determine whether an independent tort exists once the contract has been formed. Additionally, courts typically hold that the ELR does not bar tort claims which occur prior to the formation of a contract.¹¹³

B. *Fraud in the Inducement*

One of the essential elements of a contract is that parties to the contract enter into it freely and without assent obtained through fraud, mistake, duress, or undue influence.¹¹⁴ One example of a tort which has been recognized as existing, independent of a breach of contract, is fraud in the inducement.¹¹⁵ Fraud in the inducement has been recognized in Florida for decades specifically because it is a tort based on conduct which is independent of any breach of contract conduct.¹¹⁶ Fraud in the inducement contains the elements consistent with the elements that constitute an independent tort. For example, fraud in the inducement of a contract occurs prior to the actual contract.¹¹⁷ Likewise,

108. *Id.* at 1199.

109. *Id.*

110. *Id.*

111. *Hoseline*, 40 F.3d at 1199. After Hoseline filed the lawsuit, USA filed for bankruptcy causing Hoseline to abandon the breach of contract claim. *Id.* at 1199.

112. *Id.* In making this determination, the Eleventh Circuit relied on *Serina v. Albertson's, Inc.*, 744 F. Supp. 1113 (M.D. Fla. 1990). In *Serina*, the court held that a plaintiff could not bring a separate tort action where facts surrounding a breach of contract and the separate and distinct tort are intertwined. *Id.* at 1118.

113. *See Williams Elec. Co.*, 772 F. Supp. at 1237.

114. FLA. JUR. 2D *Contracts* § 35 (1995).

115. *See, e.g.*, *Burton v. Linotype Co.*, 556 So. 2d 1126, 1126 (Fla. 2d Dist. Ct. App. 1989); *Johnson v. Bokor*, 548 So. 2d 1185, 1186 (Fla. 2d Dist. Ct. App. 1989) (holding that a party fraudulently induced into a contract may sue for fraud in the inducement or for breach of contract).

116. Brief of Amicus Curiae at 5, *HTP, Ltd.* (No. 94-2779) (citing *Isom v. Equitable Life Assurance Soc'y*, 189 So. 253, 259 (Fla. 1939)).

117. *See Williams Elec. Co.*, 772 F. Supp. at 1238; *Leisure Founders, Inc. v. CUC Int'l, Inc.*, 833 F. Supp. 1562, 1572 (S.D. Fla. 1993).

“[t]he tort of fraudulent inducement recognizes, as do all tort claims, a societal belief that individuals entering into agreements with one another owe each other a duty.”¹¹⁸ The specific duty encompassed by fraud in the inducement claims is the duty of the parties entering into the contract to speak honestly as to elements which make up the contract.¹¹⁹

C. Elements of Fraud in the Inducement

Fraud is a particularly difficult claim to prove because its elements include proof of the defrauder’s intent and proof of the defrauded party’s reasonable reliance on the misrepresentation.¹²⁰ However, in order to prove fraud in the inducement, the plaintiff has the burden of demonstrating all of the following elements of common law fraud: 1) misrepresentation of material fact; 2) the representor of the misrepresentation knew or should have known of the statement’s falsity; 3) intent by the representor that the representation will induce another to rely and act on it; and 4) resulting injury to the party acting in justifiable reliance on the representation.¹²¹

A claim of fraudulent inducement requires a full examination into the facts and circumstances surrounding the claim before the occurrence of fraud can be determined.¹²² The first element of fraud in the inducement requires that there be a misrepresentation of material fact made by the defendant.¹²³ In *Cavic v. Grand Bahama Development Co.*,¹²⁴ the Eleventh Circuit held:

[T]o constitute actionable fraud, a false representation must relate to an existing or pre-existing-fact, an unspecific and false statement of opinion such as occurs in puffing generally cannot constitute fraud.

118. Brief of Amicus Curiae at 13, *HTP, Ltd.* (No. 94-2779).

119. *Id.*

120. See *Pettinelli v. Danzig*, 722 F.2d 706, 709 (11th Cir. 1984).

121. *Lou Bachrodt Chevrolet, Inc. v. Savage*, 570 So. 2d 306, 308 (Fla. 4th Dist. Ct. App. 1990) (citations omitted).

122. *Burton*, 556 So. 2d at 1128 (citations omitted).

123. *Lou Bachrodt Chevrolet*, 570 So. 2d at 308.

124. 701 F.2d 879 (11th Cir. 1983). In *Cavic*, the appellees sued the appellant for common law fraud alleging that they were induced by fraudulent misrepresentations to enter into contracts to purchase land from the appellant. The appellees complained that the appellant made false representations regarding land appreciation, resale factors, and recovery of equity, which induced the appellees to enter the contracts. The jury found that the appellants made the representations with the knowledge of their falsity and with the intent to induce the appellees to act upon the representations. The Eleventh Circuit held that the jury was justified in its determination and confirmed that the appellant’s misrepresentations went beyond mere sales puffing. *Id.* at 885.

Also, a promise of future action or a prediction of future events cannot, standing alone, be a basis for fraud because it is not a representation, there is no right to rely on it, and it is not false when made.¹²⁵

Likewise, in *Plantation Key Developers, Inc. v. Colonial Mortgage Co. of Indiana*,¹²⁶ the court held that “a mere broken promise does not constitute fraud.”¹²⁷

In a recent case concerning fraud in the inducement and the ELR, *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*,¹²⁸ the Eleventh Circuit held that the ELR does not bar a claim for damages when it is accompanied by an independent tort, such as fraud in the inducement.¹²⁹ In *Pulte*, the Eleventh Circuit held that the plaintiff, Pulte, had a valid claim for fraud in the inducement.¹³⁰ However, the court held that Pulte did not meet the burden of proof needed to support the claim because Pulte failed to show any misrepresentation by the defendant, Osmose, and Pulte failed to show that it relied on any alleged misrepresentations.¹³¹ The Eleventh Circuit’s finding offers evidence that a valid claim for fraud in the inducement can only succeed if the plaintiff meets his/her burden of proof.

The second element of fraud in the inducement requires the plaintiff to prove that the false misrepresentation made by the defendant was known, or should have been known, to be false at the time it was made.¹³² Coinciding with the second element, the third element of fraud requires the plaintiff to prove that the defendant made the misrepresentation with the intent that it would induce the plaintiff to rely and act on it.¹³³ In a seminal case involving fraudulent misrepresentation, *Finney v. Frost*,¹³⁴ the court set aside a jury

125. *Cavic*, 701 F.2d at 883 (citations omitted).

126. 589 F.2d 164 (5th Cir. 1979).

127. *Id.* at 172 (citing *Brod v. Jernigan*, 188 So. 2d 575, 579 (Fla. 2d Dist. Ct. App. 1966)).

128. 60 F.3d 734 (11th Cir. 1995).

129. *Id.* at 742 (citing *AFM Corp.* 515 So. 2d at 181–82; *Burton*, 556 So. 2d at 1128).

130. *Pulte*, 60 F.3d at 742.

131. *Id.* Pulte alleged that Osmose had fraudulently induced it to buy a certain plywood because the plywood contained certifications that it complied with applicable building codes and standards, which Pulte alleged was false. *Id.* at 734. Additionally, Pulte asserted that Osmose’s promotional literature misrepresented that the Osmose-treated plywood conformed to those building codes. *Id.* at 736. The court held that the record contained no showing that Pulte’s allegations were true. *Id.* at 742.

132. *Poliakoff v. National Emblem Ins. Co.*, 249 So. 2d 477, 478 (Fla. 3d Dist. Ct. App. 1971). *Poliakoff* is often cited to for the essential elements of fraud.

133. *Id.*; see also *Lou Bachrodt Chevrolet*, 570 So. 2d at 308.

134. 228 So. 2d 617 (Fla. 4th Dist. Ct. App. 1969), *cert. dismissed*, 239 So. 2d 101 (Fla. 1970).

verdict in favor of the plaintiff because the court felt there was insufficient evidence to support the plaintiff's allegations that the defendant knowingly provided false information which was intended to induce the plaintiff to act.¹³⁵

In *Finney*, the plaintiff purchased a yacht from the defendant with a bill of sale declaring the vessel to be free and clear of all liens, mortgages, taxes, and encumbrances.¹³⁶ The plaintiff sued the defendant because two months after the receipt of the yacht and bill of sale, the boat was attached and sold for unpaid bills.¹³⁷ The *Finney* court held that there was no evidence "to establish that the defendant knew the bills were not paid or that he told the plaintiff that the bills were paid to induce plaintiff to act."¹³⁸

On the other hand, in *American Eagle Credit Corp. v. Select Holding, Inc.*,¹³⁹ the United States District Court for the Southern District of Florida held that the plaintiff, American Eagle, established the elements of fraud and, therefore, the court entered judgment against the defendant, Roffers.¹⁴⁰ In this case, American Eagle sued Dean Roffers, secretary/treasurer of Select Holdings and Select Restaurant Group, Inc., for fraud. Roffers made a false statement regarding equipment that American Eagle had contracted to purchase from a vendor. Roffers told another Select Holdings employee to tell American Eagle that the equipment had been manufactured, was inspected in the vendor's warehouse, and was found acceptable by the Select companies, therefore, American Eagle should go ahead and pay the vendor. Roffers did not deny that the statements were false, and the court held that Roffers knew the statements were false at the time he made them.¹⁴¹ Additionally, the court held that Roffers made the false statement regarding the equipment in order to induce American Eagle to act.¹⁴²

135. *Id.* at 618.

136. The bill of sale specifically stated:

The sellers further warrant that the said vessel is free and clear of all liens, mortgages, taxes, and encumbrances of any nature or kind and hereby agree to indemnify and save harmless, the purchaser against and from any and all claims arising by reason of anything happening or occurring prior to date hereof and all expense in connection therewith.

Id.

137. *Id.*

138. *Id.*

139. 865 F. Supp. 800 (S.D. Fla. 1994).

140. *Id.* at 813.

141. *Id.* at 812.

142. *Id.* The facts stated that American Eagle was not going to pay the vendor until they were assured that the equipment had been inspected and was acceptable. *Id.*

The final and most important element of fraud in the inducement requires the plaintiff to have justifiably relied upon a misrepresentation and, as a result thereof, suffered damages.¹⁴³ Justifiable reliance is the most significant element because it ensures that the defendant will not be liable in tort for representations the plaintiff could not have been expected to rely upon.¹⁴⁴ In the seminal case of *Besett v. Basnett*,¹⁴⁵ the Supreme Court of Florida held that a “recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.”¹⁴⁶ However, the supreme court noted that a plaintiff is not precluded from recovery in tort just because he/she failed to make an independent investigation of the statement.¹⁴⁷ Moreover, the court held that “[a] person guilty of fraud should not be permitted to use the law as his shield.”¹⁴⁸

In another monumental case, *Johnson v. Davis*,¹⁴⁹ the Supreme Court of Florida explained that, “[t]he doctrine of caveat emptor does not exempt a seller from responsibility for the statements and representations which he makes to induce the buyer to act, when under the circumstances these amount to fraud in the legal sense.”¹⁵⁰ The *Johnson* court held that a seller of residential property has a duty to disclose material facts affecting the value of property which are not readily observable to the buyer and which are not known to the buyer.¹⁵¹ The significance of this element is that parties cannot proceed on

143. See *Lou Bachrodt Chevrolet*, 570 So. 2d at 308.

144. See Brief of Amicus Curiae at 14, *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995) (No. 94-2779).

145. 389 So. 2d 995 (Fla. 1980).

146. *Id.* at 997.

147. *Id.* In *Besett*, the plaintiffs, Mr. and Mrs. Basnett, filed a complaint against the Besetts and their real estate broker, the defendants, alleging that the defendants had made a fraudulent misrepresentation for the purpose of inducing the plaintiffs to buy a lodge and a particular piece of property. The plaintiffs alleged that the defendants had misrepresented the amount of business income the lodge had previously produced and the defendants had misrepresented the size of the lodge. The trial court dismissed the complaint for failing to state a cause of action; however, the district court reversed the trial court’s decision. *Id.* at 996. The supreme court held that the plaintiffs were justified in relying upon the representations made by the defendants, even though they might have learned that the representations were false had they made an independent investigation. *Id.* at 998.

148. *Besett*, 389 So. 2d at 998.

149. 480 So. 2d 625 (Fla. 1985).

150. *Id.* at 627. Prior to the Supreme Court of Florida’s decision, the doctrine of caveat emptor was applied to the sales of residential homes. *Id.* at 628. This doctrine, which stands for “let the buyer beware,” held that it was the buyer’s responsibility to be informed and examine his purchase prior to entering the contract. See *id.*

151. *Id.*

a fraud in the inducement claim unless they are justified in relying on the representation.

Likewise, a party cannot be successful on a fraud in the inducement claim unless all of the elements of fraud are proven. This provides yet another reason why the economic loss rule should not bar fraud in the inducement claims. Fraud in the inducement, in and of itself, contains sufficient safeguards against meritless claims without applying the ELR to bar fraud claims prior to a factual determination of the elements.

IV. THE ECONOMIC LOSS RULE AND FRAUD IN THE INDUCEMENT IN RELATION TO RECENT 1995 AND 1996 CASES

Fraud in the inducement has been considered an independent tort which may be brought separately from a breach of contract claim by essentially every district in Florida, including the second district.¹⁵² However, in a relatively recent decision, the Second District Court of Appeal held that the ELR bars fraud in the inducement claims.¹⁵³ In *Woodson v. Martin*,¹⁵⁴ the court was asked to determine the following question, which it then certified to the Supreme Court of Florida as a question of great public importance: "Is a buyer of residential property . . . prevented by the 'economic loss rule' from recovering damages for fraud in the inducement against [a] real estate agent and its individual agent . . . representing the sellers?"¹⁵⁵

In making its decision, the second district explained that "the nature of the damages suffered determines whether the economic loss rule bars recovery based on tort theories."¹⁵⁶ The court noted "if the damages sought are economic losses only, the party seeking recovery for those damages must proceed

152. *Monco Enters., Inc. v. Ziebart Corp.*, 673 So. 2d 491, 492 (Fla. 1st Dist. Ct. App. 1996) (citing *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)); see also *TGI Dev. Corp. v. CV Reit*, 665 So. 2d 366 (Fla. 4th Dist. Ct. App. 1996); *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995); *Burton*, 556 So. 2d at 1128; *Johnson v. Bokor*, 548 So. 2d 1185, 1186 (Fla. 2d Dist. Ct. App. 1989).

153. *Woodson v. Martin*, 663 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1995), *quashed*, No. 87,057 1996 WL 600478 (Fla. Oct. 17, 1996). In *Woodson*, the appellant bought an expensive home which he alleged was represented to him by the appellees as almost new. *Id.* at 1327. The appellant claimed that the appellees were guilty of a variety of misrepresentations and that he relied on those misrepresentations in deciding to buy the house. *Id.* When the appellant and his wife moved into the house, they discovered numerous, serious defects which led them to sue the appellees on several theories, including fraud in the inducement. *Id.*

154. 663 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1995).

155. *Id.* at 1327.

156. *Id.* at 1329.

on contract theories of liability.”¹⁵⁷ Based on this reasoning, the court found that because the only damages suffered by the appellant, Woodson, were damages to his house, the ELR barred recovery for the fraud in the inducement claim.¹⁵⁸ The second district relied on several decisions, including the Supreme Court of Florida’s holding in *Casa Clara*, despite the fact that only one of the decisions actually involved a fraud in the inducement claim.¹⁵⁹

Prior to the second district’s decision in *Woodson*, the Third District Court of Appeal of Florida held, in *HTP, Ltd. v. Lineas Aereas Costarricenses*,¹⁶⁰ that fraud in the inducement claims were not barred by the ELR.¹⁶¹ In *HTP*, the plaintiff, Lineas Aereas Costarricenses, filed a complaint against the defendant, HTP, alleging that the plaintiff had been fraudulently induced into entering into a settlement agreement. The defendant counterclaimed that the plaintiff was in breach of the settlement agreement. HTP subsequently sought the dismissal of Lineas Aereas Costarricenses’ fraudulent inducement claim on the ground that Florida’s ELR barred the claim. The third district rejected HTP’s breach of the settlement agreement claim and found that a “cause of action for fraud in the inducement [is] an independent tort that [is] not barred by the economic loss rule.”¹⁶²

Although several Florida courts have addressed the issue of whether the ELR should bar fraud in the inducement claims,¹⁶³ the second district was the only court in Florida to apply the *Woodson* rationale in finding that the ELR should bar such claims. However, the Supreme Court of Florida’s recent

157. *Id.*

158. *Id.* The *Woodson* court referred to the Supreme Court of Florida’s decision in *Casa Clara*, which the *Woodson* court interpreted as barring all claims, regardless of whether they are independent, if the only damages suffered are economic. *Woodson*, 663 So. 2d at 1329.

159. *Id.* at 1328–29. The *Woodson* court relied on the following cases: *Pulte*, 60 F.3d at 744 (holding the ELR does not bar fraud in the inducement claims; the plaintiff just failed to prove the claim); *Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198, 1200 (11th Cir. 1994) (involving a fraud in the performance claim); *Airport Rent-A-Car, Inc. v. Prevost Car, Inc.*, 660 So. 2d 628, 631 (Fla. 1995) (applying the ELR to negligence claims); *Casa Clara Condominium Ass’n v. Charley Toppino & Sons*, 620 So. 2d 1244, 1248 (Fla. 1993) (applying the rule only to negligence claims and abolishing recovery when only economic damages are suffered).

160. 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1996).

161. *Id.* at 1222 (citing *Burton*, 556 So. 2d at 1128).

162. *Id.*

163. See *Linn-Well Dev. Corp. v. Preston & Farley, Inc.*, 666 So. 2d 558 (Fla. 2d Dist. Ct. App. 1995). In *Linn-Well*, the second district affirmed its decision in *Woodson*, and certified a similar question to the Supreme Court of Florida: “Is a buyer of *commercial* property prevented by the ‘economic loss rule’ from recovering damages for fraud in the inducement against the real estate agent and its individual agent representing the sellers?” *Id.* at 559 (emphasis added).

decision in *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*,¹⁶⁴ ended the conflict by holding that the ELR does not bar fraud in the inducement claims. This decision is long overdue since, aside from the third district's decision in *HTP*, the Eleventh Circuit,¹⁶⁵ the First District Court of Appeal,¹⁶⁶ the Fourth District Court of Appeal,¹⁶⁷ the Fifth District Court of Appeal,¹⁶⁸ and every other appellate court in Florida has held that the ELR does not bar fraud in the inducement claims.¹⁶⁹ The second district's decision in *Woodson* caused several of these courts to certify conflict to the Supreme Court of Florida on this issue.¹⁷⁰ Furthermore, the second district's rationale offered no persuasive explanation for extending the ELR to bar fraud in the inducement claims.¹⁷¹ As one commentator has stated: "if fraudulent inducement claims were no longer available in breach of contract claims, parties would be foreclosed from protecting themselves from fraud."¹⁷²

V. CONCLUSION

The alleged intent of the ELR was to separate negligence claims for personal injury damages from contract claims for economic damages. However, when the Second District Court of Appeal applied the ELR to bar fraud in the inducement claims, this expansion of the ELR went too far.

164. No. 86,913, 1996 WL 600501 (Fla. Oct. 17, 1996), *approving*, *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 661 So. 2d 1221 (Fla. 3d Dist. Ct. App. 1995).

165. *See, e.g., Pulte*, 60 F.3d at 742 (stating that "[a]lthough the economic loss rule bars recovery for tort claims arising from breach of contract, the doctrine does not preclude a claim for damages occasioned by an independent tort, including fraud in the inducement of a contract").

166. *See, e.g., Monco Enter.*, 673 So. 2d at 492 (explaining that fraud in the inducement is an independent tort which is not barred by the ELR).

167. *See, e.g., TGI Dev.*, 665 So. 2d at 366 (holding that "[f]raud in the inducement, even when only economic damages are sought to be recovered, is the kind of independent tort that is not barred by the economic loss rule"). *See also Jarmco*, 668 So. 2d at 301 (affirming *TGI Dev., Inc.*, and holding that the ELR does not bar a common law fraud in the inducement claim seeking to recover only economic losses).

168. *See, e.g., Lee v. Paxson*, 641 So. 2d 145, 145-46 (Fla. 5th Dist. Ct. App. 1994) (explaining the "argument that the economic loss rule bars [a] fraudulent inducement claim is specious; nevertheless, it is clear that, under Florida law, appellant has no enforceable claim.").

169. Respondents' Answer Brief at 21, *HTP, Ltd.* (No. 94-2779).

170. *See Jarmco*, 668 So. 2d at 300; *Monco Enter.*, 673 So. 2d at 491; *TGI Dev.*, 665 So. 2d at 366; *HTP, Ltd.*, 661 So. 2d at 1221.

171. Bennett, *supra* note 95, at 48.

172. *Id.*

Fraud in the inducement, whether based on an intentional act or a negligent act, is an independent tort claim which cannot be insured against and is discovered only after the formation of the contract. The context of this kind of tort claim makes limiting the recovery of damages to economic damages under contract law wholly inadequate.

In quashing the second district's decision to expand the ELR to bar fraud in the inducement claims, the Supreme Court of Florida supported the author's reasoning that sound public policy should require, rather than restrict, the levy of punishment against fraudulent actors and the reward of full compensation to victims of fraud. The removal of any kind of fraud claim from the menu of tort law claims available to injured parties, weakens the protections afforded by law. In essence, the Second District Court of Appeal's application of the ELR encouraged intentional and negligent acts of trickery and deceit¹⁷³ because of the limitation, if not the elimination, of a means of full recovery.

Although the Second District Court of Appeal's opinion in *Woodson v. Martin* sparked debate among lawyers and judges as to the proper application of the ELR, this debate did not cloud the real consequences of applying the ELR to bar fraud in the inducement claims. The Supreme Court of Florida's very recent decision has confirmed this author's opinions; thereby ending the conflict in Florida courts and permitting recovery to the victims who have entered into contracts obtained through trickery and deceit.

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173. See Respondents' Answer Brief at 16, *HTP, Ltd.* (No. 94-2779).

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Personal Jurisdiction in a Dissolution of Marriage Action: *Garrett v. Garrett*

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I. INTRODUCTION

Nancy and Larry Garrett were married in Jacksonville, Florida on November 23, 1974. On March 9, 1978, their daughter Amy Rebecca was born in Jacksonville, and the parties lived continuously in Jacksonville from the time they were married until June of 1986.¹ The Garrett family subsequently moved to Arlington, Texas and resided there until the couple's separation in July of 1991.² Shortly thereafter, Nancy and Amy Garrett returned to Jacksonville and have remained there ever since leaving Texas. Larry Garrett also left Texas after the separation and took up residence in Greenwood, Indiana in August of 1992.³

On November 17, 1993, Nancy Gale Garrett petitioned the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, for dissolution of marriage from her husband, Larry Allen Garrett.⁴ Her husband, while residing out of state, was served in Indiana with the petition for

1. Brief for Petitioner at 1, *Garrett v. Garrett*, 668 So. 2d 991 (Fla. 1996) (No. 85,384).

2. Petitioner's Brief at 2, *Garrett* (No. 85,384).

3. *Id.*

4. See *Garrett v. Garrett*, 652 So. 2d 378 (Fla. 1st Dist. Ct. App. 1994).

dissolution of marriage.⁵ In her petition, Nancy Garrett alleged that Florida jurisdiction was proper for various reasons.⁶ The husband responded by filing a motion to dismiss for lack of personal jurisdiction stating that section 48.193 of the *Florida Statutes* did not confer personal jurisdiction over him in Florida.⁷ The trial court denied the husband's motion and ruled that Florida did have personal jurisdiction in the matter due to the husband's significant contacts with the state.⁸

On appeal, the First District Court of Appeal reversed the decision of the trial court, holding that the criteria of Florida's long arm statute had not been met.⁹ Accordingly, the trial court could not have properly exercised personal jurisdiction over Larry Garrett.¹⁰ The appellate court cited to three cases of precedent¹¹ in determining that personal jurisdiction was lacking over Mr. Garrett. In each of these cases, the gap in time between the defendant's prior residence in Florida and the commencement of the action was determined to be too remote, thus barring exercise of personal jurisdic-

5. *Id.*

6. *Garrett v. Garrett*, 668 So. 2d 991, 992-93 (Fla. 1996). Among her reasons were that: 1) she had been a resident for six months prior to the filing of the petition for dissolution of marriage; 2) she married Larry Garrett in Florida in 1974 and lived in Florida until the couple moved to Texas in 1986 with their Florida born daughter, Amy Rebecca Garrett; 3) her husband was born in Florida and currently travels to Florida to visit the daughter and other family members; and 4) her husband visits Florida to conduct business within the state. *Id.*

7. *Id.* at 993.

8. *Id.* Judge Hugh A. Carithers, Jr. based his denial of Mr. Garrett's motion on the duration of the parties' marriage in Florida before moving to Texas, Mr. Garrett's personal and business trips to Florida, and the child support payments made by Mr. Garrett in Florida. *Id.* at 993 n.1.

9. *Garrett*, 652 So. 2d at 378. The First District Court of Appeal construed section 48.193(1)(e) of the *Florida Statutes* to mean that the defendant's residency must proximately precede the commencement of the action for dissolution of marriage. *Id.* at 379. This was a rejection of the argument proffered by Nancy Garrett that proximity is not merely a temporal determination, but must be determined by the totality of the circumstances. *Id.*

10. *Id.*

11. First, in *Shammy v. Shammy*, 491 So. 2d 284 (Fla. 3d Dist. Ct. App. 1986), the court interpreted section 48.193 to mean that the defendant's residency in the state must proximately precede the commencement of the action. *Id.* at 285. Second, in *Soule v. Rosacco-Soule*, 386 So. 2d 862 (Fla. 1st Dist. Ct. App. 1980), the court rejected the position that merely because a defendant resided in Florida sometime prior to the commencement of the action, personal jurisdiction could be invoked under section 48.193. *Id.* at 863. Third, in *Bofonchik v. Smith*, 622 So. 2d 1355 (Fla. 1st Dist. Ct. App. 1993), the court found that a husband's residence in Florida from 1984 to 1986 was insufficient to support personal jurisdiction under section 48.193 in an action for child support filed by the wife in Florida in 1989. *Id.* at 1357.

tion over the defendant.¹² On rehearing *en banc*,¹³ the First District Court of Appeal reaffirmed the reasoning in their original opinion, but certified a question of great public importance to the Supreme Court of Florida.¹⁴

The Supreme Court of Florida, answering a revised certified question,¹⁵ stated that Mrs. Garrett could not obtain personal jurisdiction over her husband and, as a result, affirmed the decision of the First District Court of Appeal.¹⁶ Although recognizing the minimum contacts that a nonresident might have with a state so as to allow a court to obtain personal jurisdiction consistent with the Due Process Clause,¹⁷ the court chose to rely on whether Larry Garrett's conduct fell within one of the statutory grounds for jurisdiction found in Florida's long arm statute.¹⁸ The court stated that the language of section 48.193(1)(e) of the *Florida Statutes* does not allow a Florida court to obtain personal jurisdiction over any parties to a dissolution proceeding where the spouses once resided in Florida but "abandoned Florida as their state of residence" for any length of time.¹⁹ In other words, Mrs. Garrett could not simply return to Florida, file for dissolution of marriage, and obtain personal jurisdiction over her husband once she abandoned the protection of Florida's laws by taking up residence in another state. Finally, the court stated that Mr. Garrett's frequent trips to Florida for business and his voluntary payment of child support were not relevant facts when applied to the issue of whether section 48.193(1)(e) of the *Florida Statutes* allows

12. See *Bofonchik*, 622 So. 2d at 1355; *Shammy*, 491 So. 2d at 284; *Soule*, 386 So. 2d at 862.

13. *Garrett*, 652 So. 2d at 381.

14. *Id.* The question, as originally certified, asked: "WHEN MAY A RESPONDENT'S PRIOR RESIDENCE IN FLORIDA BE SUFFICIENT TO CREATE PERSONAL JURISDICTION IN AN ACTION CONCERNING ALIMONY, CHILD SUPPORT, OR DIVISION OF PROPERTY?" *Id.* at 381-82.

15. The Supreme Court of Florida reworded the question: "WHEN A MARRIED COUPLE RESIDING IN FLORIDA MOVES TO ANOTHER STATE, MAY ONE SPOUSE, AFTER SEPARATION, SUBSEQUENTLY RETURN TO FLORIDA AND OBTAIN PERSONAL JURISDICTION OVER THE OTHER SPOUSE BASED ON THE 'PRIOR RESIDENCE' SECTION OF FLORIDA'S LONG ARM STATUTE?" *Garrett v. Garrett*, 668 So. 2d 991, 992 (Fla. 1996).

16. *Id.* at 994.

17. The Due Process Clause of the Fourteenth Amendment to the *United States Constitution* states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

18. *Garrett*, 668 So. 2d at 994.

19. *Id.*

for a resident spouse to obtain personal jurisdiction over a nonresident spouse in a dissolution of marriage action.²⁰

This comment will focus on the potential harmful ramifications this decision will have on the law of personal jurisdiction with regard to a dissolution of marriage action in Florida. Part II will discuss the modern concept of *minimum contacts* between a defendant and the forum state, and it will examine how specific long arm statutes can restrict the outside limits of due process established through the minimum contacts analysis. Part III will focus on the reasoning of the Supreme Court of Florida in deciding *Garrett*. Part IV will criticize the decision in light of a minimum contacts approach which would have allowed the trial court to obtain personal jurisdiction over the nonresident husband. Furthermore, this part will discuss the impact of the decision on dissolution of marriage cases involving families in transition and the possible consequences suffered by a resident spouse denied the opportunity to litigate in Florida. Part V will conclude that the Florida Legislature should amend section 48.193 of the *Florida Statutes* to allow Florida courts jurisdiction over a nonresident defendant in a dissolution of marriage action who has minimum contacts with the state, such that the suit does not offend the notions of substantial justice.

II. IN PERSONAM JURISDICTION

A. *The Modern Development of Personal Jurisdiction*

Over fifty years ago, the United States Supreme Court held, in *International Shoe Co. v. Washington*,²¹ that due process only requires that “in order to subject a defendant to a judgment *in personam*, if he not be present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”²² Since *International Shoe*, there has been a line of cases²³ interpreting the minimum contacts a nonresident defendant must have

20. *Id.*

21. 326 U.S. 310 (1945).

22. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (second emphasis added).

23. *See, e.g.*, *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990); *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84 (1978).

with the forum state before a court can obtain personal jurisdiction consistent with the Due Process Clause.²⁴ These cases explored the outer boundaries of personal jurisdiction under due process. Many states have narrowed these outer boundaries for obtaining personal jurisdiction over a nonresident defendant by enacting long arm statutes that limit a plaintiff's ability to hale a defendant into court. For example, in Florida, a court cannot find personal jurisdiction over a nonresident defendant unless allowed by a grant of statutory authorization pursuant to Florida's long arm statute.²⁵ Florida's long arm statute specifies in detail the acts or conduct which allow for the court to exercise personal jurisdiction over a nonresident defendant.

From the beginning of our federal system, courts have had to grapple with the problem of the authority of a state to assert jurisdiction over parties and property in cases involving transactions not occurring entirely within the boundaries of a single state. Regardless, in every case, the court must have power over the parties to the lawsuit to render an enforceable judgment. Due process is the principal limit on the scope of this power.²⁶ By commencing the action in a particular forum, the plaintiff consents to personal jurisdiction. The defendant however, is brought into the litigation involuntarily, and the exercise of personal jurisdiction over the defendant must satisfy constitutional due process standards.²⁷

Historically, presence within the territorial jurisdiction of a court established personal jurisdiction over a nonresident defendant, thus satisfying constitutional due process standards. In *Pennoyer v. Neff*,²⁸ the notion of

24. In this context, the Court has referred solely to the Due Process Clause of the Fourteenth Amendment.

25. Section 48.193 of the *Florida Statutes* provides in pertinent part:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

....

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not.

FLA. STAT. § 48.193(1)(e) (1995).

26. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

27. *Id.*

28. 95 U.S. 714 (1877).

personal jurisdiction of a state court over a defendant was limited to persons served within the state, persons domiciled in the state, and persons consenting to jurisdiction.²⁹ In *Pennoyer*, the Court stated that “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”³⁰ *Pennoyer* established the nineteenth century constitutional doctrine that every state possesses exclusive jurisdiction and sovereignty over persons and property served with process within the territory of the forum court.³¹

More recently, the United States Supreme Court affirmed the proposition that service within the forum state subjects a nonresident defendant to the personal jurisdiction of the court.³² In the plurality opinion of *Burnham v. Superior Court of California*,³³ the Court clearly followed the precedent established in *Pennoyer*, holding that if a party is served properly with process while present in the forum, a court has personal jurisdiction over that party regardless of the existence or nonexistence of minimum contacts with the forum.³⁴ Justice Scalia, writing for the plurality, stated that “[a]mong the most firmly established principles of personal jurisdiction . . . is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.”³⁵ Consequently, the Court rejected the notion that in the absence of continuous and systematic contacts with the forum, a nonresident defendant can be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum.³⁶

29. *Id.* at 714.

30. *Id.* at 720.

31. *Id.* at 722.

32. *See Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990).

33. *Id.*

34. *Id.* at 618.

35. *Id.* at 610. In *Burnham*, the Court referred to matters that arise out of or relate to a defendant's contacts with the forum. *See generally Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990). These terms are synonymous with “general” and “specific” jurisdiction. General jurisdiction exists when the number and quality of a defendant's contacts with the forum state are sufficiently substantial such that one may litigate any dispute in the courts of the forum, whether or not that dispute grows out of those contacts. Arthur T. Von Mehren and Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) [hereinafter Von Mehren and Trautman]. Specific jurisdiction exists when the contacts with the forum are related to the dispute sought to be adjudicated. *Id.* More recently, Professor Mary Twitchell proposed to replace the terms general and specific with “dispute-blind” and “dispute-specific.” *See Mary Twitchell, The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 613 (1988) [hereinafter Twitchell].

36. *Burnham*, 495 U.S. at 616.

The opinion also recognized the weakening of *Pennoyer's* rationale.³⁷ This weakening was due to changes in the technology of transportation and communication and the tremendous growth of interstate business activity.³⁸ These changes led to a "relaxation of the strict limits on state jurisdiction"³⁹ over nonresident individuals. Furthermore, the Court noted that many state courts were focusing their attention on the minimum contacts analysis and overlooking the simple fact that a defendant might have been present in the forum, no matter how fleeting his presence. Nevertheless, in *Burnham*, the Court held that obtaining personal jurisdiction by complying with *Pennoyer's* requirement of presence within the forum satisfied the constitutional requirements of due process.⁴⁰ The plurality concluded that jurisdiction based on presence alone constitutes due process because presence is one of the continuing traditions that defines the due process standard of "traditional notions of fair play and substantial justice."⁴¹

Unlike physical presence, the minimum contacts analysis developed by the Court in *International Shoe Co. v. Washington*⁴² involves a balancing of the quality and nature of the defendant's contacts in the forum state, his or her connection with the cause of action, and the interests of the forum in protecting citizens from nonresidents.⁴³ The development of the minimum contacts analysis expanded the Nineteenth Century view of personal jurisdiction found in *Pennoyer v. Neff*. Under *International Shoe*, the amount of contact with a forum state necessary to justify an exercise of jurisdiction depends on the relationship between the defendant's contacts with the forum and the plaintiff's cause of action.⁴⁴

International Shoe eliminated the need to resort to a finding of consent to jurisdiction or a finding of presence within the jurisdiction. Two new criteria were set forth by the Court, such that personal jurisdiction would be proper if the cause of action arose from the party's activities within the state, or if the cause of action arose from conduct outside the forum state by a party who engaged in continuous and systematic business within the state.⁴⁵ These two standards of *International Shoe* have evolved into the concepts of

37. *Id.* at 617.

38. *Id.*

39. *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 260 (1958) (Black, J. dissenting)).

40. *Id.* at 618.

41. *Burnham*, 495 U.S. at 619.

42. 326 U.S. 310 (1945).

43. *See id.* at 319–20.

44. *See id.* at 320.

45. *See id.* at 319–21.

specific and general jurisdiction. Specific jurisdiction exists over an out of state party when the cause of action arose out of that party's contacts with the forum, regardless of whether those contacts occurred within the state.⁴⁶ General jurisdiction exists over any cause of action if an out of state party has engaged in continuous and systematic contacts with the forum state.⁴⁷ The most important contribution to the personal jurisdiction analysis by the Court in *International Shoe* was the determination that the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."⁴⁸

The State of Washington claimed that International Shoe owed the state unemployment compensation fund contributions.⁴⁹ The State of Washington filed suit in a Washington court in an attempt to collect the unpaid funds. The issue in the case became whether, within the limitations of the Due Process Clause of the Fourteenth Amendment, the State of Washington could assert personal jurisdiction over the International Shoe Company.⁵⁰

The Court's widely quoted holding stated that due process required only that a defendant "have certain minimum contacts [with the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁵¹ Using the facts of the case, the Court applied this new standard of *minimum contacts* and found that the activities and conduct of the International Shoe Company were "neither irregular nor casual."⁵² The company's activities resulted in a large volume of business, in the course of which the International Shoe Company received "the benefits and protections of the laws of [Washington], including the right to resort to the courts for enforcement of [the company's] rights."⁵³ The Court also held that the company's conduct was "systematic and continuous throughout the years in question."⁵⁴ Accordingly, the Court felt that the International Shoe Company's operations established sufficient contacts with the State of

46. See Twitchell, *supra* note 35, at 613.

47. See Von Mehren and Trautman, *supra* note 35, at 1136.

48. *International Shoe*, 326 U.S. at 319.

49. *Id.* at 311.

50. *Id.*

51. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

52. *Id.* at 320.

53. *International Shoe*, 326 U.S. at 320.

54. *Id.*

Washington to permit the state to enforce any obligations or debts which the company incurred in Washington.⁵⁵

Several cases since *International Shoe* have further defined the scope and meaning of a defendant's minimum contacts with the forum state. In *World-Wide Volkswagen Corp. v. Woodson*,⁵⁶ the Court held that personal jurisdiction was improper unless the defendant purposefully availed himself of the privileges and protection of the forum's laws by conducting activities within the forum state.⁵⁷ The Court also stated that when a defendant purposefully directs activities at the forum state, the defendant has notice of the possibility of being haled into the forum's courts.⁵⁸

Additionally, in *Kulko v. Superior Court of California*,⁵⁹ the United States Supreme Court found that a California court had no personal jurisdiction over a nonresident father living in New York who paid child support to his daughter living in California.⁶⁰ The Court reasoned that the mere act of sending his daughter to live in California and paying child support suggested no intent by the father to purposefully avail himself of any benefits from the

55. *Id.* at 319–20.

56. 444 U.S. 286 (1980). In *World-Wide Volkswagen Corp.*, Harry and Kay Robinson purchased a new Audi car from Seaway Volkswagen, Inc. in Massena, New York in 1976. During their move to Arizona the following year, the Robinsons were struck in the rear by another car while driving in Oklahoma. An alleged defect in their Audi left Mrs. Robinson and her two children severely burned from a fire caused by the accident. Subsequently, the Robinsons joined *World-Wide Volkswagen Corp.* as a defendant in the products liability litigation. The Court held that this defendant had no ties, contacts, or relations with the State of Oklahoma and that the lower court lacked personal jurisdiction over *World-Wide Volkswagen Corp.* *Id.* at 299.

57. *Id.* at 297 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

58. *Id.*

59. 436 U.S. 84 (1978).

60. *Id.* at 96. Under a separation agreement executed by Sharon and Ezra Kulko in 1972, their children were to remain in New York with the father during the school year and spend vacations in California with the mother. Ezra Kulko agreed to pay \$3,000 per year in child support for the periods that the children were with Sharon in California. In 1976, Sharon, now remarried, filed an action in Superior Court of California asking for permanent custody of the children. The father appeared specially and moved to quash service of the summons, claiming that he was not a California resident and lacked sufficient minimum contacts with California as formulated in *International Shoe*. *Id.* at 88. The trial court denied his motion, which he appealed to the California Court of Appeal. *Id.* The appeals court affirmed the trial court ruling, reasoning that by allowing his children to live in California, and by paying child support, he had caused an effect in the state warranting the exercise of personal jurisdiction over him. *Id.* at 88–89. The Supreme Court of California granted review and affirmed the rulings of the lower state courts. *Kulko*, 436 U.S. at 89. Thereafter, Ezra Kulko petitioned for certiorari with the United States Supreme Court. *Id.* at 90.

forum state.⁶¹ Writing for the majority, Justice Marshall stated that, “the state courts in the instant case failed to heed our admonition that ‘the flexible standard of *International Shoe*’ does not ‘herald[d] the eventual demise of all restrictions on the personal jurisdiction of state courts.’”⁶²

Also, in *Hanson v. Denckla*,⁶³ the Court held that personal jurisdiction was proper only if the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of that state’s laws.⁶⁴ The Court held that Florida had not satisfied this test in attempting to assert jurisdiction over a Delaware trustee in a dispute over the validity of a trust that had been established by a Pennsylvania domiciliary who subsequently moved to Florida.⁶⁵ The majority’s conclusion that minimum contacts was not a mechanical application, but rather a factual determination of the requisite “affiliating circumstances” of the case, broadened the scope of obtaining personal jurisdiction under due process.⁶⁶

In *Burger King Corp. v. Rudzewicz*,⁶⁷ however, Justice Brennan took the minimum contacts analysis one step further by stating that even if minimum contacts with the forum exist, other factors may be considered that would prevent a court from obtaining personal jurisdiction over the defendant.⁶⁸ These factors led to a reformulation of the minimum contacts analysis in that, depending on the presence or absence of these factors, more or fewer contacts will suffice. Applying the reformulated approach to the minimum contacts analysis, the Court held that personal jurisdiction existed over Rudzewicz, a Michigan franchisee of Burger King, in a suit in Florida based on a franchise agreement.⁶⁹ The Court emphasized that Rudzewicz’s ongoing contractual relationship with Burger King’s corporate headquarters in Miami was purposefully directed to the forum and gave Rudzewicz fair

61. *Id.* at 96.

62. *Id.* at 101 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)).

63. 357 U.S. 235 (1958).

64. *See id.* at 235.

65. *Id.* at 254.

66. *Id.* at 246.

67. 471 U.S. 462 (1985).

68. *Id.* at 476. These factors include: “the burden on the defendant,’ ‘the forum State’s interest in adjudicating the dispute,’ ‘the plaintiff’s interest in obtaining convenient and effective relief,’ ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies,’ and the ‘shared interests of the several States in furthering fundamental substantive social policies.’” *Id.* at 477 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1990)).

69. *Id.* at 487.

warning of being subject to suit in Florida.⁷⁰ Justice Brennan also cited to the fact that Florida had a legitimate interest in protecting a resident corporation from a breach of contract by a nonresident franchisee.⁷¹

In the complex case of *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁷² the Court held that Helicol's⁷³ contacts with the State of Texas were insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.⁷⁴ In *Helicopteros*, all the parties conceded that the claims against Helicol did not arise out of, and were not related to, Helicol's activities with Texas.⁷⁵ Because of this concession, the Court explored the nature of Helicol's contacts with the State of Texas to determine whether those contacts were the kind of systematic and continuous business activities that would allow the Court to exercise personal jurisdiction over the defendant.⁷⁶ Using this approach, the majority concluded that Helicol's contacts with Texas were insufficient to satisfy due process and reversed the judgment of the Supreme Court of Texas which earlier held that Helicol was subject to the jurisdiction of the Texas court system.⁷⁷

In Justice Brennan's dissent, the suggestion was made that the majority made no distinction between controversies that relate to a defendant's contacts with a forum and those that arise out of such contacts.⁷⁸ Justice Brennan believed that the undisputed contacts between Helicol and the State of Texas were sufficiently important and sufficiently related to the underlying cause of action.⁷⁹ Justice Brennan stated that Helicol had purposefully

70. *Id.* at 482.

71. *Burger King*, 471 U.S. at 482-83.

72. 466 U.S. 408 (1984).

73. Helicol is the common trade name of Helicopteros Nacionales de Colombia, S.A.

74. *Helicopteros*, 466 U.S. at 418-19. On January 26, 1976, a helicopter owned by Helicol crashed in Peru. Four United States citizens were among those who lost their lives in the accident. Helicol is a Colombian corporation with its principal place of business in the city of Bogota, Colombia. The decedents of the crash were employed by a Peruvian consortium headquartered in Houston, Texas. This consortium, through Helicol, purchased helicopters, spare parts, and accessories for more than four million dollars from Bell Helicopter Company in Fort Worth, Texas. Helicol also sent pilots to Fort Worth for training and received into its New York City bank accounts over five million dollars in payment from the consortium for the purchase of the helicopters. Despite these contacts, the majority opinion of the Court was unwilling to analyze *Helicopteros* as a "specific" jurisdiction case based on these specific contacts with the United States. *Id.*

75. *Id.* at 415.

76. *Id.* at 415-16.

77. *Id.* at 418-19.

78. *Helicopteros*, 466 U.S. at 420 (Brennan, J., dissenting).

79. *Id.*

availed itself of the benefits and obligations of Texas law, and that these contacts would not “‘offend [the] ‘traditional notions of fair play and substantial justice.’”⁸⁰ In response to Justice Brennan’s dissent, the majority stated that the distinction between controversies that relate to a defendant’s contacts with a forum and those that arise out of such contacts was never raised as an issue in the case.⁸¹ The majority cited to the fact that the decedents’ representatives made no argument that their cause of action either arose out of or was related to Helicol’s contacts with the State of Texas.⁸²

In the most recent personal jurisdiction case, *Asahi Metal Industry Co. v. Superior Court of California*,⁸³ a divided Court revisited the issue of personal jurisdiction based on a defendant’s minimum contacts with the forum state.⁸⁴ Asahi, a Japanese corporation, manufactured a valve assembly used by a Taiwanese corporate defendant in a motorcycle tire tube.⁸⁵ The Taiwanese corporation, Cheng Shin, impleaded Asahi in a personal injury suit filed in California.⁸⁶ Asahi was aware that the valves were used in products sold in California, but knew of no other contacts with the State of California.⁸⁷

The opinion, written by Justice O’Connor and joined only by three other Justices, concluded that merely injecting a product into the stream of commerce, even knowing that the product might end up in the forum state, is insufficient for a finding of personal jurisdiction over the defendant.⁸⁸ This portion of the plurality opinion further stated that absent more purposeful conduct, such as advertising designed specifically for the market, or providing service facilities in the forum, the minimum contacts analysis could not be met in this case.⁸⁹

80. *See id.* at 420 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

81. *Id.* at 416.

82. *Id.*

83. 480 U.S. 102 (1987).

84. *Id.* at 105.

85. *Id.* at 106.

86. *Id.* On September 23, 1978, in California, Gary Zurcher lost control of his Honda motorcycle and collided with a tractor. In September of the following year, Zurcher filed a product liability action against Cheng Shin, the Taiwanese manufacturer of the bicycle tube. *Id.* Cheng Shin impleaded Asahi Metal Indus. Co., the manufacturer of the tubes’ valve assembly. *Asahi*, 480 U.S. at 106.

87. *Id.* at 107.

88. *Id.* at 112. Chief Justice Rehnquist, and Justices Powell and Scalia, concurred in this portion of the opinion.

89. *Id.*

In another part of Justice O'Connor's opinion, eight of the Justices joined in holding that, regardless of the existence of minimum contacts, an exercise of personal jurisdiction over Asahi would "offend 'traditional notions of fair play and substantial justice.'"⁹⁰ In *Asahi*, the Court explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors.⁹¹ A court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies."⁹² The Court considered these factors in *Asahi* and held that, even apart from the question of the placement of goods in the stream of commerce, it would be unreasonable to allow the assertion of jurisdiction over Asahi.⁹³ The Court concluded that the burden on the defendant was unreasonable, particularly because Asahi was an international defendant, and the only claim remaining before the California court was the third party indemnification claim by Cheng Shin against Asahi.⁹⁴

The decision in *Asahi* called for a court to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a state court.⁹⁵ In every case, those interests, as well as the federal government's interest in foreign relations, will be better served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case.⁹⁶ By viewing this case in an international context, the Court managed to find that the heavy burden on Asahi, weighed against the slight interest of the plaintiff, Gary Zurcher, and the forum state, was too great to allow the exercise of personal jurisdiction by a California court over an alien defendant.⁹⁷ Thus, in similar cases, perhaps limited to foreign parties, the reasonableness of jurisdiction must be examined even though the party has minimum contacts with the forum state.

90. *Id.* at 113 (quoting *International Shoe Co.*, 326 U.S. 310, 316 (1945)).

91. *Asahi*, 480 U.S. at 113.

92. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

93. *Id.* at 116.

94. *Id.* at 114.

95. *Id.* at 115.

96. *Asahi*, 480 U.S. at 115.

97. *Id.* at 116.

B. *Long Arm Statutes Narrow Minimum Contacts*

Statutes conferring the power to exercise personal jurisdiction over persons outside the state are called long arm statutes. To assert personal jurisdiction over a nonresident defendant, a state court must satisfy the requirements enumerated in the state's personal jurisdiction statute.⁹⁸ Long arm statutes allow personal jurisdiction whenever federal due process is satisfied or they allow personal jurisdiction on narrower grounds, such as by performing specific acts within the forum state. Even though due process may be satisfied, personal jurisdiction may be improper if the state long arm statute's requirements are not met.

A number of states, such as California,⁹⁹ have enacted statutes that permit courts in those states to exercise personal jurisdiction to the full extent permitted by the Due Process Clause of the Fourteenth Amendment. The proper analysis under this type of coextensive long arm statute is simply to evaluate whether the defendant has minimum contacts with the forum. Other states, such as Florida,¹⁰⁰ have long arm statutes that set forth particular circumstances that permit courts in those states to allow an exercise of personal jurisdiction over persons outside the state. In these states, the outer boundary of the statutorily conferred jurisdiction is the maximum extent of jurisdiction that a court can assume.

III. *GARRETT V. GARRETT*

In the First District Court of Appeal opinion of *Garrett v. Garrett*,¹⁰¹ the court addressed the issue of whether the trial court lawfully acquired personal jurisdiction over Larry Garrett pursuant to Florida's long arm statute.¹⁰² The trial court cited several factors that established sufficient contacts with Florida which allowed the court to obtain personal jurisdiction over Mr. Garrett. Among these factors were the duration of the marriage in Florida before the parties moved to Texas, the husband's frequent trips to Florida for business, the husband's voluntary payment of support in Florida, and the wife's representation that the husband expressed a desire to return

98. See *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84 (1978).

99. CAL. CIV. PROC. CODE § 410.10 (Deering 1991). This section states that: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." *Id.*

100. See FLA. STAT. § 48.193 (1995).

101. 652 So. 2d 378 (Fla. 1st Dist. Ct. App. 1994).

102. *Id.*

his residence to Florida.¹⁰³ The appellate court disagreed with the trial court's finding and stated that long arm jurisdiction may be exercised only if the cause of action is based on conduct or omissions of the nonresident defendant that arose out of his residency in Florida.¹⁰⁴ The First District Court of Appeal further stated that both parties voluntarily left Florida for their new residence in Texas and left no real property in Florida.¹⁰⁵ Also, the couple remained in Texas for five years prior to their separation. These factors created an insufficient showing of residential proximity in Florida to support a finding of personal jurisdiction pursuant to Florida's long arm statute.¹⁰⁶

Nancy Garrett argued that the determination of proximity is not merely a temporal determination but must be examined in light of the totality of the circumstances.¹⁰⁷ Mrs. Garrett cited *Durand v. Durand*,¹⁰⁸ a case in which the Third District Court of Appeal found long arm jurisdiction over a husband who had not resided in the state for over six years prior to the commencement of the action.¹⁰⁹ In *Durand*, the court based its decision on the totality of the circumstances, which encompassed several facts including the wife and children's continued residence in Florida and the parties ownership of real property in Florida.¹¹⁰ Furthermore, the court focused on the fact that the marital home was in Florida and the separation of the marriage occurred in Florida.¹¹¹ However, the First District Court of Appeal ruled that, unlike the situation in *Durand*, Mr. Garrett's residency was too far remote in time from the cause of action.¹¹² As a result, no Florida court could have obtained personal jurisdiction over Mr. Garrett.¹¹³

In dissent, Judge Benton stated that when personal service has been accomplished, as was the case with Mr. Garrett, the only limitation on the grant of personal jurisdiction was that the husband have sufficient minimum

103. *Id.*

104. *Id.* at 379.

105. *Id.*

106. *Garrett*, 652 So. 2d at 379.

107. *Id.*

108. 569 So. 2d 838 (Fla. 3d Dist. Ct. App. 1990), *review denied*, 583 So. 2d 1034 (Fla. 1991).

109. *Id.* at 839.

110. *Id.*

111. *Id.*

112. *Garrett*, 652 So. 2d at 379. Again, Mr. Garrett had not been a resident of Florida since 1986.

113. *Id.*

contacts with Florida.¹¹⁴ Moreover, Judge Benton believed that the totality of the circumstances in the present case satisfied the minimum contacts analysis required for due process.¹¹⁵ Nevertheless, the First District Court of Appeal rejected this position, stating that a defendant's residency in the state must proximately precede the commencement of the action.¹¹⁶ Alternatively, the majority concluded that the totality of the circumstances insufficiently supported a finding of personal jurisdiction over Larry Garrett, and it vacated the trial court's order denying the motion to dismiss for lack of personal jurisdiction.¹¹⁷

When the Garrett case reached the Supreme Court of Florida,¹¹⁸ the court distinguished between the minimum contacts analysis and the strict language codified in Florida's long arm statute in determining when a nonresident defendant may be subject to the power of a state court.¹¹⁹ The court began the analysis by establishing that a state's power to exercise personal jurisdiction is limited by the Due Process Clause of the Fourteenth Amendment.¹²⁰ Next, the court acknowledged that the United States Supreme Court had decided many cases using the minimum contacts approach in determining when a state court can exert personal jurisdiction consistent with due process.¹²¹ The court concluded that a state has the power to enact statutes governing the exercise of jurisdiction over nonresidents as long as the statutes are either "coextensive with or more restrictive than" the outside limits of due process established by the United States Supreme Court.¹²² Finally, the court pointed to the fact that Florida's long arm statute¹²³ enumerates the specific situations in which jurisdiction over a nonresident defendant is proper.¹²⁴

First, the court focused on the language of section 48.193(1)(e) of the *Florida Statutes*, the specific part of the long arm statute dealing with proceedings connected to a dissolution of marriage action.¹²⁵ The court

114. *Id.* at 380 (Benton, J., dissenting).

115. *Id.* at 380–81.

116. *Id.* at 379.

117. *Garrett*, 652 So. 2d at 379.

118. *Garrett v. Garrett*, 668 So. 2d 991 (Fla. 1996).

119. *Id.* at 993–94.

120. *Id.* at 993 (relying on *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987)).

121. *Id.*

122. *Id.*

123. *See* FLA. STAT. § 48.193 (1995).

124. *Garrett*, 668 So. 2d at 994.

125. *Id.* at 993 (citing FLA. STAT. § 48.193(1)(e)).

quoted a section of the statute that reads, "if the defendant resided in this state preceding the commencement of the action,"¹²⁶ and it stated that this portion of the statute cannot be taken "quite so literally."¹²⁷ Turning to the facts of the case, the court stated that when the Garretts left Florida in 1986 to set up residence in Texas, they effectively "abandoned" Florida.¹²⁸ The opinion went on to state that, "[t]o allow the court to obtain personal jurisdiction under these circumstances would empower the Florida courts to exercise jurisdiction over any party to a dissolution proceeding if the couple had ever lived in this state, for however brief a time."¹²⁹

In defense of this position, the court cited two district court of appeal cases which allowed personal jurisdiction under section 48.193(1)(e) of the *Florida Statutes*.¹³⁰ In each of those cases, the matrimonial domicile had been in Florida and one spouse continued to maintain residence in Florida after the parties separated. By contrast, the Garretts lived in Texas as a married couple for five years after leaving Florida and maintained no residence or real property in Florida until Nancy Garrett returned to Florida after the separation in 1992.¹³¹ Based on the dissimilarities between the *Garrett* case and the two district court cases interpreting section 48.193(1)(e), the court stated that obtaining personal jurisdiction over Mr. Garrett was not possible under Florida's long arm statute.¹³²

Nancy Garrett alternatively argued that the Florida courts could exercise jurisdiction over her husband under a minimum contacts analysis. Mrs. Garrett stated that her husband had sufficient contacts with Florida which allowed her to file suit in Florida.¹³³ First, she alleged that her husband periodically came to Florida to visit their daughter, Amy Rebecca, and also to visit other family members living in Jacksonville.¹³⁴ Second, Mrs. Garrett stated that her husband often traveled to Florida to conduct business in preparation for his possible return to Florida.¹³⁵ Finally, Mr. Garrett was

126. *Id.* at 994 (quoting FLA. STAT. §48.193(1)(e)).

127. *Id.*

128. *Id.*

129. *Garrett*, 668 So. 2d at 994.

130. *See Durand v. Durand*, 569 So. 2d 838 (Fla. 3d Dist. Ct. App. 1990); *Binger v. Binger*, 555 So. 2d 373 (Fla. 1st Dist. Ct. App. 1989), *review denied*, 560 So. 2d 232 (Fla. 1990).

131. *Garrett*, 668 So. 2d at 994.

132. *Id.*

133. *Id.* at 992-93.

134. *Id.* at 993.

135. *Id.*

directly making child support payments in Florida on behalf of Amy Rebecca.¹³⁶ Despite these contacts with Florida, the court stated that a minimum contacts analysis was not legally relevant to the issue of whether the prior residence provision of section 48.193(1)(e) applied to a grant of personal jurisdiction over Mr. Garrett in a dissolution of marriage action.¹³⁷ The court concluded the opinion by holding that because the Garretts jointly abandoned Florida as their state of residence, Mrs. Garrett lost the “‘protection’ of section 48.193(1)(e).”¹³⁸ Accordingly, the decision of the First District Court of Appeal was affirmed.¹³⁹

IV. IMPACT OF GARRETT

A. *Disregard for Minimum Contacts*

If a person freely and expressly consents to the jurisdiction of a state, there can be no question that the state may legitimately exercise authority over him. However, if a person does not consent to the jurisdiction of a state, a court may exercise personal jurisdiction over a nonresident defendant without violating any procedural due process right¹⁴⁰ by applying a minimum contacts analysis to the facts of the case. Despite the approval of the minimum contacts analysis by the United States Supreme Court, many state legislatures have enacted long arm statutes that limit the situations in which a state may obtain jurisdiction over a nonresident defendant. The Florida Legislature enacted section 48.193 which limits personal jurisdiction to the acts enumerated in the statute.¹⁴¹

As a result, a defendant's minimum contacts with Florida may not become legally relevant in resolving the final determination of a court's power over a nonresident spouse in a dissolution of marriage action.¹⁴² This was the problem that Nancy Garrett encountered when her case came before the Supreme Court of Florida.¹⁴³ Indeed, Larry Garrett had the requisite minimum contacts with the State of Florida¹⁴⁴ to allow a Florida court to

136. *Garrett*, 668 So. 2d at 993.

137. *Id.* at 994.

138. *Id.*

139. *Id.*

140. For a discussion of procedural due process, see *Mathews v. Eldridge*, 424 U.S. 319 (1976).

141. *See* FLA. STAT. § 48.193.

142. *See generally Garrett*, 668 So. 2d at 991.

143. *Id.*

144. *See id.* at 991.

obtain personal jurisdiction over him pursuant to section 48.193(2).¹⁴⁵ By narrowly focusing the *Garrett* decision on the language of section 48.193(1)(e), the Supreme Court of Florida failed to recognize that Larry Garrett's activities within the state subjected him to the jurisdiction of the court pursuant to section 48.193(2).

Section 48.193(2) of Florida's long arm statute is defined as a "general jurisdiction" statute. When a defendant has systematic and continuous contacts with the forum state, a court in that state may exercise jurisdiction over the defendant regardless of the connection to the defendant's activities within the forum.¹⁴⁶ In *Garrett*, the husband periodically visited his daughter in Florida, paid voluntary child support in Florida, and frequently visited Florida on business trips. This type of continuous contact satisfies the due process analysis articulated in *Burger King Corp. v. Rudzewicz*¹⁴⁷ and *Helicopteros Nacionales de Colombia, S.A. v. Hall*.¹⁴⁸ This conduct also falls within the language of Florida's restrictive long arm statute.¹⁴⁹

The court's decision in *Garrett* failed to look beyond the issue of Mr. Garrett's residential proximity to the underlying cause of action. In fact, the court should have analyzed Mr. Garrett's numerous contacts with the state which were sufficient to support Mrs. Garrett's claim that the trial court had proper jurisdiction over the dissolution proceeding. The real issue in *Garrett* was whether a nonresident had consented to personal jurisdiction in Florida based on his purposeful availment of the protections and benefits of the forum. This affiliation with Florida was free and knowing because, by intentionally establishing a relationship with Florida, the defendant had voluntarily submitted to the sovereign authority of the state.

Mr. Garrett was voluntarily paying child support to his daughter in Florida. Furthermore, Mr. Garrett conducted business activities in Florida during various trips throughout the year. Finally, his frequent visits to see his family in Florida demonstrated his purposeful and continuous contacts with the state. Due process only requires that a defendant have a reasonable expectation that he may be haled into court in the forum state as a result of

145. Subsection (2) of section 48.193 states that: "A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity." FLA. STAT. § 48.193(2) (1995).

146. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

147. 471 U.S. 462 (1985).

148. 466 U.S. 408 (1984).

149. *See* FLA. STAT. § 48.193(2) (1995).

his activities within the state.¹⁵⁰ Again, Mr. Garrett purposefully availed himself of the benefits of Florida's laws by freely conducting business and personal visits within the state. After all, nonresidents cannot be denied entry into a state,¹⁵¹ and nonresidents cannot be refused the opportunity to engage in economic activity within a state.¹⁵² Accordingly, Larry Garrett's contacts with Florida were such that the Supreme Court of Florida could have allowed for a grant of personal jurisdiction by the trial court under a minimum contacts analysis.

In addition, none of the policy factors that weigh against a grant of jurisdiction, despite a finding of minimum contacts with the forum, would have denied the exercise of personal jurisdiction over Mr. Garrett. These factors include the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief.¹⁵³ Moreover, a court must also consider the interstate judicial system's interest in obtaining efficient resolution to controversies and the shared interest of the several states in furthering social policies.¹⁵⁴ In *World-Wide Volkswagen*¹⁵⁵ and *Asahi*,¹⁵⁶ the Court explained that the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of these factors. Finally, the Court clearly stated that when minimum contacts have been established, the interests of the plaintiff and the forum in the exercise of jurisdiction will justify "even the serious burdens placed on the alien defendant."¹⁵⁷

Turning to the facts in *Garrett*, Mr. Garrett had voluntarily placed himself within Florida's jurisdiction many times prior to the filing of the dissolution of marriage action. The burden on Mr. Garrett to physically appear in a Florida court was substantially lessened by his ongoing willingness to visit Florida for various reasons. Also, Nancy Garrett submitted an affidavit to the court alleging that Mr. Garrett desired to move back to Florida and that he was continuously seeking suitable employment in Florida.¹⁵⁸ In this case, the defendant's contacts were established, and the defendant showed a desire to return to the forum state permanently. Thus, the burden on the defendant was minimal, if not non-existent.

150. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

151. See *Edwards v. California*, 314 U.S. 160 (1941).

152. See *Toomer v. Witsell*, 334 U.S. 385 (1948).

153. *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113 (1987).

154. *World-Wide Volkswagen*, 444 U.S. at 292.

155. *Id.*

156. *Asahi*, 480 U.S. at 114.

157. *Id.*

158. Brief for Petitioner at 2, *Garrett v. Garrett*, 668 So. 2d 991 (Fla. 1996) (No. 85,384).

Second, Florida's strong public policy favoring parental responsibility¹⁵⁹ was impaired by denying the trial court the authority to obtain personal jurisdiction over a nonresident father who voluntarily paid child support in Florida for the benefit of his daughter. The Supreme Court of Florida ignored Florida's strong social policy¹⁶⁰ of protecting a child's parental support. Therefore, since the burden on the defendant was minimal and the state's interest was great, the court erred by not affirming Mrs. Garrett's claim of personal jurisdiction over her nonresident husband.

Mrs. Garrett had a compelling interest in her litigation with her husband. First, her monthly salary of \$1,283.75¹⁶¹ was grossly insufficient to cover her living expenses. Unless Mrs. Garrett was granted the divorce in Florida, her financial circumstances limited her ability to pursue her rights out of state.¹⁶² Florida clearly has an interest in protecting dependent wives and their children from impoverishment and possible dependency on state services due to the inability to obtain relief in a dissolution of marriage action.¹⁶³ This compelling interest in the litigation was never thoroughly considered by the court anywhere in the *Garrett* decision.

Second, a denial of personal jurisdiction over her husband would unduly impede Mrs. Garrett's ability to seek the financial settlement necessary to alleviate her financial shortfall. Again, if a spouse is unable to

159. *See Morris v. Morris*, 672 So. 2d 622 (Fla. 1st Dist. Ct. App. 1996). In *Morris*, the first district, following the supreme court decision in *Garrett*, rejected a grant of personal jurisdiction over a nonresident husband in a dissolution of marriage action. Specially concurring, Justice Booth stated:

The facts of the instant case appear to be more egregious than those in *Garrett* in that Appellee's minor child, who was born in this state and resided here for ten of his twelve years, suffers from Down's Syndrome. The child is now effectively deprived of parental support, contrary to this state's strong public policy favoring parental responsibility and jurisdiction of courts based on the presence of the child.

Id. at 624 (Booth, J., specially concurring). Justice Booth criticized the decision in *Garrett* which held that, "[b]ecause the Garretts jointly abandoned Florida as their state of residence, the wife lost the 'protection' of section 48.193(1)(e)."¹⁶⁰ *Id.* Justice Booth stated, "There is no mention in *Garrett* of the child's right to the protection of the statute, and this was, I believe, a major oversight. A minor child's right to parental support is not readily subject to waiver or abandonment."¹⁶¹ *Id.*

160. *See id.* at 622.

161. Brief for Petitioner at 11, *Garrett v. Garrett*, 668 So. 2d 991 (Fla. 1996) (No. 85,384).

162. *Id.*

163. Telephone Interview with Nancy N. Nowlis, Attorney at Law (Aug. 7, 1996) (Nowlis was the attorney for Nancy Garrett in the case at issue in this case comment).

establish alimony or equitable distribution rights in a dissolution of marriage action, then the ability to obtain effective relief is diminished, resulting in a devastating effect on dependent children. Despite this sincere need by Mrs. Garrett to obtain relief, the Supreme Court of Florida disregarded these factors in the analysis of whether personal jurisdiction over her husband in Florida was proper.

B. *The Cost of Ongoing Litigation*

Mrs. Garrett's first attempt to litigate this matter occurred in Texas where she filed a petition for dissolution of marriage.¹⁶⁴ Shortly thereafter, she dismissed her petition in Texas and moved to Florida. Then, in 1994, Mrs. Garrett filed a second petition for dissolution of marriage in the Circuit Court for Duval County, Florida. After the trial court found that Florida did have personal jurisdiction over her husband, Mr. Garrett filed an appeal with the First District Court of Appeal.¹⁶⁵

This appeal added further cost to Mrs. Garrett's strained financial budget. As a result of the appellate decision in *Garrett*, Mrs. Garrett was forced to appeal her case to the Supreme Court of Florida.¹⁶⁶ After the final decision by the Supreme Court of Florida, Mrs. Garrett was left with the costly prospect of filing a third dissolution of marriage action in her husband's state of residence, Indiana. Certainly, the interstate judicial system would not be harmed by allowing a spouse the opportunity to litigate in Florida with a nonresident spouse who clearly meets the minimum contacts analysis developed by the United States Supreme Court and meets the statutory criteria of Florida's long arm statute. In fact, the efficient resolution of the case in Florida would have put an end to the litigation and prevent the potentially costly litigation in the Indiana court system.

V. CONCLUSION

There is confusion "in respect to Florida courts having personal jurisdiction and Florida courts obtaining personal jurisdiction over a non-resident defendant by service of process pursuant to the 'long arm statute.'"¹⁶⁷ Even the United States Supreme Court has acknowledged the difficulty of defining when a forum state can exercise personal jurisdiction

164. Brief for Petitioner at 2, *Garrett v. Garrett*, 668 So. 2d 991 (Fla. 1996) (No. 85,384).

165. *See Garrett*, 668 So. 2d at 993.

166. *See id.*

167. *Id.* at 994 (Wells, J., concurring).

over a nonresident defendant.¹⁶⁸ Furthermore, long arm statutes that enumerate the contacts which subject a defendant to jurisdiction within a state may prevent a plaintiff from obtaining judicial relief over a nonresident defendant whose minimum contacts with the state do not meet the long arm statute's narrow list of acceptable contacts. One solution is to use a purposeful affiliation analysis for all personal jurisdiction cases in the State of Florida.¹⁶⁹ This solution focuses attention on the extent to which the person has freely and knowingly associated himself with the state in a way that subjects him to the sovereign power of that state.¹⁷⁰ However, this solution fails to take into account other factors such as the defendant's burden to litigate in a foreign state, the plaintiff's interest in the litigation, and the state's interest in protecting its own citizens.

In Florida, the better solution is to clearly enact a statute that allows a plaintiff spouse in a dissolution of marriage action to obtain personal jurisdiction over a defendant spouse when the defendant spouse has minimum contacts with Florida such that the "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁷¹ By using the minimum contacts analysis developed by the United States Supreme Court, Florida's courts can go beyond the restrictive language of the long arm statute and consider other factors relevant to the determination of personal jurisdiction. These factors include "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies;" and the interest of the plaintiff in seeking adequate relief.¹⁷² The Florida Legislature must amend section 48.193(1)(e) to allow for the use of a minimum contacts approach in replacement of the current language which states in part, "if the defendant resided in this state preceding the

168. See, e.g., *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990); *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Ct. of Cal.*, 436 U.S. 84 (1978); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1877).

169. For a good discussion on adopting a purposeful affiliation test nationwide, see Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 *GEO. WASH. L. REV.* 849, 890 (1989).

170. *Id.*

171. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

172. *Asahi*, 480 U.S. at 113.

commencement of the action.”¹⁷³ The current language is ambiguously written, causing confusion as to the residential proximity a defendant must have in Florida prior to the commencement of the action. The minimum contacts approach alleviates this confusion and allows the court to properly focus on the conduct of the defendant within the state, thus permitting the court to examine other factors relevant to the maintenance of the suit and due process.

Gregory P. McMahon

173. See FLA. STAT. § 48.193(1)(e) (1995).