

Nova Law Review

Volume 16, Issue 1

1991

Article 1

Nova Law Review 16, 1

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NOVA LAW REVIEW



THE 1991 SURVEY OF FLORIDA LAW

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Administrative Law	<i>Johnny C. Burris</i>
Admiralty	<i>Robert M. Jarvis</i>
Constitutional Law	<i>David C. Hawkins</i>
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Ethics	<i>Jacquelyn P. Needelman</i>
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FALL 1991

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Survey of Florida Law

Keynote Address at the 1991 Nova Law Review Banquet

Justice Gerald Kogan*

I know tonight is a busy program. However, there are some comments that I want to make to you. I haven't really discussed these matters at all today, despite my four previous speeches. These are matters that are very close to my heart and something that I have always been concerned about—and quite frankly, more concerned now than ever before. You know, one of the classes I taught when I was here at Nova was Professional Responsibility. I remember the key question I used to love to ask. I'd look at the class and I'd say "you're sitting in your office. You're a practicing lawyer and this well known drug dealer marches in and puts down right in front of you \$250,000 in cash, all in one, five and ten dollar bills and asks you to represent him in a drug case. And you know where the money came from. Undoubtedly he made most of it in the local school yards in your community. Would you take that money to represent this man?" And in the true spirit of the legal profession, everyone said "yes." After all, even a drug dealer is entitled to have proper representation and as far as where the money came from, I remember an incident that once took place when I was in a place called Petticoat Lane. It's a flea market, and it operates only on Sunday mornings. I remember shopping and looking around when a man spoke to this fellow with a Cockney accent and said to him, "You know, I'm wondering if these are hot goods you're selling here." And his comment was, "Sir, you don't ask me where I get my merchandise and I won't ask you where you get your money from." And so it is that lawyers are faced with this kind of a decision almost daily in one form or another, whether you're doing civil work or criminal work, the main question arises and the one problem we all face in the profession is simply the matter of what is our professional responsibility. Very simply, what are we talking about when we talk about legal ethics? What

* Justice, Florida Supreme Court.

is the responsibility that we owe not only to the courts and our fellow lawyers but also to our clients, and what do we owe to the general public? I like to look upon the law as being a high minded profession. I like to look upon the law as being a way that we, as lawyers, can do service to society; to better society, no matter what field we happen to go into. I am chagrined and I am disturbed when lawyers go to law school for one purpose and one purpose only, and that is to see how much money they can make in the practice of law. Now making a lot of money is not a bad thing to do. It brings a lot of the conveniences and enjoyment that are out there like the food that you have to buy. But at the same time the ones that spend their entire professional life after the pursuit of money is not, in my opinion, what being a lawyer is all about. Because when money becomes the sole object we begin to forget our purpose in society and our purpose is to help our system of justice proceed in an orderly manner where justice is brought to all those who are served by our court system and by our attorneys. If we forget that, we are without any question in deep trouble.

We have a situation now that pervades our profession that, quite frankly, causes me to be ashamed. We know of instances, for example, where the biggest and most important thing that now prevails in the legal profession is what is known as the billable hour. Now for those of you who are not yet in practice, you will pretty soon be introduced to that billable hour. Your entire legal career, if you're in a particular law firm, will be dedicated to the billable hour. That simply means you have to put in the work because we have to make the money in this law firm to pay your salary, to pay our overhead and to pay for all the employees that we have in this particular office, and that's the most important thing that you can possibly do. As a result, what has happened is we have a generation of lawyers that have gone out there and have worked like dogs trying to meet their billable hours, and as a result of working many, many hours in excess of what they need, we've seen that their families have been affected, we've seen marriages that have broken up. We've seen all sorts of horrors take place. We've seen lawyers who have become alcoholics, lawyers who have become addicted to drugs. Much of that stems from the type of hours that lawyers put in trying to satisfy the billable hour.

We see other horrors that are occurring. The other horrors are a lawyer takes three files down to the courthouse and works on those three files from nine until twelve. Then when the lawyer gets back to the office, instead of apportioning the three hours amongst the three files the lawyer charges client A for three hours, client B for three

hours and client C for three hours. Now that's outrageous. And these are things that clients are becoming more and more aware of. As a matter of fact, for those of you who aren't aware of this, house counsel have now become a fact of life with many of our large corporations. They feel why should I spend all this money by hiring lawyers outside the corporation who I know are going to charge me for every stamp that goes on a letter, for every sheet of paper they put through a fax machine or through the word processing machine. Every time I turn around I get another bill for something else when I can do that a lot more cheaply by having my own lawyers and use them in my corporation as house counsel, and they find that they do as good a job as the law firms.

What we have effectively done in our pursuit of the almighty dollar in our profession is price the average citizen out of the legal services market. The average wage earner in America today cannot afford to hire a lawyer. It is an absolute impossibility unless it's on a contingency basis. If they want ordinary routine legal work done, they just can't afford it. And as a profession we have fought mandatory pro bono. I have heard lawyers and law professors argue before our courts and say to force lawyers to do pro bono work is equivalent to ignoring the existence of the Thirteenth Amendment to the United States Constitution. Now I do think that goes a little bit too far and I told that particular law professor, when he argued in front of us several months ago, that he was going way overboard, and he kept saying to me that the founding fathers have nothing to do with the Thirteenth Amendment. That came later and the Thirteenth Amendment was not to free lawyers from involuntary servitude. This amendment was not passed to prevent you from having to do pro bono work. As lawyers we take a great deal out of our society, and as lawyers we must put back into that society in proportion to what we take out by service to our community, by doing pro bono work, we have to put back in that which we take out. I know a lot of lawyers who are really going to get angry when they hear something about that but, quite frankly, I just don't care because I think that we owe this to society and we better start doing it because as lawyers we don't have a very good reputation anyway in the community. If you ask somebody out there, a lay person, where lawyers rank, you'll find that we rank just above the used car salesmen as far as respect goes. We were talking at the table earlier when it was acknowledged that doctors are really heading in our direction as well, and it's time that all of us turned around and started reconsidering where we're going.

So I commend all of you when you go out into the practice of law, whenever it may be, realize that you have a privilege to practice law. You're in a unique situation. When you pass that bar exam and you're sworn in as a member of any bar anywhere, you gain a license that allows you to have privileges that the average citizen does not have, and because you have these privileges, expect to give something back to the community. I think this is the biggest problem that, as lawyers, we are currently facing and it certainly demands our attention. I just want you to know that I'm not just picking on lawyers. I'm going to pick on judges a little bit while I'm standing up here.

One thing that I've always cited to and that is the fact that we as judges does not put us in a category where all of a sudden on the day we put the robe on there ascended down from the sky wisdom that we never had before and embedded itself in our skulls. We have the same brain power and, in some cases, lack of brain power when we got on the bench as we had the day we were practicing law, the day before we ascended to the bench. We are very, very dependent on the lawyers, quite frankly, to aid us and assist us in doing what we should do when deciding cases. If we ever say that we've learned everything, then our system is headed for deep trouble. So let's not dicker with that one. I think the problem with our judges, as with the attorneys, is that we have come to expect certain things by judges that many of them are unwilling to give us. Hopefully, our judges, through a better system to select judges than we may have now or systems that we ought to develop, will bring us judges who can essentially do what I consider the three major things that a judge has to do to be effective. First of all, he can be a Phi Beta Kappa in undergraduate school, you know graduate summa cum laude, with highest honors, be an editor to a law review and all that sort of stuff, but quite frankly that doesn't mean very much when you take the bench unless you have the three qualities I'm about to tell you about.

The number one quality is in order to be a judge you've got to be able to make decisions. If you can't make a decision you don't belong on the bench. Number two, you must have a deep understanding of the human condition, and by that I simply mean you must understand what makes people tick. You must understand about cultural differences, about ethnic differences, about how various groups react to various situations and that not everybody reacts the same in the same set of circumstances. Not everybody had the same background. Not everybody looks at the world like you may look at it, and that doesn't mean that they're looking at it and their view is wrong. Their view may be

just as right as your view and their view may be right and your view may be wrong. So you must understand what these people have to say, why they say it and where they're coming from to understand what the human condition is all about. And thirdly, you have to have courage. And that is the courage to be able to do what you feel is right, regardless of the political or personal consequences that you, as a judge, may suffer. If you're the type of judge who's going to sit on the bench and say "well, if I rule this way it's going to hurt me in the next election," and then don't rule that way because you want to save yourself all that aggravation, then you quite frankly do not belong on the bench. And that you as attorneys have got the right—and the members of our community and our society—have got the right to demand that our judges do just that, and that is make the courageous decisions when they feel in their heart and their mind and in their conscience that is the right thing to do. And if it is the right thing to do and they believe it to be right, then they must go ahead and do it regardless of the effect it may have on them politically or personally.

It's going to be up to you as lawyers, when you're out there practicing, to make sure that you hold the judge's feet to the fire. Do not ever be afraid to speak up against injustice. Do not ever be afraid to take a judge to task if that judge is not doing the job that they should be doing, because as I said before, our system cannot survive unless we require that of our judges.

These are some very simple things that I like to talk to law students about, about your ethical responsibility and about the judge's ethical responsibility. If we all get our acts together, then maybe someday we can have a better perception by the public as to what we lawyers and judges are all about. So it's been a great day for me. I've enjoyed being with you and I want to congratulate the law review staff on the fine job they've done. I wish the new law review staff good luck. And contrary what you may believe, we do occasionally read law review articles, especially when we have to because we're researching that particular problem. So it doesn't go completely in vain, although I must admit when I get all the law reviews from the State of Florida the reading I have to do can become difficult, but at least I peruse them and I put them aside and I remember, strangely enough, when a problem comes up that we've got a law review article somewhere. They are very, very helpful, so they're not written for naught. Judges *do* look at them and researchers *do* examine them, they can be very, very helpful, and they do from time to time have an instrumental part in creating our opinions. So everybody keep up the good work. Thanks for having

me down here and again, to those of you who are going to graduate pretty soon, good luck on your bar examination and good luck in the practice of law. Remember give back to the community that which you take out of it as an attorney, whether it be in the form of community service, whether it be in the form of pro bono. And if any of you ever aspire to the bench, remember those three things; you make decisions, understand the human condition, and have the courage of your convictions to make the right decision regardless of the personal consequences. If you do all of those things, I'll be very, very happy and all of us will be on our way to making our profession what it should be.

Administrative Law: 1991 Survey of Florida Law*

Johnny C. Burris**

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[T]he delegation of broad and undefined discretionary power from the legislature to the executive branch [and independent administrative agencies] deranges virtually all constitutional relationships and prevents attainment of the constitutional goals of limitation on power, substantive calculability, and procedural calculability.¹

Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.²

I. INTRODUCTION

Administrative agencies, whether we approve or not, have become

1. Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295, 296 (1987). See generally THEODORE J. LOWI, *THE END OF LIBERALISM THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979).

2. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE A PRELIMINARY INQUIRY* 3 (Illini Books ed. 1971).

the primary institutions for creating and implementing governmental policy. Understanding how the administrative process operates and the nature of both substantive and procedural constraints the law imposes on the exercise of discretion by administrative agencies has become an essential part of the modern lawyer's repertoire. This article is designed to assist lawyers in keeping themselves abreast of recent developments in the complex and diverse area of administrative law by providing an overview of administrative law decisions³ by the Florida appellate courts during the survey period.⁴

3. Cases concerning the Workers' Compensation system generally are not addressed in this article, because its administrative hearing system is not subject to the Florida Administrative Procedure Act. FLA. STAT. § 120.52(1)(c) (1991) [hereinafter "the APA"] ("A judge of compensation claims shall not, in the adjudication of workers' compensation claims, be considered an agency or part of an agency for the purposes of this act.").

4. As in past years this article perhaps errs on the side of comprehensiveness. Most of the cases discussed do not, in and of themselves, raise some new and/or important development in administrative law. However, I continue to firmly believe that such a comprehensive approach is justified because each appellate court decision augments our knowledge of how the courts are interacting with administrative agencies, and thus, is valuable.

Most of the decisions discussed in this article appear in volumes 554 to 583 of the Southern Reporter, Second Series. Earlier articles on Florida administrative law have appeared in a variety of books and law reviews. See, e.g., FLORIDA ADMINISTRATIVE PRACTICE (The Florida Bar 3d ed. 1990); ARTHUR J. ENGLAND & L. HAROLD LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL (1979); Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U.L. REV. 661 (1991) [hereinafter Burris IV]; Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U.L. REV. 437 (1991) [hereinafter Dore III]; Patricia A. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U.L. REV. 703 (1991) [hereinafter Dore II]; L. Harold Levinson, *The Florida Administrative Procedure Act After 15 Years*, 18 FLA. ST. U.L. REV. 749 (1991); Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U.L. REV. 767 (1991); Johnny C. Burris, *Administrative Law, 1989 Survey of Florida Law*, 14 NOVA L. REV. 583 (1990) [hereinafter Burris III]; Johnny C. Burris, *Administrative Law, 1988 Survey of Florida Law*, 13 NOVA L. REV. 727 (1989) [hereinafter Burris II]; Johnny C. Burris, *Administrative Law, 1987 Survey of Florida Law*, 12 NOVA L. REV. 299 (1988) [hereinafter Burris I]; Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 965 (1986) [hereinafter Dore I]; Murray H. Dubbin & Samuel J. Dubbin, *Administrative Law: Access to Review of Official Action—Standing Under the Florida Administrative Procedure Act*, 35 U. MIAMI L. REV. 815 (1981); Joseph Z. Fleming & David L. Mallory, *Administrative Law*, 33 U. MIAMI L. REV. 735 (1979); Arthur J. England & L. Harold Levinson, *Administrative Law*, 31 U. MIAMI L. REV. 749 (1977); L. Har-

II. CONSTITUTIONAL AND JURISDICTIONAL ISSUES

A. *The Delegation Doctrine*⁵

"There is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation."⁶ Most courts at both the federal and state levels early on abandoned their efforts at rigorously enforcing separation of powers requirements in the context of delegation of authority to administrative agencies. However, Florida courts resisted this course. In *Askew v. Cross Key Waterways*,⁷ the Florida Supreme Court reaffirmed a commitment to rigorously enforce the delegation doctrine through a very formalistic approach to these issues. The decision in *Cross Key* cast considerable doubt on the validity of many statutory delegations of authority to administrative agencies.⁸

However, beginning in 1981, Florida courts gradually abandoned the formalist approach to the delegation doctrine outlined in the *Cross Key* decision that threatened the constitutional validity of many enabling statutes which delegated substantial authority and discretion to administrative agencies. The courts, while never formally abandoning the *Cross Key* philosophy on delegation issues, nonetheless functionally

old Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617 (1975); L. Harold Levinson, *A Comparison of Florida Administrative Practice Under the Old and the New Administrative Procedure Acts*, 3 FLA. ST. U.L. REV. 72 (1975). See generally A. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* (1986) (an excellent general discussion of state administrative law issues); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (1978-84) (five volume set offering one of the most comprehensive overviews of administrative law).

5. This constitutional doctrine traditionally has been labeled the non-delegation doctrine. This clearly is a misnomer, as courts, contrary to the result suggested by the label, almost never find the delegation of quasi-legislative or quasi-judicial authority, or the aggregation of legislative, executive, and judicial functions in one administrative body to be constitutionally flawed. The non-delegation doctrine designation occurred because strongly worded dicta in early United States Supreme Court cases which addressed these issues indicated a hostility in principle to such actions by Congress, even though the delegations in these cases were held constitutionally sound. In keeping with legal reality, rather than myth, I have labeled this section "The Delegation Doctrine," rather than "The Non-Delegation Doctrine." See *Burriss I*, *supra* note 4, at 302 n.15.

6. *Buckley v. Valeo*, 424 U.S. 1, 280-81 (1976) (White, J., concurring in part and dissenting in part).

7. 372 So. 2d 913 (Fla. 1978).

8. See *Burriss I*, *supra* note 4, at 304-07.

adopted a pragmatic approach to delegation issues similar to that used in the federal courts.⁹

Under the pragmatic approach, which has been imposed under the *Cross Key* rubric, the critical inquiry in delegation cases is "whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent."¹⁰ The degree of specificity required will vary with "the subject matter dealt with and the degree of difficulty involved in articulating finite standards."¹¹ The courts found that a substantial degree of flexibility and uncertainty should be tolerated so that the legislature can delegate authority to an administrative agency "with the expertise and flexibility needed to deal with complex and fluid conditions . . . which . . . make direct legislative control impractical or ineffective . . . [and] make the drafting of detailed or specific legislation impractical or undesirable."¹² Standardless delegation of authority to an administrative agency will not be condoned, but it takes very little in the way of direction from the legislature for a statute to move from the standardless category to the category of constitutionally sufficient minimum guidance. While courts continue to ritualistically refer to the *Cross Key* decision, the nature of the inquiries made under the delegation doctrine are now pragmatic, designed to assure in a minimalistic fashion that the legislature and not administrative agencies are making fundamental policy decisions.¹³ The net result has been a decline in the use of the delegation doctrine to declare statutes unconstitutional.¹⁴

9. *E.g.*, *Yakus v. United States*, 321 U.S. 414 (1944); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (the first modern statement of the "intelligible principle" approach to delegation issues); *Amalgamated Meat Workers v. Connelly*, 337 F. Supp. 737 (D.D.C. 1971). *But see* *American Textile Mfr. Inst. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting) (rigorous application of the delegation doctrine would require holding these statutes an unconstitutional form of delegation); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

10. *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 819 (Fla. 1983).

11. *Cross Key Waterways*, 372 So. 2d at 918.

12. *Jones v. Department of Revenue*, 523 So. 2d 1211, 1214 (Fla. 1st Dist. Ct. App. 1988).

13. *See* *Burris III*, *supra* note 4, at 730-31; *Chiles v. Children A, B, C, D, E, & F*, 16 Fla. L. Weekly S699 (Fla. 1991) (Overton, J., concurring).

14. *See* *Burris III*, *supra* note 4, at 585-87; *Burris II*, *supra* note 4, at 729-30; *see also* *Burris I*, *supra* note 4, at 302-12.

Of course, a different result may be achieved if the attempted delegation was

In fact, the process of abandoning or ignoring the requirements set out in the *Cross Key* decision has progressed to the point that during this survey period only one case was decided which involved a significant discussion of whether a delegation of authority to an administrative agency was unconstitutional.¹⁵ In *Young v. Broward County*,¹⁶ the

viewed by the court as concerning the relatively rare circumstance of a power which was not delegable. See *Chiles*, 16 Fla. L. Weekly at S699. The first part of the opinion in *Chiles* treated budget cutting as a matter which must be decided by the legislature; but in the latter part of its opinion, the court apparently qualified its earlier position by indicating that if it was a possibility for the legislature to adopt sufficiently detailed guidance for the exercise of budget cutting authority, then the Administrative Commission could exercise some delegated authority in this area. *Id.*

In *Barry v. Garcia*, 573 So. 2d 932 (Fla. 3d Dist. Ct. App. 1991), the court considered whether the Ad Hoc Independent Review Panel of the City of Miami was properly delegated the power to issue subpoenas. The Panel was created by the City Commission of the City of Miami for the purposes of investigating the relationship between the police department and the Overtown area, and was directed to report its findings to the City Commission. *Id.* at 933. The City Commission resolution creating the ad hoc panel granted it the power to issue subpoenas.

Two individuals were subpoenaed by the Panel, but refused to testify or appear before the Panel. The Panel petitioned the circuit court to hold these individuals in contempt unless they could show cause why they should not be so found. The circuit court "found that as a matter of law, the Ad Hoc Independent Review Panel did not have the authority to issue subpoenas and to compel attendance of witnesses to its proceedings." *Id.* at 934. The City of Miami Charter provided that the Commission or any committee thereof are the only bodies authorized by the Charter to exercise the investigative subpoena power. *Id.* at 937; City of Miami Charter § 14. It was clear that any investigative subpoena could be issued either by the body carrying out the investigation or by a court, but if the investigative body wished to enforce its subpoena, then it must apply through the courts for an order concerning the matter. Because the City Charter did not currently authorize anyone other than the City Commission or a committee composed of City Commissioners to exercise the subpoena power, the City Commission acted inappropriately in delegating this power to the Ad Hoc Independent Review Panel. *Garcia*, 573 So. 2d at 938. "Generally, a city commission, which is a legislative body of a city, possesses no power to delegate their authority as prescribed in their charter. Municipal officials can only act in accordance with an express grant in their charter and not any implied grant of power." *Id.* at 939. Therefore, the Ad Hoc Independent Review Panel had no power to issue a subpoena, and accordingly, the circuit court properly determined that it could not enforce any subpoena issued by the body with a contempt citation. See generally Florida Administrative Practice § 1.9-.12 (The Florida Bar 3d ed. 1990).

15. *Chiles*, 16 Fla. L. Weekly S699, was decided too late for a full discussion in this survey article. Five other cases briefly alluded to delegation doctrine matters. See *State v. Carswell*, 557 So. 2d 183, 184 (Fla. 3d Dist. Ct. App. 1990) (A statute did not violate the delegation doctrine by incorporating by reference existing federal standards. The court did note in dicta, however, that any attempt to incorporate by reference

court addressed the issue of whether the Broward County ordinance regulating when the Broward County Animal Control Division may declare a dog to be vicious and order it destroyed involved an invalid delegation of authority.¹⁷ The court concluded the ordinance could not be characterized as creating a circumstance where the administrative agency could engage in arbitrary decision making. The ordinance provided sufficient guidance to the administrative agency, because the ordinance contained an adequate definition of what constituted a vicious dog.¹⁸

However, Chief Judge Hersey in his dissent, while not directly mentioning it, apparently followed both the letter and the spirit of the *Cross Key* decision when noting the ordinance was constitutionally flawed. The ordinance was flawed because the choice of which penalty may be imposed after a determination that a dog was vicious as a result of one attack, humane disposal or an opportunity for the owner to properly provide for adequate security, was "vested solely in the unbridled discretion of the individual who, from time to time, may hold the post of Director of the Animal Control Division of Broward County."¹⁹ Such a delegation of unbridled discretion was a violation of the delegation doctrine, because it left the fundamental policy choice of what was the appropriate response to the problem to the administrative agency.²⁰

future changes in the federal standards would violate the delegation doctrine.); *St. Johns County v. Northeastern Fla. Builders Ass'n*, 583 So. 2d 635, 642 (Fla. 1991); *Pittman v. State*, 570 So. 2d 1045, 1046 (Fla. 1st Dist. Ct. App. 1990); *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1239 (Fla. 5th Dist. Ct. App. 1990); *cf. Barber v. State*, 564 So. 2d 1169, 1172 (Fla. 1st Dist. Ct. App. 1990) (vesting the prosecutor with the discretion to choose among competing statutory provisions in a criminal case was not an invalid delegation of discretion to the executive branch).

16. 570 So. 2d 309 (Fla. 4th Dist. Ct. App. 1990).

17. The court noted in dicta that the ordinance also did not violate any other tenets of constitutional law such as the due process of law guarantee. *Id.* at 310.

18. *See Young*, 570 So. 2d at 309; *see also St. Johns County v. Northeastern Fla. Builders Ass'n*, 583 So. 2d 635, 642 (Fla. 1991); *Pittman v. State*, 570 So. 2d 1045, 1046 (Fla. 1st Dist. Ct. App. 1990); *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1239 (Fla. 5th Dist. Ct. App. 1990).

19. *Young*, 570 So. 2d at 310-11 (Hersey, C.J., dissenting).

20. There [wa]s absolutely no guidance in the ordinance, no standards or guidelines to control the discretion of the director of animal control as to whether, after a first bite, a dog owner [wa]s to be given the opportunity to confine his dog and to provide security as required in one section of the ordinance, or, whether the owner [wa]s simply to be advised that the dog will be disposed of under another section of the ordinance.

Id. at 310 (Hersey, C.J., dissenting). *See Cross Key Waterways*, 372 So. 2d at 918-21;

B. Separation of Powers: Prohibiting the Usurpation of Functions

Florida courts have, for now at least, ceased to rigorously apply the delegation doctrine, but they remain particularly attentive to separation of powers concerns in other contexts. In addition to providing the foundation for the delegation doctrine, the separation of powers doctrine also prohibits one branch of the government from invading the core powers of another branch.²¹ This principle was illustrated in several cases during the survey period concerning whether the core judicial functions were improperly delegated to nonjudicial officers.

In *Department of Agriculture and Consumer Services v. Bonanno*,²² the court held, in part, that the legislature could delegate to a hearing officer the power to make an initial determination of the amount of just compensation to be paid for citrus trees destroyed during the citrus canker eradication program, as long as this determination was subject to judicial review. The court noted that the ultimate determination of whether just compensation was paid for private property taken by the government was a core function of the judiciary. Therefore, by providing a right to judicial review of the initial determination made by a hearing officer, the legislature exercised its constitutional power to provide for a means of determining just compensation without improperly invading the core of judicial functioning.²³

In this area the issue of appropriate delegation does not always involve another branch of government invading a core judicial function. On some occasions it is the judiciary that delegated its powers. In

Chiles, 16 Fla. L. Weekly S699.

21. FLA. CONST. art. II, § 3; see *Chiles*, 16 Fla. L. Weekly 699; *Locke v. Hawkes*, 16 Fla. L. Weekly S716 (1991). The government also cannot delegate its police powers to a private party. Such action is beyond the legislature's authority, whether done by statute or contract. See *P.C.B. Partnership v. City of Largo*, 549 So. 2d 738, 741 (Fla. 2d Dist. Ct. App. 1989).

22. 568 So. 2d 24 (Fla. 1990) (per curiam).

23. *Id.* at 28-29. Further, in *Lampley v. State*, the court noted that the initial determination of whether a person was mentally incompetent and should be hospitalized was a core judicial function which could not be delegated to an administrative agency. 555 So. 2d 1242, 1243 (Fla. 4th Dist. Ct. App. 1989); see *Bentley v. State*, 398 So. 2d 992 (Fla. 4th Dist. Ct. App. 1981). However, once the initial determination of incompetency and involuntary hospitalization had been made by the appropriate court, then a hearing officer may determine whether the involuntary hospitalization should be continued. *Lampley*, 555 So. 2d at 1245; see *Liebman v. State*, 555 So. 2d 1242 (Fla. 4th Dist. Ct. App. 1989).

Bradley v. State,²⁴ the court reaffirmed²⁵ that trial court delegation to the probation and parole officer of the power to determine the appropriate amount of restitution owed by a criminal defendant was an impermissible delegation of a core judicial function.²⁶ The determination of all elements of a sentence for a defendant involves the exercise of judicial power which may not be entrusted to an executive branch employee.²⁷

The issue of whether the legislature invaded judicial core functions can be a particularly vexing one in the area concerning the distinction between substantive law making and matters of practice and procedure.²⁸ The former is within the legislative power sphere while the latter is within the scope of the judicial power. In *Haven Federal Savings*

24. 581 So. 2d 245 (Fla. 1st Dist. Ct. App. 1991).

25. See *Hamrick v. State*, 532 So. 2d 71, 72 (Fla. 1st Dist. Ct. App. 1988).

26. *Bradley*, 581 So. 2d at 246; see also *Weckerle v. State*, 579 So. 2d 742, 743 (Fla. 4th Dist. Ct. App. 1991); FLORIDA ADMINISTRATIVE PRACTICE § 1.12 (The Florida Bar 3d ed. 1990).

27. "However, once the court has rendered its decision, it may assign the performance of ministerial details necessary to the implementation of its decision to an executive branch employee." *Burris III*, *supra* note 4, at 590 (emphasis added). *cf.* *Citizens of Florida v. Wilson*, 567 So. 2d 889, 892 (Fla. 1990) In *Wilson*, while expressly disapproving of the process, the court nonetheless held that the Public Service Commission, in delegating some authority to staff to draft a revised supplemental service rider, did not inappropriately forfeit its statutory duties, because it properly set forth the conditions which it expected to see in the revised supplemental service rider. 567 So. 2d at 892. Thus, the staff was merely carrying out a ministerial task to see that these conditions were met in the revised supplemental service rider. The court found that all of the conditions which were set forth for approval of the revised supplemental service rider were addressed by the staff, so they did not exceed the scope of the ministerial duties which had been assigned to them. *Id.*

28. *Cf. Jarrell v. State*, 576 So. 2d 793, 794 (Fla. 2d Dist. Ct. App. 1991) (The court, in dicta, noted that a statute which imposed mandatory consecutive sentences for some offenses was not an unconstitutional invasion of the core judicial function by the legislature.). The legislature is also prohibited from usurping the authority of the executive branch. In *Chiles v. Public Service Commission Nominating Council*, 573 So. 2d 829, 832-33 (Fla. 1991), the court noted that the Public Service Commission was a legislatively created entity exercising legislative powers, and the statute governing the selection of individuals to fill unexpired terms on the Public Service Commission did not encroach upon the governor's constitutional appointment powers in such cases. See FLA. CONST. art. IV, § 1(f); *Chiles v. Children A, B, C, D, E, & F*, 16 Fla. L. Weekly S699 (Fla. 1991) (McDonald, J., dissenting) (In part, the argument was over whether budget reductions required by a shortfall in revenue was a legislative or executive function.).

and *Loan Ass'n v. Kirian*,²⁹ the court found that a statute requiring the severance of counterclaims for a separate trial in a foreclosure action concerned a procedural matter.³⁰ The court noted that practice and procedure matters concern the method of conducting litigation, not the establishment or regulation of rights or elements of a cause of action.³¹ The court held that the procedural aspects of the statute were unconstitutional to the extent they were inconsistent with rules adopted by the Florida Supreme Court which made severance of a counterclaim a matter within the trial judge's discretion.³²

Of course, these same principles prohibit the courts from exercising the core functions of other branches, but the precise lines of what constitutes core functions has not always been clear. This is especially so in light of the substantive law—practice and procedure dichotomy. In *State v. Florida Police Benevolent Ass'n*,³³ the court observed that the separation of powers doctrine did not “preclude[] the judicial branch from addressing the constitutionality of the acts of the other branches” of government.³⁴ The court noted that no special policy reasons, based upon separation of powers concerns, existed for excluding appropriation legislation from the power of the judiciary to determine the constitutionality of legislation.³⁵ In *Conley v. Boyle Drug Co.*,³⁶ the

29. 579 So. 2d 730 (Fla. 1991).

30. The court rejected the argument that this statute concerned substantive rights, because it offered greater protection to mortgage lenders. The court found no evidence that the legislature believed it was substantially altering the rights of the mortgage lenders. Rather, the legislative history demonstrated that this statute was adopted as a mere administrative convenience for the mortgage lenders. *Id.* at 733; see FLA. STAT. § 702.01 (1989).

31. *Kirian*, 579 So. 2d at 732.

32. *Id.* at 732-33; accord *Curenton v. Chester*, 576 So. 2d 969, 970 (Fla. 5th Dist. Ct. App. 1991) (following *Milton v. Leapai*, 562 So. 2d 804 (Fla. 5th Dist. Ct. App. 1990)); *In Re Adoption of a Minor Child*, 570 So. 2d 340, 342 (Fla. 4th Dist. Ct. App. 1990) (harmonizing a statutory time limit with the Florida Rule of Appellate Procedure); *Milton v. Leapai*, 562 So. 2d 804, 807 (Fla. 5th Dist. Ct. App. 1990) (time frame established in settlement offer statute was procedural, and encroached on the Florida Supreme Court's rule making authority).

33. 580 So. 2d 619 (Fla. 1st Dist. Ct. App. 1991) (per curiam).

34. *Id.* at 620.

35. *Id.*; see *Chiles*, 16 Fla. L. Weekly at S699. *But see* *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Cir. Public Defender*, 561 So. 2d 1130, 1136 (Fla. 1990) (strongly asserting that judicial review of appropriation statutes should be limited to law making procedural issues, and not reach the merits of the appropriation decisions.); *Department of Health and Rehabilitative Serv. v. Brooke*, 573 So. 2d 363, 368-71 (Fla. 1st Dist. Ct. App. 1991) (expressing great doubt about

court further noted that the common law process of evolving tort remedies in light of new experiences and circumstances did not impermissibly invade the legislative function of regulating the elements of causes of action.³⁷

C. *Accountability: Was the Agency Acting Within the Scope of Its Authority*

The general rule is that administrative agencies may not exercise any powers not expressly delegated to them, nor exceed the scope of the authority delegated to them by the legislature. If administrative agencies exceed their limited authority or powers, then their actions are ultra vires. However, the courts have recognized that there are some limited circumstances when an administrative agency can successfully claim some implied powers not explicitly provided for in the enabling statute. During the survey period, the courts consistently rejected such claims and reinforced the limited scope of this exception due to the possibility that it could be used to impermissibly enlarge or modify the scope of authority delegated to an administrative agency.³⁸ As the

the courts reviewing budgetary decisions the legislature delegated to the executive branch). *cf.* Florida Assoc. of Counties, Inc. v. Department of Admin., 580 So. 2d 641, 644 & n.9 (Fla. 1st Dist. Ct. App. 1991) (rejecting any strong presumption that non-contemporaneous interpretation of constitutional provisions by implementing legislation was constitutionally correct).

36. 570 So. 2d 275 (Fla. 1990).

37. *Id.* at 283-84.

38. The implied power argument cannot be used to expand the scope of authority delegated to an administrative agency. It can only be "used to provide additional powers for implementing agency policy in an area already clearly within its delegated area of authority. Burriss III, *supra* note 4, at 594; *see* Rabren v. Department of Professional Regulation, 568 So. 2d 1283, 1288-89 (Fla. 1st Dist. Ct. App. 1990) (concluding that while the statute does not specifically authorize the Board of Commissioners to adopt policy through its exercise of adjudicatory power, it is an appropriate implied power incident to its authority to enter orders as part of its disciplinary actions.). *But see* Willner v. Department of Professional Regulation, 563 So. 2d 805, 806-07 (Fla. 1st Dist. Ct. App. 1990) (The court noted that an order containing a requirement of a payment of \$60,000 to the Department of Legal Affairs for Consumer Protection Activities was an unlawful administrative penalty. While the Department of Professional Regulation was delegated authority by the Florida legislature to impose conditions on any grant of probation, it was a "general grant of authority to the . . . Department of Professional Regulation, lacking in sufficient specificity to evince a legislative intent to authorize . . . [the Department of Professional Regulation] to exact monetary penalties as conditions of probation." (emphasis in original)).

court noted in *Department of Environmental Regulation v. Puckett Oil Co.*,³⁹ when an administrative agency files an untimely response to a petition, the hearing officer cannot use his or her discretionary authority to grant or deny permission to file an untimely response as a means of sanctioning the agency for failing to strictly adhere to the rules.⁴⁰ Hearing officers have not been delegated authority to impose such sanctions in any case other than enforcement of discovery orders or "failure to comply with the pleading requirements of the statute."⁴¹ Even the power to impose sanctions in the case of discovery orders was limited.⁴² Hearing officers cannot dismiss a petition or otherwise functionally deprive a party of its right to a hearing as a means of enforcing a discovery order.⁴³

In *Cataract Surgery Center v. Health Care Cost Containment Board*,⁴⁴ the court held that the administrative rules⁴⁵ proposed by the Health Care Cost Containment Board concerning the "collection of data from freestanding ambulatory surgery centers"⁴⁶ were an invalid

39. 577 So. 2d 988 (Fla. 1st Dist. Ct. App. 1991).

40. The court stated:

[N]o statutory authority, either expressly or reasonably implied therefrom, empowering DOAH to set a jurisdictional time limitation on the right of an agency to respond to a petition for fees and costs. To the contrary, we consider that the division's power to permit a late-filed response is reasonably implied from the very statutes that rule 22I-6.035 referenced as authorizing its adoption: Section 120.57, Florida Statutes (1989), specifically subsection (1)(b)4, authorizing parties "to respond, to present evidence and argument on all issues," and sections 57.111(4)(c) and (d), allowing a state agency against which a small business party has prevailed to oppose an application for attorney's fees and costs by affidavit, and requiring the hearing officer to conduct an evidentiary hearing on the application. Clearly the two statutes, which the rule was designed to implement, imply that the agency shall be given a fair opportunity to defend against an application for fees and costs. We find nothing in the statutes reasonably suggesting that if an agency fails to comply with the time limitations required for its response, a summary final order, regardless of any mitigating circumstances, must thereafter be entered.

Id. at 992.

41. *Id.* at 993.

42. *Id.* at 992-93.

43. *Id.* at 993.

44. 581 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1991).

45. The challenged proposed rules were 10N-6.002-06. See FLA. STAT. § 120.54(4) (1989) (permits challenges to proposed rules as ultra vires acts); FLA. ADMIN. WEEKLY 1378-83 (March 23, 1990).

46. *Cataract Surgery Ctr.*, 581 So. 2d at 1360.

exercise of the authority delegated to it by the legislature. The Board claimed that the proposed rules were designed to enable it to collect the data necessary for advising the legislature and the Governor on what impact the shift from institutional to ambulatory care was having on health care costs.⁴⁷ The court noted that “[a]ny attempt by an [administrative] agency to extend or enlarge its jurisdiction beyond its statutory authority . . . [must] be declared . . . invalid.”⁴⁸ In order to assure that administrative agencies do not exceed its delegated authority the courts must independently evaluate an administrative agency’s claim that it was acting within the scope of its delegated authority.⁴⁹ In reviewing the statutes to determine the scope of an administrative agency’s authority, the courts must look not only at the specific statutory sections cited by the administrative agency, but also at the whole statutory scheme which the administrative agency was delegated authority to administer.⁵⁰

The court characterized the rule making authority delegated to the Health Care Cost Containment Board as limited to where other specific sections of the statute “confer such rulemaking power.”⁵¹ The court

47. *Id.*; see FLA. STAT. §§ 407.03, .07-.08 (1990).

48. *Cataract Surgery Ctr.*, 581 So. 2d at 1361.

49. See *Cataract Surgery Ctr.*, 581 So. 2d at 1360-61 (characterizing the judicial review process as only slightly different from the usual deferential approach to an administrative agency’s interpretation of its enabling statute); Burris III, *supra* note 4, at 590-94.

50. *Cataract Surgery Ctr.*, 581 So. 2d at 1360-61. In doing so, the court assumes it is authorized to examine other statutory sections not noticed in the rule making process as the source of the administrative agency’s rule making authority for the proposed rule. This opens up the possibility that a defective notice of a proposed rule, because it failed to state the appropriate source of statutory authority, could be saved by the court noting the appropriate statutory section during the judicial review process and declaring the defect in the notice to be harmless error.

51. *Id.* at 1361. Compare FLA. STAT. § 407.03(1) (1989) (“Adopt, amend, and repeal rules respecting the exercise of the powers conferred by this chapter which are applicable to the promulgation of rules.”) with *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st Dist. Ct. App. 1975)

Where the empowering provision of a statute states simply that an agency may “make such rules and regulations as may be necessary to carry out the provisions of this Act,” the validity of regulations promulgated thereunder will be sustained so long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious.”

Although not explicitly considered by the court, the APA provision that “[n]o agency has inherent rulemaking authority” may have influenced how the court read these statutory provisions. FLA. STAT. § 120.54(15) (1989).

rejected the claim that the Board was granted general rule making authority in all areas addressed in its enabling statute. The court also rejected the Board's claim that other statutory provisions⁵² authorized it to promulgate these information gathering rules. The court found that when those statutory provisions were read in conjunction with the rest of the enabling act⁵³ it was clear the legislature intended that these information gathering provisions should apply only to hospitals and nursing homes.⁵⁴ The court observed that the only time any meaningful mention was made of ambulatory care facilities in the statute was in the section of the statute that required the Health Care Cost Containment Board to report to the legislature and the governor on the impact the shift from institutional to ambulatory care may have on health care costs. Without more than this mere mention of ambulatory care facilities, the court "decline[d] to infer that an [administrative] agency may require detailed and expensive reporting from any business which may have information relevant to the agency's purpose in situations where the agency is given no other regulatory authority, and where there is no specific legislative authority to require the collection of such data."⁵⁵

*Board of Trustees of Internal Improvement Trust Fund v. Board of Professional Land Surveyors*⁵⁶ concerned the issue of whether a proposed rule was within the scope of authority delegated to an administrative agency by the legislature.⁵⁷ The Board of Professional Land Surveyors proposed rules designed to establish a uniform system for determining the ordinary high water line or mark used in determining the "demarcation between privately-owned uplands and sovereign submerged lands."⁵⁸ After a hearing was held, the hearing officer entered a final order finding "most of the contested rules invalid but concluding that certain specified rules constituted a valid exercise of the Board of

52. FLA. STAT. § 407.03, .07-.08 (1989).

53. See FLA. STAT. §§ 407.02, .025, .05, .09 (1989) (information gathering concerning hospitals); FLA. STAT. §§ 407.30-.34 (1989) (information gathering concerning nursing homes).

54. "Chapter 407 provides a detailed framework of regulation and reporting requirements for hospitals and nursing homes, but there is no indication of legislative intent to allow the [Health Care Cost Containment Board] to exercise jurisdiction over freestanding ambulatory surgery centers." *Cataract Surgery Ctr.*, 581 So. 2d at 1362.

55. *Id.* at 1363.

56. 566 So. 2d 1358 (Fla. 1st Dist. Ct. App. 1990).

57. FLA. STAT. § 120.54(4) (1989) (permits challenges to proposed rules as ultra vires acts).

58. *Board of Professional Land Surveyors*, 566 So. 2d at 1359.

Surveyors' delegated legislative authority."⁵⁹

The court held that all of the proposed rules were ultra vires acts, because they exceeded the statutory authority delegated to the Board of Professional Land Surveyors by the legislature. The legislature delegated to the Board the power to promulgate rules concerning the minimum technical standards designed "to ensure that surveys are accurately measured, complete, and of sufficient quality *in those respects* to provide legally defensible real property boundaries."⁶⁰ The legislature never delegated to the Board of Surveyors the power

to define any . . . fixed point [such] as the ordinary high water line or to circumscribe thereby the legal consequences that flow from the fixing of such a point. The determination of rights of parties to a riparian boundary dispute is instead a matter subject ultimately to judicial resolution under all applicable law.⁶¹

The Board was limited to promulgating rules which assured that the boundary lines for riparian property are properly recorded by surveyors. The Board was never delegated the authority to promulgate these proposed rules, even if they did precisely recodify the case law concerning the drawing of a line between privately owned land and sovereign submerged land.⁶² It is clear, in light of the limited scope of authority delegated to the Board, that the court correctly concluded that this was a classic case of an administrative agency acting beyond the scope of its delegated authority.⁶³

59. *Id.* The hearing officer held that some of the rules were an invalid exercise of delegated authority, because "they did not precisely restate or embody the case law of Florida relating to the scope of sovereign submerged land ownership and the concept of ordinary high water line." *Id.* at 1360. Conversely, those few rules which the hearing officer found to be a valid exercise of delegated authority were an accurate restatement of the decisions of Florida courts concerning the determination of the ordinary high water line. *Id.*

60. *Id.* at 1361 (emphasis in original).

61. *Board of Professional Land Surveyors*, 566 So. 2d at 1361.

62. *Id.* The court specifically noted that it was not passing on the hearing officer's determination of whether the administrative rules properly or improperly restated the case law in Florida concerning where the ordinary high water mark should be located. *Id.*

63. "If an [administrative] agency has exceeded its grant of rule making authority or if the rule enlarges, modifies, or contravenes the specific provisions of law implemented, such infractions are among those requiring a conclusion that the proposed rule is an invalid exercise of delegated legislative authority." *Id.* at 1360.

In *Browning v. Department of Business Regulation*,⁶⁴ the court held that the Division of Florida Land Sales, Condominiums and Mobile Homes had exceeded the scope of its delegated authority in attempting to enforce contractual rescission agreements between a developer and purchasers.⁶⁵ The Division was authorized by statute to seek and enforce cease and desist orders, impose civil penalties and invoke other appropriate remedies as authorized by Florida Statutes chapter 498.

In this case, the Division of Florida Land Sales, Condominiums and Mobile Homes had successfully entered an order compelling the developer, Browning, to offer all purchasers a right of rescission:

It is apparent . . . that once the developer has made an agreement to rescind with the purchaser, the applicable provisions of Chapter 498 denominate the purchaser as the proper party to resort to court action to enforce the agreement for rescission. The prevailing purchaser is protected against the expense of attorney's fees and litigation costs incurred in such action. Chapter 498 does not contain authority for the Division to file suit in court to compel the consummation of an agreement for rescission made between the purchaser and the developer, and to so construe its provisions would exceed the authority delegated to the Division by statute. [Administrative a]gencies do not have the inherent power to enforce private consumer remedies unless that authority is clearly apparent from the statutes.⁶⁶

Nothing in the final judgment indicated that the Division "ha[d] authority to compel consummation of the rescission agreement on behalf of a lot purchaser after he accepted Browning's offer to rescind. Nor could the judgment validly have so provided, as such a provision would ac-

64. 574 So. 2d 188 (Fla. 1st Dist. Ct. App. 1991).

65. The court stated:

[T]he only issue we must decide is whether the trial court, on an application to enforce judgment by its contempt proceedings, is authorized to compel the developer to refund the purchase price to the rescinding purchasers or whether each purchaser must personally seek enforcement before the court once they have accepted the developer's offer to rescind. Resolution of this issue depends on the nature and extent of the remedy of rescission upon which the [administrative] agency order and, consequently, the final judgment was entered in this case.

Id. at 192.

66. *Id.* at 193.

cord to the Division powers beyond that authorized by statutes.”⁶⁷ In this case, Browning complied with the administrative order. He did so by “offering rescission and entering into private rescission agreements with those accepting that offer, enforcement of these private agreements remains up to the purchaser as authorized in [section] 498.061.”⁶⁸ Accordingly, the circuit court did not have authority to grant the Division of Florida Land Sales, Condominiums and Mobile Homes’ request that the court use contempt powers to enforce the rescission agreements reached between Browning and the purchasers.⁶⁹

In *Schiffman v. Department of Professional Regulation*,⁷⁰ the court held that the Board of Pharmacy exceeded its delegated authority when it attempted through a nonrule policy to permanently bar Schiffman from petitioning for reinstatement of his license as a pharmacist.⁷¹ The court relied upon *Beam Distilling Co. v. Department of Professional Regulation*,⁷² which interpreted a similar statute that regulated the licensing of nurses, in reading the statute as having only delegated

67. *Id.* at 194. The court noted that if the Division of Florida Land Sales, Condominiums and Mobile Homes was concerned that the developer would not comply with the rescission agreements, then it should have required the developer to establish a trust fund for that purpose. *Id.* at 194 n.2.

68. *Browning*, 574 So. 2d at 194.

69. *Id.* The court noted that,

the circuit court in this case was empowered to decline enforcement of any conditional penalty imposed by the . . . [Division of Florida Land Sales, Condominiums and Mobile Homes] order that it found was inappropriate in view of the circumstances shown to exist at the time the matter came before it, including changes that occurred since the administrative order had been entered.

Id. The circuit court had the power to do this, because it was expressly authorized by statute to determine whether the penalty imposed was appropriate. Such is not the case when an administrative order is being reviewed by an appellate court. Compare FLA. STAT. § 120.69(5) (1989) with FLA. STAT. § 120.68 (1989). When the circuit court exercised this power, then the standard of judicial review for an appellate court was “whether the [circuit] court abused its discretion under the circumstances shown by the evidence.” *Browning*, 574 So. 2d at 195. Clearly, the circuit court had the authority to determine whether Browning still had the means to carry out the rescission imposed by the administrative order.

The court also noted that in appellate review of a contempt citation order issued to enforce an administrative order, the decision of the circuit court to impose or deny the contempt request should only be overturned when it is clearly erroneous. *Id.* at 195.

70. 581 So. 2d 1375 (Fla. 1st Dist. Ct. App. 1991).

71. See *infra* notes 259-97 and accompanying text (discussion of nonrule policy issues).

72. 530 So. 2d 450 (Fla. 1st Dist. Ct. App. 1988).

to the Board of Pharmacy the power to regulate pharmacist licensing for the purpose of protecting the public from those who are not qualified to practice the profession. This legislative purpose was not furthered by permanently banning a rehabilitated and qualified individual from seeking reinstatement of his license. The court made it clear that any attempt by the Board of Pharmacy to impose such a sanction, whether by nonrule policy or by administrative rule, would be an act beyond its delegated authority.⁷³

In *Department of Natural Resources v. Wingfield Development Co.*,⁷⁴ the court considered whether the Department of Natural Resources rules⁷⁵ concerning what constitutes "under construction" were a valid exercise of delegated authority.⁷⁶ The administrative rules provided that a project was considered under construction as long as there was continuous physical activity on the project and no period of inactivity longer than six months. The court found that these requirements imposed by administrative rules were an invalid exercise of delegated legislative authority.⁷⁷ The statute specifically exempted from the requirements associated with a coastal construction control line any project under construction prior to its establishment. The statute permitted the Department of Natural Resources to make a determination of whether a project was under construction only once—at the time it established the coastal construction control line. The statute did not authorize the Department to continually reexamine the question of whether an exempt project was under construction. Because the administrative rules, especially as interpreted by the Department, authorized such a continual process of review, they were an ultra vires exercise of delegated authority that "enlarge[d] and modifie[d]" the scope of authority delegated to the Department by the legislature.⁷⁸ The legislature must act before the Department can impose such a scheme on exempt projects.⁷⁹

73. *Schiffman*, 581 So. 2d at 1379.

74. 581 So. 2d 193 (Fla. 1st Dist. Ct. App. 1991).

75. FLA. ADMIN. CODE r.16B-33.002(56), .004(1) (1991).

76. *Wingfield Dev. Co.*, 581 So. 2d at 197. The court also considered a nonrule policy issue. See *infra* notes 291-97 and accompanying text.

77. *Wingfield Dev. Co.*, 581 So. 2d at 197.

78. *Id.* at 198; see FLA. STAT. § 120.52(8)(c) (1989).

79. Judge Schwartz argued, in his dissent, that the term "under construction," as used in the statute, envisioned an ongoing process of review to determine if the exemption from the coastal construction control line permit requirements was justified. He concluded that the legislature could not have intended for the statute to allow a con-

The decisions in *Puckett Oil Co.*, *Cataract Surgery Center*, *Board of Professional Land Surveyors*, *Browning*, *Schiffman*, and *Wingfield Development Co.* are examples of courts independently evaluating the question of whether administrative agencies have appropriately limited themselves to those powers specifically delegated and reasonably implied from the statutory scheme.⁸⁰ The non-deferential approach to judicial review in this area is designed to assure that the ultra vires doctrine does not become as ineffective a check on the exercise of discretion claimed by administrative agencies as the delegation doctrine has on the scope of discretionary authority the legislature can delegate to administrative agencies.⁸¹

D. *Procedural Due Process*⁸²

The constitutional guarantee of procedural due process is designed to assure that the government does not arbitrarily deprive a person of a constitutionally protected liberty or property interest. This is accomplished by requiring the government, in many cases, to provide an individual with an opportunity for a hearing to determine the validity of the government's decision.⁸³

The initial issue in all cases involving procedural due process claims is whether a constitutionally protected liberty or property interest is at stake which requires some type of hearing. If no such interest is at stake, then procedural due process requirements do not constrain the government's ability to act. The process of identifying a constitutionally protected liberty interest is a relatively easy task, because it usually involves a determination of whether a fundamental right such

tractor to remain secure in its exemption by "merely begin[ning] construction on the day before the line . . . [was] fixed, cease [construction] the day after, and wait, presumably for decades, until it secure[d] financing to complete the structure." In rejecting this absurd result the Department of Natural Resources merely interpreted the statute in a reasonable manner. The court should defer to such a reasonable interpretation. *Wingfield Dev. Co.*, 581 So. 2d at 199 (Schwartz, J., dissenting); see *infra* 576-83 and accompanying text (discussion of when courts should defer to an interpretation of a statute adopted by an administrative agency).

80. See *infra* notes 126-32 and accompanying text.

81. See Burris III, *supra* note 4, at 590-94.

82. See generally FLORIDA ADMINISTRATIVE PRACTICE § 1.21-1.46 (The Florida Bar 3d ed. 1990)

83. Of course the government may statutorily grant hearings in cases when none would be required by the Florida or United States Constitutions. *E.g.*, FLA. STAT. § 120.54(3), (4) (1989).

as freedom of speech or privacy is at stake in the governmental decision making process.⁸⁴ However, determining whether a constitutionally protected property interest exists is more complex, because it turns on whether state laws or procedures recognize a property interest of constitutional magnitude:

Property interests . . . are not created by the Constitution. [T]hey are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.⁸⁵

On this basis, state law or governmental conduct only creates a constitutionally protected property interest when the *Roth/Sindermann* mutuality of expectation test is satisfied:⁸⁶ "To have a property interest in a [governmental] benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must . . . have a legitimate claim of entitlement to it."⁸⁷ "A legitimate entitlement is established (1) by the state's unilateral promise of benefit in its laws or administrative rules or (2) by the conduct of the state and the individual which creates 'mutually explicit understandings that support . . . [the] claim of entitlement.'"⁸⁸ In two cases during the survey period, Florida courts apparently used these principles in finding there was or was not a constitutionally protected interest at stake. What was remarkable about these cases was not their outcomes, but rather, that the courts did not make explicit reference to these well-established principles in resolving the issues in

84. *Burris I*, *supra* note 4, at 323 n.167. However, in some circumstances even the determination of whether a constitutional protected liberty interest was at stake can be difficult, because the degree of deprivation may not be sufficient to persuade the court that an invasion of a constitutionally protected liberty interest occurred. *Compare Wisconsin v. Constantineau*, 400 U.S. 433 (1971) *with* *Ingraham v. Wright*, 430 U.S. 651 (1977); *Paul v. Davis*, 424 U.S. 693 (1976).

85. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see Perry v. Sindermann*, 408 U.S. 593, 600-01 (1972) (patterns of conduct between the parties can establish a constitutionally protected property interest); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985).

86. *Roth*, 408 U.S. at 564; *Sindermann*, 408 U.S. at 593.

87. *Roth*, 408 U.S. at 577.

88. *Burris III*, *supra* note 4, at 595 (quoting *Sindermann*, 408 U.S. at 601.). This standard is not always easily satisfied. *See, e.g., Bishop v. Wood*, 426 U.S. 341 (1976).

this area.⁸⁹

In *Spiegel v. University of South Florida*,⁹⁰ the court found that the University of South Florida's contract with Dr. Spiegel, providing that he was to be Chair of the Department of Orthopedics and Rehabilitation, was sufficient to create a constitutionally protected property right.⁹¹ The court noted that his removal from that position might well stigmatize him and harm his reputation and ability to obtain employment in other places. The court considered this to be an infringement on his constitutionally protected liberty interests.⁹² Therefore, he was entitled to a hearing prior to being deprived of this benefit. The court ordered him reinstated as Chair of the Department, but left the door open for the University to try to remove him after it gave him notice and an opportunity to be heard.⁹³

In *Van Poyck v. Dugger*,⁹⁴ the court recognized that a prisoner had a constitutionally protected liberty interest⁹⁵ "in not being arbitrarily removed from the general prison population,"⁹⁶ and placed in a high security cell under twenty-four hour lockdown status.⁹⁷ Because Van Poyck, in his habeas corpus petition alleged that no administrative hearing was ever held, the court held that the trial court must hold an evidentiary hearing to determine whether the prison officials acted arbitrarily in placing Van Poyck in special confinement or whether it was done for legitimate penological reasons.⁹⁸

89. See *Florida Sugar Cane League v. State*, 580 So. 2d 846, 851 (Fla. 1st Dist. Ct. App. 1991).

90. 555 So. 2d 428 (Fla. 2d Dist. Ct. App. 1989).

91. *Id.* at 429.

92. *Id.*; see *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (constitutionally protected liberty interest at stake in cases of reputational injury). *But see Paul v. Davis*, 424 U.S. 693 (1976) (such harms will not be assumed to exist, they must be alleged, and if disputed, proved).

93. *Spiegel*, 555 So. 2d at 429-30.

94. 582 So. 2d 108 (Fla. 1st Dist. Ct. App. 1991).

95. The court also recognized that the conduct of the prison officials could constitute an unconstitutional form of cruel and unusual punishment. *Id.* at 109.

96. *Id.*

97. Because Van Poyck was sentenced to death for murdering a correctional officer while aiding in a prison escape, the relevant prison population was death row. However, death row prisoners were not normally subject to the special administrative treatment Van Poyck was receiving. *Id.*

98. See *Id.* at 109-10. The right to such a hearing is dependent on state law creating constraints on the discretion of prison officials in making such decisions. If there are none, then there is no need to hold a hearing. See *Meachum v. Fano*, 427 U.S. 215 (1976).

If the court finds there was a constitutionally protected liberty or property interest at stake, it must determine whether the procedural protections, if any, provided by the state were constitutionally sufficient. Perhaps the relatively few cases addressing the threshold issue of whether a constitutionally protected interest was at stake, and the conclusory analysis applied by the courts when ignoring these established doctrinal inquiries, can be explained by the fact that courts and the State of Florida generally are willing to concede the existence of such an interest, and focus primarily on whether the procedural process offered was constitutionally sufficient.⁹⁹ The nature of the constitutionally mandated procedural due process protection will vary depending on the context. In *Mathews v. Eldridge*,¹⁰⁰ the Supreme Court formally adopted a balancing approach to this question:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁰¹

During the survey period, the courts decided only a few cases concerning the constitutional adequacy of the procedure provided by the state. Again, as in other survey periods, "[w]hat is remarkable about these is not the results in each instance, but the fact that the courts ignored the *Mathews v. Eldridge* paradigm for deciding such questions."¹⁰²

Clearly, if no hearing was held, either pre- or post-deprivation, of a constitutionally protected property or liberty interest, then a violation

99. The decline in the number of cases which raised significant procedural due process issues could also be attributed to the limited success such claims have had in the appellate courts at both the state and federal levels. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 30 & n.80 (1985).

100. 424 U.S. 319 (1976).

101. *Id.* at 334-35.

102. *Burris III*, *supra* note 4, at 597. See, e.g., *Florida Sugar Cane League v. State*, 580 So. 2d 846, 851 (Fla. 1st Dist. Ct. App. 1991); *Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 774 (Fla. 1st Dist. Ct. App. 1991); *J.B. Coxwell Contracting, Inc. v. Department of Transp.*, 580 So. 2d 621, 624 (Fla. 1st Dist. Ct. App. 1991).

of the constitutional guarantee of procedural due process has occurred.¹⁰³ But if an emergency exists, then a post-deprivation hearing may be all that procedural due process requires.¹⁰⁴ In *Garcia v. Department of Professional Regulation*,¹⁰⁵ the court summarily concluded that the provisions of the Administrative Procedure Act, governing the emergency suspension of professional licenses,¹⁰⁶ on their face did not violate the constitutional requirements of procedural due process.¹⁰⁷ While not explicitly stated by the court, this result occurred because in light of the emergency, the APA¹⁰⁸ offered an adequate post-deprivation remedy.

Procedural due process further requires that a party receive adequate notice of the charges so he or she may prepare a defense.¹⁰⁹ In *Willner v. Department of Professional Regulation*,¹¹⁰ the court noted correctly that an administrative agency may not impose fines or other sanctions for violations which were not charged in an administrative complaint.¹¹¹ The court failed to explicitly set forth the reasons why a procedure which did not provide notice was constitutionally and statutorily defective, but it is clear that the APA¹¹² and the due process clauses of the Florida and United States Constitutions require such notice.¹¹³

Procedural due process also requires that a party have an opportunity to present his or her defense to an impartial decision maker.¹¹⁴ In *Ridgewood Properties, Inc. v. Department of Community Affairs*,¹¹⁵

103. See *Brevard County v. Hammel*, 575 So. 2d 772 (Fla. 5th Dist. Ct. App. 1991).

104. See e.g., *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

105. 581 So. 2d 960 (Fla. 3d Dist. Ct. App. 1991).

106. FLA. STAT. §§ 120.54(9), .60(8) (1989).

107. *Garcia*, 581 So. 2d at 961.

108. FLA. STAT. §§ 120.50-73 (1989).

109. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

110. 563 So. 2d 805 (Fla. 1st Dist. Ct. App. 1990).

111. The court also noted that any attempt by an administrative agency to impose an enhanced fine structure for violations which occurred prior to the date that the new fine structure became applicable was a violation of the Ex Post Facto Clause of the United States and Florida Constitutions. *Id.* at 806; see U.S. CONST. art. II, § 10; FLA. CONST. art. I, § 10.

112. FLA. STAT. § 120.57(1)(b)(2) (1989).

113. U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 9.

114. *Goldberg*, 397 U.S. at 271; see *Burriss I*, *supra* note 4, at 330-31.

115. 562 So. 2d 322 (Fla. 1990); see *Burriss III*, *supra* note 4, at 596-97 (brief discussion of the decision by the First District Court of Appeal in this case).

the Florida Supreme Court considered a certified question from the First District Court of Appeal of whether it is "a violation of a party's due process rights in an administrative hearing for the head of a department to appear as an expert witness when that same department head later enters the final order in the case?"¹¹⁶ The Department of Community Affairs notified Ridgewood Properties that it must submit a required impact statement for approval before proceeding with a planned office park development on a piece of property in Maitland, Florida. Ridgewood Properties responded that it did not need to file the required impact statement for two reasons.¹¹⁷ At the administrative hearing, the Secretary of the Department of Community Affairs testified as an expert witness. He was the only witness for the Department of Community Affairs. The hearing officer relied upon his testimony in the recommended order to resolve disputed factual issues. The Secretary adopted as the final order essentially all of the findings of fact and conclusions of law in the hearing officer's recommended order.

The supreme court acknowledged that aggregation of functions in administrative agencies meant that the judicial model for an impartial decision maker in administrative hearings need not be followed. The aggregation of functions was not constitutionally fatal to an administrative agency head performing the role of impartial decision maker in most cases.¹¹⁸ However, this was anything but a normal case. The court characterized the role played by the Secretary of the Department of Community Affairs as that of "prosecutor, witness, and ultimate judge of the facts and the law. Most significantly, . . . [the] Secretary . . . necessarily passed upon his own evidence."¹¹⁹ To approve the hearing

116. *Ridgewood Properties, Inc.*, 562 So. 2d at 322.

117. First, "the development rights in the land had vested prior to the passage of the [Development of Regional Impact] Statute" so this new statutory requirement should not govern the development of the land. *Id.* Second, the Department of Community Affairs' policies concerning when a landowner must file a development regional impact statement for approval were unpromulgated rules found in a series of letters to other developers, and were invalid because they had never been adopted as administrative rules, as required by the APA. *Id.* at 322-23 & n.2.

118. Combination of "the fact-seeking and judicial functions in the same office does not automatically violate due process." *Id.* at 323. Nor would such a combination violate the principle of separation of powers. *See, e.g., McDonald v. Department of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st Dist. Ct. App. 1977); *Florida Motor Lines, Inc. v. Railroad Comm'rs*, 129 So. 876 (Fla. 1930).

119. The court noted that the Secretary of the Department of Community Affairs had "signed the notice of violation," "was in charge of the attorneys prosecuting the alleged violation," "was the Department's only witness in its case in chief," "re-

officer's findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial.¹²⁰ Even with the best of intentions, this can hardly be characterized as an unbiased, critical review."¹²¹ Rather, it was clear the Secretary had a predisposition to reject the contravening evidence and this deprived him of the attributes of an impartial decision maker as required by the procedural due process clauses of the Florida and United States Constitutions. As a general rule, if the head of an administrative agency testified at the hearing about a disputed material issue of fact, then the recommended order must be reviewed by a neutral third party, not the head of the administrative agency nor one of his employees.¹²²

1. Access to Transcripts of Administrative Hearings

One final aspect of due process touched upon during the survey period concerned the availability of hearing transcripts. The APA provides that an administrative agency must maintain an accurate and complete account of all testimony and other evidence that makes up the record in a formal administrative hearing.¹²³ In two cases during the survey period, the Florida Supreme Court considered whether an indigent party in an administrative hearing had a statutory or constitutional right to a free transcript of the hearing so that he or she could seek judicial review of the decision by the administrative agency.¹²⁴

*Gretz v. Florida Unemployment Appeals Commission*¹²⁵ con-

viewed the hearing officer's findings," and "issued the final order." *Ridgewood Properties, Inc.*, 562 So. 2d at 323.

120. The Secretary of the Department of Community Affairs testified at the hearing over objections, and his testimony provided the only basis for finding competent, substantial evidence to support the position ultimately adopted in the final order, rejecting the contravening evidence offered by the opposing party. *Id.* at 324.

121. *Id.*; see also *McIntyre v. Tucker*, 490 So. 2d 1012, 1013 (Fla. 1st Dist. Ct. App. 1986).

122. *Ridgewood Properties, Inc.*, 562 So. 2d at 324 & n.4. The APA provides that when a head of an administrative agency has been disqualified from performing this review function, then the governor should appoint an individual not associated with the administrative agency to serve as a substitute decision maker. *Id.* at 324; See FLA. STAT. § 120.71 (1989).

123. FLA. STAT. §§ 120.57(1)(b)(6), (7) (1989); see FLA. STAT. § 120.57(2)(b) (1989) (nature of the record in an informal hearing).

124. Without a record, judicial review of an administrative order is, in most cases, precluded. See FLA. STAT. § 120.68(4) (1989).

125. 572 So. 2d 1384 (Fla. 1991).

cerned whether administrative rules¹²⁶ which required a person seeking unemployment compensation to pay a fee for the preparation of a transcript so that he or she could seek judicial review of the administrative agency's order was a valid exercise of the authority delegated to it by the legislature. The court found the rules were invalid because they were contrary to a provision in the enabling statute governing the unemployment compensation system.¹²⁷ The court read the statute as prohibiting the Unemployment Appeals Commission from charging fees for any service it provided.¹²⁸ This was very broad language designed to assure that claimants had adequate access to the unemployment compensation system.¹²⁹ The court reasoned that the duty imposed on administrative agencies by the APA to make transcripts available to a party upon request at no more than the actual cost of reproducing such transcript,¹³⁰ and the enabling statute which provided that Unemployment Compensation Appeals Commission may not charge a fee for its services,¹³¹ established the actual cost of a transcript for claimants in an unemployment circumstance as zero.¹³²

In *Smith v. Department of Health and Rehabilitative Services*,¹³³ the court considered the issue of whether a statute or the Florida Constitution required that an indigent party in a non-criminal administrative hearing was entitled to a free transcript of the administrative proceeding so that he or she could seek judicial review of the administrative order.¹³⁴ Prior to 1980, the courts interpreted Florida Statute section 57.081 as not granting an indigent party a right to a free transcript in either a judicial, civil, or an administrative proceeding.¹³⁵ In 1980, the legislature amended this statutory provision; how-

126. FLA. ADMIN. CODE. 38E-3.003(2), .009(3) (1991).

127. *Gretz*, 572 So. 2d at 1385; see FLA. STAT. § 443.041(2)(a) (1987).

128. Whether the service was mandated by statute or voluntarily undertaken did not matter. Both were covered under the statute. *Gretz*, 572 So. 2d at 1386.

129. *Id.*

130. FLA. STAT. § 120.571(1)(b)(6) (1985) (currently codified as FLA. STAT. § 120.57(1)(b)(7) (1987)); see *Gertz*, 572 So. 2d at 1386.

131. FLA. STAT. § 443.041 (1985).

132. *Gertz*, 572 So. 2d at 1386. "It is illogical to assume that the legislature prohibited charging the claimant for some fees in order to facilitate their ability to obtain judicial review, but intended to allow charging of a fee that would essentially prevent the claimant from pursuing that review." *Id.*

133. 573 So 2d 320 (Fla. 1991).

134. *Id.* at 321-22; FLA. CONST. art. I, § 9 (due process); FLA. CONST. art. I, § 21 (access to courts); FLA. STAT. § 57.081 (1985).

135. *Smith*, 573 So. 2d at 322; *Harrell v. Department of Health & Rehabilita-*

ever, the exact effect of the amendment was unclear.¹³⁶ The court found that the purpose of the statute was to assure that any indigent person before an administrative agency received the services of the justice system without charge. The obligation of an administrative agency to maintain a complete record of a proceeding¹³⁷ was one of those attributes of the justice system which section 57.081(1) meant to be available without charge.¹³⁸ "Thus, . . . [administrative] agencies must supply transcripts, and as indigents, the petitioners are entitled to receive them without charge."¹³⁹

Concerning the due process claim, the court noted in dicta that there was no reason to read the Florida Due Process Clause differently from that in the United States Constitution. The United States Supreme Court in *Ortwein v. Schwab*,¹⁴⁰ found that requiring an indigent person to pay a modest filing fee was rationally related to off-setting the expense of operating a court system, and as such, it was not a violation of due process. The Florida Supreme Court saw no reason to distinguish between the payment of a modest filing fee and payment of the cost of a transcript. Thus, the court concluded that the indigent parties who had received an evidentiary hearing on their claims without cost would not "be constitutionally entitled to be furnished with a free transcript to assist in the prosecution of their appeals."¹⁴¹ Essentially, this dicta invited the legislature to reconsider its statutory policy, by making it clear that there was no constitutional requirement compelling the current policy.

tive Servs., 361 So. 2d 715 (Fla. 4th Dist. Ct. App. 1978); *Bower v. Connecticut Gen. Life Ins. Co.*, 347 So. 2d 439 (Fla. 3d Dist. Ct. App. 1977).

136. *Smith*, 573 So. 2d at 322.

137. FLA. STAT. § 120.57(1)(b)(7) (1989).

138. The court believed this was a different rationale from *Gretz* which it read as limited to those circumstances where the legislature, by statute, had established the value of the service rendered in providing a transcript was zero. *Smith*, 573 So. 2d at 323.

139. *Id.* But see *id.* at 325 (McDonald, J., concurring in part and dissenting in part). The court also noted that this meant indigent parties seeking judicial review of an administrative hearing order had greater rights than when they were appealing from a trial court judgment in a civil case. The court noted that this disparity was a matter of legislative concern. *Id.*

140. 410 U.S. 656 (1973).

141. *Smith*, 573 So. 2d at 324; see *id.* at 325 (McDonald, J., concurring in part and dissenting in part). The court also noted that filing fees, or the costs incident to seeking judicial review such as preparing a transcript, would not be unreasonable restraints on the access to the courts. *Id.* at 323; see FLA. CONST. art. I, § 21.

Justice Ehrlich agreed with the majority's conclusion concerning the reading of section 57.081, but dissented from the majority's conclusion that there was no constitutional guarantee that an indigent party was entitled to a free transcript of an administrative proceeding so that he or she could seek judicial review of the administrative agency's order.¹⁴² He noted that there was a critical distinction between the federal constitutional requirement of due process and the due process guarantee found in the Florida Constitution. The Florida Supreme Court has consistently held that when the legislature chooses an administrative decision process, it must also include a right to judicial review in order to satisfy the requirements of procedural due process.¹⁴³ Because judicial review of an administrative order can occur only if the transcript of the appropriate portions of the administrative hearing are available, the transcript becomes a necessary element of access to the judicial review process. An indigent person would be functionally prohibited from seeking judicial review unless there was a constitutional guarantee to a transcript of the proceedings; the majority erred in not so holding.¹⁴⁴

142. *Smith*, 573 So. 2d at 325 (Ehrlich, J., concurring in part and dissenting in part).

143. *Id.* (Ehrlich, J., concurring in part and dissenting in part) (citing *Scholastic Systems, Inc. v. Leloup*, 307 So. 2d 166 (Fla. 1974)).

144. *Id.* (Ehrlich, J., concurring in part and dissenting in part). Justice Ehrlich also believed that the right of reasonable access to courts guaranteed by the Florida Constitution would be denied if an indigent party did not have a transcript of the administrative proceeding made available at no charge. Without the transcript, an indigent party is deprived of any meaningful form of judicial review. When an indigent party wanted to seek judicial review but could not because of the cost of obtaining a transcript of the administrative hearing, then an unreasonable burden was placed on his or her right of access to the court system. Because the judicial review process provided for under the APA is the first opportunity for the individuals participating in an administrative process to have access to the courts, if they are deprived of a free transcript, they are deprived of all access to the courts. Such is not the case when individuals have access to a trial court as an initial matter, and the sole question is whether they should have access to an appellate review process. In such a case, the individual has had access to a court under the Florida Constitution, but in the case of an administrative hearing, such initial access does not occur until the appellate process. *Id.* at 326 (Ehrlich, J., concurring in part and dissenting in part).

E. *Standing*¹⁴⁵

1. Formal Administrative Hearing

There continues to be a substantial amount of litigation over whether a party has standing to invoke the APA formal hearing process.¹⁴⁶ Perhaps this is explained by the fact that standing constraints permit administrative agencies, and sometimes others, to avoid many difficult substantive issues.¹⁴⁷ Whatever the reason for the continued litigation of these issues, the test for judging when a person is entitled to a formal hearing is well-settled.¹⁴⁸ The two part test set forth in *Agrico Chemical Co. v. Department of Environmental Regulation*¹⁴⁹ for resolving standing issues remains the standard used by courts in determining whether a person has standing to request a formal hearing

145. See generally Dore I, *supra* note 4; Dubbin & Dubbin, *supra* note 4; Burriss III, *supra* note 4, at 601-06; Burriss II, *supra* note 4, at 742; Burriss I, *supra* note 4, at 334-43. In *City of Destin v. Department of Transportation*, the court held, in part, that the question of standing to invoke a formal hearing under the APA can be waived by an administrative agency failing to object on that basis in a timely fashion. 541 So. 2d 123, 127 (Fla. 4th Dist. Ct. App. 1989).

146. Any question concerning standing may be waived if a party failed to properly preserve the issue for judicial review. See *Florida Assoc. of Counties, Inc. v. Department of Admin.*, 580 So. 2d 641, 646 (Fla. 1st Dist. Ct. App. 1991); *Friends of the Hatchineha, Inc. v. Department of Env'tl. Regulation*, 580 So. 2d 267, 270 (Fla. 1st Dist. Ct. App. 1991) (by implication).

147. Cf. *Amalgamated Transit Union, Local 1267 v. Benevolent Assoc. of Coachmen, Inc.*, 576 So. 2d 379 (Fla. 4th Dist. Ct. App. 1991) (*per curiam*). In *Amalgamated*, the court concluded that the Florida Public Employees Relation Commission improperly permitted the Benevolent Association of Coachmen, Inc. to initiate a complaint against Broward County's Division of Mass Transit concerning the collection of a special assessment from employees' wages. The court reached this decision, because the Association of Coachmen failed to allege, establish, or approve that it was being harmed, or that its members were being harmed by the alleged unlawful special assessments. The court noted that while the record in this case properly established the special assessment was in fact illegal, because the action was brought by a party who lacked standing, the decision of the Florida Public Employees Relation Commission must be reversed. *Id.* at 380.

148. A party is entitled to a formal hearing under the APA if "the substantial interests of a party are determined by an agency . . . whenever the proceeding involves a disputed issue of material fact." FLA. STAT. § 120.57 (1989). The formal hearing requirement does not govern student disciplinary action in the state universities. FLA. STAT. § 120.57(5) (1989).

149. 406 So. 2d 478 (Fla. 2d Dist. Ct. App. 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982).

under section 120.57. This test requires that a party,

must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.¹⁵⁰

After a person has established that he or she standing, then he or she must also allege and prove that there is a disputed issue of material fact to resolve before an administrative agency is required to hold a formal hearing.¹⁵¹ Two cases which applied this test in determining standing issues during the survey period are worthy of special note.

*Town of Palm Beach v. Department of Natural Resources*¹⁵² concerned the decision by the Department of Natural Resources that no permit was needed for the 2000 Condominium to carry out its plan for trimming and maintenance activities of salt water resistant dune vegetation on property located seaward of the coastal construction control line.¹⁵³ The two adjacent property owners¹⁵⁴ and the Sierra Club¹⁵⁵ challenged this decision, and petitioned for a hearing under section 120.57 to resolve the dispute. The Department of Natural Resources denied the petition, holding that these parties "lacked standing to request a formal hearing because they had failed to show a substantial interest in the outcome of the hearing . . . [as they] had failed to show how they were affected by the Department [of Natural Resources'] determination of its jurisdiction."¹⁵⁶

150. *Id.* at 482.

151. FLA. STAT. § 120.57 (1989). If there is no disputed material factual issue, then the person is entitled only to an informal hearing. FLA. STAT. § 120.57(2) (1989).

152. 577 So. 2d 1383 (Fla. 4th Dist. Ct. App. 1991).

153. *Id.* at 1384-85. Finding a lack of jurisdiction was premised on the determination that the planned activities did not "involve excavation or removal and destruction of native salt resistant vegetation." *Id.* at 1385. The court rejected this reading of the scope of the jurisdiction of the Department of Natural Resources. *Id.* at 1385-86.

154. The Town of Palm Beach and Mr. Darwin both alleged that they owned property which would be adversely effected by the trimming and maintenance activities of salt water resistant dune vegetation by 2000 Condominium. *Id.* at 1385.

155. The Sierra Club alleged that its members used the beaches adjacent to the property, were interested in preserving beaches, and that the trimming and maintenance activities of salt water resistant dune vegetation would adversely effect these interests. *Id.*

156. *Town of Palm Beach*, 577 So. 2d at 1385.

The court held that the Department of Natural Resources erred in concluding that these parties lacked standing to invoke the section 120.57 hearing. The court applied the *Agrico Chemical Co.* two part test. The court found that the first element, whether the necessary degree of injury in fact was alleged, was satisfied because the denial of jurisdiction would allow the planned trimming and maintenance activities to immediately go forward without any further governmental review or permits at either the state or local level,¹⁵⁷ which allegedly would result in an adverse impact on the adjacent property and the beach areas themselves.¹⁵⁸ The court found that the second element, whether the nature of the alleged injury was within the zone of interest protected by the statute, was satisfied, because the statutes and administrative rules were designed to protect the beaches and dunes from harm, which was exactly what the parties alleged was about to happen.¹⁵⁹ The court noted that given the scope of the jurisdiction granted the Department of Natural Resources by the legislature, the determination of whether the Department of Natural Resources properly found it did not have jurisdiction in this case was dependent on disputed factual issues which a section 120.57 hearing could resolve.¹⁶⁰

While the test in *Agrico Chemical Co.* generally governs standing issues in some circumstances, the statutorily designated status of a person or entity will confer standing even if the requirements of *Agrico Chemical Co.* could not be satisfied. In *Phibro Resources Corp. v. Department of Environmental Regulation*,¹⁶¹ the court reversed the order

157. *Id.* at 1387-88.

158. *Id.*

159. *Id.* at 1388. The court distinguished *Town of Palm Beach* from *Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n*, 418 So. 2d 1046 (Fla. 1st Dist. Ct. App. 1982), *rev. denied*, 430 So. 2d 451 (Fla. 1983), where the court held that a party lacked standing to challenge an administrative agency's determination that it lacked jurisdiction, when the injury alleged would arise from completion of the project, not the administrative agency's decision. The court read the decision in *Grove Isle, Ltd.* as limited to circumstances where the actual activity which was alleged would cause injury, would be subject to further state or local review or permit requirements. Only in such cases did the denial of jurisdiction have such an attenuated relationship to the alleged injury so that the party would lack standing. However, such was not the case in *Town of Palm Beach*, because the court found that the denial of jurisdiction would allow the planned trimming and maintenance activities to immediately go forward without any further governmental review or permits on either the state or local level. 577 So. 2d at 1387-88.

160. *Id.* at 1386.

161. 579 So. 2d 118 (Fla. 1st Dist. Ct. App. 1991) (modified on denial of motion

of the Department of Environmental Regulation denying Phibro Resources and Solomon, Inc.¹⁶² a formal administrative hearing concerning consent orders which the Department of Environmental Regulation intended to enter into with Mobil and Conserv.

Three different corporations, Mobil, Phibro Resources, and Conserv, operated a facility at different periods over several years. In 1985, the Department of Environmental Regulation notified them "that pollutants exceeding levels permissible in class II groundwaters had been detected" at the facility.¹⁶³ In 1989, the Department notified Phibro Resources that it "intended to enter into consent orders with Conserv and Mobil" concerning liability for the remedial measures needed at the facility.¹⁶⁴ Phibro Resources requested a formal hearing on the adequacy of these consent orders. The Department held that Phibro Resources lacked standing, because it "had failed to show a substantial interest sufficient to warrant the initiation of a section 120.57 proceeding in that it had neither demonstrated injury in fact of sufficient immediacy to warrant a hearing, nor . . . shown that its affected interest was of the type or nature . . . [the statute] was designed to protect."¹⁶⁵

The Department claimed that any injury allegation was speculative for two reasons. First, Phibro Resources would suffer no injury unless three contingencies occurred: 1) the consent orders, at some unknown time in the future, would fail to resolve the pollution problems; 2) the Department would seek to hold Phibro Resources liable at that point; and 3) the Department would succeed in doing so. Second, any defenses or objections that Phibro Resources could raise to the consent orders could be asserted at a hearing held after the first two contingencies had occurred.¹⁶⁶ The court observed that the Department's position would be correct but for the fact that it did not properly understand the nature of the proceeding at the time of its decision. Phibro Re-

for rehearing en banc). On rehearing, the court refused to withdraw its opinion, even though the parties had reached a settlement of all the issues and requested a voluntary dismissal while the rehearing petition was pending. *Id.* at 125.

162. Solomon, Inc. was the corporate parent of Phibro. The court held that the request by Solomon, Inc. for a hearing was not untimely filed, and even if it was, that there was no prejudice to any party in permitting it to file a petition for a hearing twenty-one days late. *Id.* at 124; *see infra* notes 313-328 and accompanying text.

163. *Phibro*, 579 So. 2d at 119.

164. *Id.*

165. *Id.* at 120.

166. *Id.* *But see id.* at 125, 126-27 (Barfield, J., dissenting) (finding that this offered more than adequate protection of Phibro's interests).

sources was not seeking access to the administrative process. It was already a party, because it,

was made a party to the proceeding by statute, in that it was served with a written notice of a warning which specified the provision of the statute and rule alleged to have been violated and the facts alleged to constitute a violation. [Both the statute and administrative rules] provide that a person served with a notice of violation . . . shall be entitled to a section 120.57 administrative hearing within twenty days following service of notice; otherwise the person's right to an administrative hearing shall be deemed waived.¹⁶⁷

Having been designated a party, Phibro Resources did not need to demonstrate that its interests would be "determined in the proceeding (the execution of the two consent orders), so long as the interests of a specific party or parties were there determined."¹⁶⁸ Clearly the consent orders would determine the interests of Mobil and Conserv, and there was no reason for holding that Phibro Resources, a party, lacked standing.¹⁶⁹ Further, because the consent orders assumed there was the possibility of future liability for Phibro Resources, the orders "had the potential of affecting the substantial interests of Phibro [Resources]."¹⁷⁰ The Department of Environmental Regulation thus erred in concluding to the contrary.¹⁷¹

167. *Phibro*, 579 So. 2d at 122. The court specifically rejected the claim by the Department that the notice of violation had no impact on Phibro Resources Corporation's substantial interests. The notice served as a warning and triggered the time frame for requesting an administrative hearing.

168. *Id.*

169. *Id.*

170. *Id.* at 123. The court noted that the claimed interests were not just potential economic injury. It included potential administrative and criminal liability for any wrongs it may have committed. As such, it had a real interest in assuring that the consent orders provided an adequate means for "stem[ming] further migration of contaminated groundwater" from the facility. *Id.*

171. The court suggested, in a portion of the opinion deleted on rehearing, that if the Department of Environmental Regulation wanted to proceed with its consent orders without implicating the interests of Phibro, then it should dismiss the notice of violation against Phibro with prejudice, or provide it with an "unconditional release from any future liability." *Phibro*, 579 So. 2d at 124; *see id.* at 125.

2. Standing in Other Contexts

a. Certificate of Need

The decision in *AMISUB v. Department of Health and Rehabilitative Services*¹⁷² concerned whether a hospital located in another district could challenge the certificate of need decision by the Department of Health and Rehabilitative Services for an adjoining district.¹⁷³ The statute provided: "Existing health care facilities may initiate [proceedings challenging the issuance of a certificate of need] upon a showing that an established program will be substantially effected by the issuance of a certificate of need to a competing facility program within the same district."¹⁷⁴ The Department of Health and Rehabilitative Services rejected AMISUB's challenge to the certificate of need issuance in the adjoining district, because AMISUB's health care facility, Northridge Medical Center, was physically located in another district. AMISUB admitted its facility was located in another district, but claimed that it operated a program in both districts because its facility was located near the line dividing the two districts. Because of its location, the Center in fact functionally served patients from both districts, and therefore should have been considered an established program in both districts.

The court rejected this claim for the following reasons. First, the purpose of this statute was to limit the number of health care providers who could challenge certificate of need decisions. The court believed the reading of the statute suggested by AMISUB would be contrary to this statutory purpose, as it would expand, not limit, the circumstances under which a health care facility would have standing to challenge a certificate of need decision.

Second and more importantly, the court noted that an administrative agency's interpretation of a statute which it was primarily responsible for administering was entitled to great weight. It should not be overturned by a court unless the interpretation is "clearly errone-

172. 577 So. 2d 648 (Fla. 1st Dist Ct. App. 1991) (per curiam).

173. The court also rejected the request by the Department of Health and Rehabilitative Services for an award of attorney's fees for pursuing a frivolous appeal of the administrative order. The court found that the appeal was not frivolous, because it was not so devoid of merit on the face of the record that there was little or no prospect of success. *Id.* at 650.

174. FLA. STAT. § 381.709(5)(b) (1989).

ous."¹⁷⁵ Both the hearing officer and the Department of Health and Rehabilitative Services had interpreted the statute as not authorizing a challenge to a certificate of need just because a facility in an adjacent district may have its patient pool diminished. The court considered this "a permissible interpretation of the statutory language."¹⁷⁶ As such, the interpretation adopted by the Department of Health and Rehabilitative Services was not clearly erroneous; rather, it was reasonable.

Third, the court found that the definition of "program" used in the statute should be that ordinarily and commonly used, because neither the legislature nor the Department of Health and Rehabilitative Services had given it a special definition. Under the ordinary definition of "program," AMISUB's Northridge Medical Center would not qualify because it was not physically performing procedures anywhere within the adjacent district.¹⁷⁷ Therefore, Northridge Medical Center did not have standing to contest the certificate of need decision by the Department of Health and Rehabilitative Services.

St. Joseph Hospital v. Department of Health and Rehabilitative Services,¹⁷⁸ concerned the issues of whether the Department of Health and Rehabilitative Services properly denied St. Joseph Hospital's request for an administrative hearing on a certificate of need application, and whether the order granting such a certificate of need for Fawcett Memorial Hospital for the same district, after St. Joseph Hospital was denied its opportunity to participate in the proceeding, was appropriate. The court agreed with the Department of Health and Rehabilitative Services that St. Joseph had failed to timely apply for a certificate of need, and thus, had waived its right to be a part of the decision process concerning Fawcett Memorial Hospital. St. Joseph Hospital attempted to intervene very late in the process concerning Fawcett Memorial Hospital's application.¹⁷⁹ The court found that St. Joseph Hospital also

175. *AMISUB*, 577 So. 2d at 649.

176. *Id.* at 649-50; see *infra* notes 576-83 and accompanying text.

177. *Id.* at 650.

178. 559 So. 2d 595 (Fla. 1st Dist. Ct. App. 1989).

179. *Id.* at 596. St. Joseph Hospital did not petition to intervene until after the certificate of need controversy concerning the 1987 batching cycle had reached a settlement among those parties which had originally participated in the process. *Id.* at 596-97. Having been denied permission to intervene, St. Joseph Hospital then filed a request for a comparative review of its application for certificate of need with that of the Fawcett Memorial Hospital certificate of need application. The Department of Health and Rehabilitative Services denied this request as untimely, because it was not an application which occurred during the same batching cycle. *Id.* at 597; FLA. STAT. §

lacked standing to intervene in the Fawcett Memorial Hospital certificate of need decision process, because it did not have a current program which would compete with the one to be granted to Fawcett Memorial Hospital.¹⁸⁰ Further, the court noted that even if St. Joseph Hospital was entitled to intervene because its substantial interests were effected by the certificate of need decision process, it waived such an opportunity by not attempting to intervene until well after the parties came to an agreement and the case was being remanded to the Department of Health and Rehabilitative Services for implementation of the settlement terms concerning the issuance of certificates of need for the 1987 batching cycle.¹⁸¹

b. Declaratory Statements

In *Florida Optometric Ass'n v. Department of Professional Regulation*,¹⁸² the court considered whether optometrists had standing to intervene in a declaratory statement proceeding conducted before the Board of Opticianry. The petition for a declaratory statement concerned whether an optician was permitted to use a Titmus Vision Tester to check a consumer's visual acuity with and without corrective

381.709(5)(b) (1987).

The court found that this decision was correct, and that the letter of intent to participate in the certificate of need batching cycle sent by St. Joseph Hospital was insufficient to constitute an application for that batching cycle. *St. Joseph*, 559 So. 2d at 597. The court noted that while the Department of Health and Rehabilitative Services did fail to properly publish the fixed need pool for the 1987 batching cycle, it did make available to all applicants the information concerning the fixed need pool cycle for purposes of determining whether it was appropriate to apply for a certificate of need and the likelihood of success in the comparative review process. Given this information, any applicant could have determined whether it was appropriate for it to apply for the 1987 batching cycle. *Id.* at 597-98. The failure of St. Joseph Hospital to apply during this batching cycle could not be excused because of the failure of the Department of Health and Rehabilitative Services to make these determinations for it. *Id.* at 598.

180. *Id.* St. Joseph Hospital engaged in the treatment of general cardiac problems. This did not create a sufficient competing program which would be substantially affected by the issuance of a certificate of need to Fawcett Memorial Hospital for a cardiac catheterization program. *Id.* In so concluding the court clearly was indicating that the first element in the *Agrico Chemical* test was not satisfied. *See supra* notes 146-60 and accompanying text.

181. *St. Joseph*, 559 So. 2d at 598.

182. 567 So. 2d 928 (Fla. 1st Dist. Ct. App. 1990).

lenses.¹⁸³ Optometrists petitioned to intervene in this declaratory statement proceeding, and also sought a formal hearing under APA section 120.57(1). The Board denied the request to intervene, holding that the optometrists did not have standing, because there was no allegation that their substantial interests were going to be affected by any resolution of the declaratory statement request.¹⁸⁴

The court reversed the Board's decision, holding that in order to have standing to intervene in the declaratory statement proceeding, a person must satisfy the *Agrico Chemical Co.* two-part test.¹⁸⁵ The court found that the optometrists had standing to intervene in the declaratory statement proceeding and to request a formal hearing under section 120.57. The court relied on *Florida Medical Ass'n v. Department of Professional Regulation*¹⁸⁶ because it presented an almost identical battle between professions concerning the scope of their exclusive practice areas, except that in this case it was set in a declaratory statement context. The court agreed with the optometrists that but for the declaratory statement, patients would be required to seek their counsel in order to have the Titmus Vision Tester administered. Thus, the first element of standing was satisfied by demonstrating a sufficient degree of injury in fact. The second element of standing, the zone of interest requirement, was also satisfied by the allegation that the legislature intended for only licensed optometrists to administer such a test, because it was instrumental in the process of prescribing or treating diseases or ailments of the human eye, which opticians were prohibited

183. *Id.* at 931.

184. *Id.* at 932.

185. The elements of the test are that the person has "suffer[ed] injury in fact which is of sufficient immediacy to entitle him to a [section] 120.57 hearing, and . . . that . . . [the] injury is of a type or nature which the proceeding is designed to protect." *Id.* (quoting *Agrico Chemical Co. v. Department of Env'tl. Regulation*, 406 So. 2d 478, 482 (Fla. 2d Dist. Ct. App. 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982)); see *supra* text accompanying notes 146-60.

186. 426 So. 2d 1112 (Fla. 1st Dist. Ct. App. 1983). In *Florida Medical Ass'n*, the first element of the standing test, necessary degree of injury in fact, was satisfied when it was alleged that the proposed rule would potentially deprive a professional category of patients who now would have the option of seeking treatment through another profession. The court also found that the second element of the standing test, the zone of interest requirement, was satisfied because an allegation was made that the legislature had determined that the authority to prescribe drugs was exclusively within the scope of a licensed physician's authority and that it should not be carried out by any other, including optometrists. *Id.*

from carrying out.¹⁸⁷

3. Intervention in the Administrative Decision Process by Third Parties

*Manasota-88, Inc. v. Agrico Chemical Co.*¹⁸⁸ concerned the issue of when a third party could intervene in a case where a default permit was issued by the Department of Environmental Regulation for the mining of phosphates within state wetland areas.¹⁸⁹ Agrico Chemical filed a permit application with the Department of Environmental Regulation requesting permission to mine phosphates within state wetland areas. The relevant statutes provided that such an application must be ruled upon by the Department within ninety days after the application was submitted.¹⁹⁰ If the Department failed to do so, then it must issue a default permit. However, the Department of Environmental Regulation may later impose conditions to assure that the project was properly managed for purposes of mitigating any adverse impact on state wetlands.

Manasota-88, Inc., a third party, attempted to intervene in the administrative process associated with issuance of the default permit. The court held that the Department properly determined that Manasota-88, Inc. could intervene in the permit process even though the permit was

187. *Florida Optometric Ass'n*, 567 So. 2d at 932-33. The court distinguished this case from *Florida Society of Ophthalmology v. Board of Optometry*, 532 So. 2d 1279 (Fla. 1st Dist. Ct. App. 1988), based upon the fact that in that case there was no allegation that an exclusive area of practice at stake. Thus, the zone of interest aspect of the *Agrico Chemical* standing test was not satisfied. *Florida Optometric Ass'n*, 567 So. 2d at 933.

188. 576 So. 2d 781 (Fla. 2d Dist. Ct. App. 1991).

189. The court also addressed several other issues. First, the court noted that the decision of the Department of Environmental Regulation was supported by substantial competent evidence; and there was no factual error committed by the Department of Environmental Regulation in this case. Second, the court noted that Manasota-88, Inc. was not denied any procedural rights when the hearing officer denied its motion for a continuance in order to study the modified mitigation plan submitted by Agrico Chemical Company. The hearing officer granted Manasota-88, Inc. an additional three weeks to study the plan as modified and to submit any additional evidence concerning the feasibility of the modified plan. Manasota-88, Inc. failed to offer any such evidence. *Id.* at 782-83. Third, because Manasota-88, Inc. did not request a stay, the project had gone forward during the appellate process, and even if an issue was presented in terms of denial of procedural rights, it was moot as soon as the wetlands in question in fact no longer existed. *Id.* at 783.

190. FLA. STAT. § 120.60(2) (1989).

issued by default. The court concluded that it was impossible for a third party intervenor to act before the Department gave notice of its intent concerning a permit application. This point was the first opportunity any third party intervenor had to respond to the Department's decision to issue a default permit. As such, it was the only appropriate point in time to file for intervention. It was, in fact, the only point where a third party had an opportunity to intervene in the process.¹⁹¹ Further, once an intervenor had properly filed a response to the notice of intent to issue a default permit, a hearing must have been held to resolve any disputed factual issues concerning what mitigative steps should be taken.¹⁹²

We do not agree with Agrico [Chemical Company's] position that a default permit issues automatically without further [administrative] agency inquiry. Nothing in the statute prevents [the Department of Environmental Regulation] from holding a hearing to determine reasonable mitigative conditions necessary to protect the interest of the public and the environment, prior to which we need the default permit. The party who finds conditions placed on default permit owners are unreasonable, may resort to the appellate process for relief.¹⁹³

Thus, it is the process of determining the mitigative conditions in which the third party intervenor may participate either informally or in the context of a formal hearing.¹⁹⁴

F. *Exhaustion of Administrative Remedies*

"As a general proposition, where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the court will act."¹⁹⁵ Generally, this is not a jurisdictional re-

191. An administrative agency must provide an affected person, "within a specified time after some recognizable event in investigatory or other free-form proceeding, [to request] formal or informal proceedings under section 120.57." *Capeletti Bros. v. Department of Transp.*, 362 So. 2d 346 (Fla. 1st Dist. Ct. App.), *cert. denied*, 368 So. 2d 1374 (Fla. 1978); *see* FLORIDA ADMINISTRATIVE PRACTICE § 2.30 (The Florida Bar 3d ed. 1990).

192. *Manasota-88, Inc.*, 576 So. 2d at 783.

193. *Id.*

194. Clearly, the default decision had already been made. The third party may not intervene in that decision process. *Id.* at 784.

195. *Halifax Area Council v. City of Daytona Beach*, 385 So. 2d 184, 186 (Fla.

quirement,¹⁹⁶ but rather, a prudential one,¹⁹⁷

designed to assure: (1) that courts do not stray from their limited role of judicial review in the administrative process; (2) that agencies have an opportunity to perform the duties delegated to them by the legislature; and (3) that agencies have the initial opportunity to correct any errors that occurred during the administrative process.¹⁹⁸

During the survey period, the courts decided several cases applying these considerations.

A classic application of the doctrine of exhaustion of administrative remedies is *Department of Revenue v. Brock*.¹⁹⁹ *Brock* concerned a

5th Dist. Ct. App. 1980). If the legislature clearly has left the selection of the judicial process to the parties, then there is no requirement of exhaustion of administrative remedies. See *Friends of the Hatchineha, Inc. v. Department of Env'tl. Regulation*, 580 So. 2d 267, 273 (Fla. 1st Dist. Ct. App. 1991) (noting that when the legislature provided for two independent means of seeking a remedy for erroneous administrative agency action, suit in the appropriate circuit court or administrative hearing, there was no requirement that a party chose one or the other means). *cf.* *Van Poyck v. Dugger*, 582 So. 2d 108 (Fla. 1st Dist. Ct. App. 1991) (determining that when a prisoner exhausted all of his administrative appeals, then the trial court must hold a hearing on his habeas corpus petition in which he alleged prison officials acted arbitrarily in placing him in a high security cell under 24 hour lockdown status).

196. See *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

197. See *Howlett v. Rose*, 571 So. 2d 29 (Fla. 2d Dist. Ct. App. 1990) (noting that exhaustion of state administrative remedies was not a jurisdictional prerequisite to an action under 42 U.S.C. § 1983). *But see* *Park v. Dugger*, 548 So. 2d 1167, 1168 (Fla. 1st Dist. Ct. App. 1989) (holding that exhaustion of administrative remedies was a jurisdictional prerequisite to a circuit court having jurisdiction to issue a writ of mandamus); *Leonard v. Morgan*, 548 So. 2d 803, 804 (Fla. 1st Dist. Ct. App. 1989) (noting that exhaustion of administrative remedies may be required where the legislature has given an administrative agency exclusive jurisdiction to rule on the matter initially).

198. *Burris I*, *supra* note 4, at 344. Because the exhaustion of administrative remedies requirement is prudential, courts may waive it in appropriate cases. One exception to this requirement occurs when the case involves constitutional issues which an agency cannot address in its administrative proceeding. *Mann v. City of Oakland Park*, 581 So. 2d 986, 987 (Fla. 4th Dist. Ct. App. 1991) (*per curiam*) (noting that when a party alleged that an administrative system was unconstitutional on its face, exhaustion of administrative remedies should not be required before a court may appropriately exercise jurisdiction); see also *Public Serv. Comm'n v. Fuller*, 551 So. 2d 1210, 1212-13 (Fla. 1989); FLORIDA ADMINISTRATIVE PRACTICE § 7.3 (The Florida Bar 3d ed. 1990).

199. 576 So. 2d 848 (Fla. 1st Dist. Ct. App. 1991) (*per curiam*).

suit brought by the Florida Hotel and Motel Association and three hotel operators in circuit court to enjoin the Department of Revenue from "collecting gross receipts tax on all local and long distance telephone services separately billed to their tenants."²⁰⁰ The Department of Revenue interpreted the statute which provided that "charges made by a hotel and motel . . . or local telephone service or toll telephone service, when such charges occur incidentally to the right of occupancy of such hotel or motel"²⁰¹ shall be exempt from the gross receipt statute, as not applying to any such charges which are separately billed, because they are not incidental to the right of occupancy.²⁰² After the circuit court suit was filed, the plaintiffs in this case also filed a challenge to the proposed rule which was to codify this interpretation.²⁰³ The rule challenge was ultimately unsuccessful and was dismissed.²⁰⁴ Even though the plaintiffs had pursued the administrative remedy of the rule challenge, the circuit court, after the rule challenge had been administratively dismissed, permanently enjoined the Department of Revenue from collecting the gross receipts tax on "telecommunication service from operators of transient rental facilities."²⁰⁵ After this decision, the plaintiffs dismissed their appeal from the administrative order which dismissed their rule challenge.²⁰⁶

This was a fatal mistake, as the court held that the circuit court did not have jurisdiction to enjoin the Department of Revenue's policy. The court noted that the purpose of the prudential requirement of exhaustion of administrative remedies was "to assure that an [administrative] agency responsible for implementing a statutory scheme ha[d] a full opportunity to reach a sensitive, mature, and considerate decision upon a complete record appropriate to the issue."²⁰⁷ This goal would be accomplished when 1) the administrative agency was permitted to fully develop a factual record upon which it could then exercise its administrative discretion, and 2) the administrative agency, charged by the legislature with primary responsibility for administering a statutory scheme, had a full and fair opportunity to initially resolve the issues.²⁰⁸

200. *Id.* at 849.

201. FLA. STAT. § 203.012(2)(b)(3) (1989).

202. *Brock*, 577 So. 2d at 849.

203. *Id.*

204. *Id.* at 850.

205. *Id.*

206. *Id.*

207. *Brock*, 577 So. 2d at 850.

208. *Id.*

The court noted that exhaustion of administrative remedies was not an absolute requirement. In some cases, such as when there was no factual dispute and it was alleged the administrative agency exceeded its delegated powers by acting in an ultra vires manner, exhaustion of administrative remedies was not required.

However, this exception did not apply in this case, because whether the administrative agency appropriately exercised its delegated discretion depended upon factual determinations made by the administrative agency. It was appropriate in this circumstance to require exhaustion of administrative remedies “[a]lthough statutory construction [wa]s ultimately the province of the judiciary, it should not be undertaken without first giving the [administrative] agency an opportunity to explain its interpretation and to create a record in an administrative form.”²⁰⁹ In such a case, it was clearly inappropriate for the circuit court to preempt the normal judicial review process associated with the administrative rule challenge process. The plaintiffs should have pursued the judicial remedies associated with the administrative rule challenge rather than continuing to press their suit in the circuit court.²¹⁰

*Marks v. Northwest Florida Water Management District*²¹¹ is also a classic case of how a party who failed to avail himself of the administrative hearing process lost the right to judicial review of an administrative order. Marks sought judicial review of an administrative order which held that he had performed repair work on a dam without the necessary permits. Repairs were needed because the dam was in an unsafe condition which created a risk of catastrophic failure. After receiving notice of the administrative complaint Marks failed to request a hearing under section 120.57(1) of the APA. Having heard nothing from Marks, the Northwest Florida Water Management District entered a final order directing him to either pump out the water behind the dam and cease using the dam for retaining water, or obtain the appropriate permits and repair the dam. Marks claimed that the administrative order was remedial in nature, and that Florida law required a complaint for a remedial order be served upon the owner of the property. Marks also claimed he was not the owner of the property.²¹²

The Northwest Florida Water Management District claimed that

209. *Id.*

210. *Id.*

211. 566 So. 2d 46 (Fla. 1st Dist. Ct. App. 1990).

212. *Id.* at 47; FLA. STAT. § 373.436 (1989).

the administrative order was a corrective one. In the case of corrective orders, the administrative complaint must be served upon the alleged violator.²¹³ The court refused to take judicial notice of the property records concerning the dam which were offered to prove Marks' assertion that he was not the property owner. If Marks wished to assert this factual defense, then he should have invoked the administrative hearing process. Having failed to invoke this process, he waived his rights to challenge the factual conclusions reached by the Northwest Florida Water Management District.²¹⁴ While the court never explicitly characterized the case as concerning exhaustion of administrative remedies, the net effect of its decision was to hold that Marks failed to raise a factual issue with the appropriate administrative agency, and was therefore precluded from raising the same issue in the courts.

If an administrative agency was acting strictly in an advisory capacity, then exhaustion of administrative remedies will not be required, because none of the policy reasons for requiring it are present. In *Ujcic v. City of Apopka*,²¹⁵ the court held that before bringing suit under the Whistle-Blower's Act, a police officer was not required to exhaust his administrative remedies before a review board. This result was acceptable because any decision of the review board would be advisory and non-binding on the city or the police officer, and the proceedings before the circuit court are de novo, with no need for an administrative hearing to develop a record for judicial review.²¹⁶

The courts have made it clear that a person need not exhaust his or her administrative remedies under section 120.56 which provides for rule challenges before raising the validity of a rule in the other administrative proceedings. *United Health, Inc. v. Department of Health and Rehabilitative Services*²¹⁷ involved a challenge by long term health care providers to the validity of the administrative rule authorizing a rate freeze for the services they provide. The Department of Health and Rehabilitative Services denied the long term health care providers both a formal and informal hearing under the APA,²¹⁸ claiming that

213. *Marks*, 566 So. 2d at 47; FLA. STAT. § 373.119 (1989).

214. *Marks*, 566 So. 2d at 47.

215. 581 So. 2d 218 (Fla. 5th Dist. Ct. App. 1991).

216. *Id.* at 220; *accord Hill v. Monroe County*, 581 So. 2d 225, 226-27 (Fla. 3d Dist. Ct. App. 1991). The court also noted that Ujcic should be permitted to amend his complaint to include the allegation that the exhaustion of administrative remedies was not necessary in this case. *Ujcic*, 581 So. 2d at 220; *see also Hill*, 581 So. 2d at 227.

217. 579 So. 2d 342 (Fla. 1st Dist. Ct. App. 1991) (per curiam).

218. FLA. STAT. § 120.57(1), (2) (1989).

the only method available to challenge a rule is through the APA rule challenge provision in section 120.56.²¹⁹

The court held that the Department of Health and Rehabilitative Services erred in not holding a hearing, because the long term health care providers have substantial interests which were "affected by [the administrative] agency action . . . [, and] seek monetary relief which is not available in a section 120.56 proceeding."²²⁰ The court noted that nothing in the APA required the long term health care providers to exhaust the rule challenge process before proceeding with a request for a section 120.57 hearing.²²¹ If a rule challenge was the appropriate forum for resolving some of the issues raised in the petition for a section 120.57 hearing, then it may be filed, and the section 120.57 hearing stayed until it was resolved.²²²

In *Lloyd Citrus Trucking v. Department of Agriculture and Consumer Service*,²²³ the court interpreted Florida Statute section 601.65 which provides:

If any licensed citrus fruit dealer violates any provision of this chapter, such dealer shall be liable to the person allegedly injured thereby for the full amount of damages sustained in consequence of such violation. Such a liability may be enforced either by proceeding in an administrative action to and before the Department of Agriculture and pursuing such actions with ultimate termination if desired, or by filing of a judicial suit at law in a court of competent jurisdiction.²²⁴

The court read this statute as providing that a party had a choice of either pursuing an administrative process or direct access to the courts, but not both. "The statutory wording is clear. The legislature described the kind of remedies only. Once Lloyd Citrus pursued its chosen

219. *United Health, Inc.*, 579 So. 2d at 342-43; FLA. STAT. § 120.56 (1989).

220. *United Health, Inc.*, 579 So. 2d at 343.

221. *Id.*; accord *J.B. Coxwell Contracting, Inc. v. Department of Transp.*, 580 So. 2d 621, 623 (Fla. 1st Dist. Ct. App. 1991) (The court noted that a party may challenge the validity of a rule in an administrative agency enforcement proceeding. There was no requirement in such a case that the party must file a separate rule challenge in order to exhaust administrative remedies.).

222. *United Health, Inc.*, 579 So. 2d at 343. The court also noted that any other approach was impractical given the time frames for filing a petition requesting a section 120.57 hearing. *Id.*

223. 572 So. 2d 977 (Fla. 4th Dist. Ct. App. 1990).

224. FLA. STAT. § 601.65 (1979).

course, suit in circuit court to resolution, the Department was without jurisdiction to hear the matter²²⁵ Lloyd Citrus correctly concluded that the only way it could preserve its opportunity to pursue the administrative hearing process was by dismissing its lawsuit prior to its ultimate resolution.²²⁶ However, where the voluntary dismissal of the lawsuit occurred ten years after it was filed, but before any ultimate resolution of the issues by the circuit court, the administrative remedy was foreclosed, apparently based upon estoppel principles.²²⁷

In *Board of Regents v. Armesto*,²²⁸ a circuit court granted the request of a Florida State University law student for a permanent injunction enjoining Florida State University from falsely charging the student with violations of the Student Code of Conduct. The injunction was granted by the circuit court because of alleged improper conduct by Florida State University in conducting its investigation of the allegations.²²⁹

The district court of appeal noted that primary jurisdiction doctrine requires that "circuit courts . . . abstain from exercising their equitable jurisdiction over administrative proceedings where adequate administrative remedies have not been exhausted. An exception exists where threatened agency action is so egregious or devastating that administrative remedies are either too little or too late."²³⁰ The law student alleged that the nature of irreparable injury which she would suffer was that The Florida Board of Bar Examiners "might refuse to admit her to practice even if she were acquitted [of the allegedly false charges] at the University hearing."²³¹ The court characterized this alleged irreparable injury as mere speculation, and insufficient to "demonstrate that her administrative remedies were inadequate" where she had the right to request that the charges be dismissed and to defend herself in a fair university hearing concerning the matter.²³² "The possible [collateral] consequence[s] . . . [are] not a basis to bypass the administrative process."²³³

225. *Lloyd Citrus Trucking*, 572 So. 2d at 978.

226. *Id.*

227. *Id.* at 979.

228. 563 So. 2d 1080 (Fla. 1st Dist. Ct. App. 1990).

229. *Id.* at 1080-81.

230. *Id.* at 1081.

231. *Id.*

232. *Id.* The court found that the allegation of the likelihood of false charges being filed was not supported by sufficient evidence. *Id.*

233. *Armesto*, 563 So. 2d at 1081.

The court also rejected the due process challenge to the administrative process provided by Florida State University, because the allegation was not a facial attack on the structure of the administrative hearing process, but one concerning how it was going to be applied to her particular circumstances. It is well established in Florida that such an allegation is insufficient to warrant bypassing the administrative process. In such a case, the exhaustion of administrative remedies is appropriate so that the administrative agency has the first opportunity to resolve the disputed issue.²³⁴

G. *Res Judicata and Collateral Estoppel*

Res judicata principles are designed to conserve the resources of administrative agencies, courts, and the parties by precluding needless relitigation of issues.²³⁵ In *Nelson & Co. v. Holtzclaw*,²³⁶ the court noted that administrative orders issued by judges of compensation claims "are subject to the same principles of res judicata as applied to judgments of courts."²³⁷ In discussing prior precedent in the area, the court noted two items of interest. First, res judicata principles were designed to prevent relitigation of issues over which there was likely to be little change over time. Second, res judicata principles did not preclude relitigation of issues where there was a likelihood of change over time.

In *Massie v. University of Florida*,²³⁸ the court noted that the interests of justice on a few occasion might require a court to abandon the traditional rules of res judicata and collateral estoppel. An appellate court has inherent power to correct its own prior erroneous decisions in order to prevent injustice, even when this involves review of an administrative hearing decision which has become final after appropriate appellate review. This discretion must be exercised only in the most unusual circumstances, and is not as a matter of right, merely a matter of grace.²³⁹ When a court finds that such circumstances exist, its "duty in reviewing worker's compensation cases to administer justice under the law outweighs its duty to follow an earlier decision of the court in

234. *Id.* at 1081-82.

235. *Nelson & Co. v. Holtzclaw*, 566 So. 2d 307, 308-09 (Fla. 1st Dist. Ct. App. 1990).

236. 566 So. 2d 307.

237. *Id.* at 308.

238. 570 So. 2d 963 (Fla. 1st Dist. Ct. App. 1990).

239. *Id.* at 974-75.

the same case when, due to an error in reviewing the evidence, doing so resulted in . . . injustice to a party."²⁴⁰ The court concluded, after reviewing the record, that the deputy commission was presented with "a legally sufficient petition for modification . . . based on a complete absence of evidence to support [an essential] finding of fact [and] []which absence of evidence [was] now conceded by the deputy commissioner"²⁴¹

Thus, the court in *Massie* recognized that in extraordinary circumstances, it is possible to overturn a prior appellate ruling affirming an administrative agency's decision. It is limited to the very unusual circumstances of when the earlier decision was based upon erroneous factual premises, and the trier of fact confessed that there were no facts in the record to support his conclusion which was critical to the decision he ultimately reached in the case.²⁴²

III. GOVERNMENT IN THE SUNSHINE

The Public Records²⁴³ and Sunshine²⁴⁴ statutes are designed to assure that the public has access to the decision making processes and records of governmental institutions.²⁴⁵ As a result of these statutes, the operation of Florida governmental institutions is open to public scrutiny. In response, the courts have rigorously enforced the requirements of these statutes.

During the survey period, one interesting case, *News-Press Publishing Co. v. Lee County*,²⁴⁶ was decided concerning the Sunshine

240. *Id.* at 975.

241. *Id.* at 977; *see id.* at 977-78 (Ervin, J., concurring).

242. *Cf.* Full Circle Service, Inc. v. Department of Agric., 556 So. 2d 757, 758 (Fla. 2d Dist. Ct. App. 1990) (noting that when a case was remanded after judicial review to the administrative agency, it did not permit parties to re-litigate issues which were properly decided by the court initially).

243. FLA. STAT. §§ 119.01-.14 (1989); *see also* FLA. STAT. § 120.53(3) & n.1 (1991) (text of subsections (2) and (4) as of March 1, 1992); FLA. STAT. §§ 120.532-.533 (1991).

244. FLA. STAT. § 286.011 (1989).

245. *See also* FLA. STAT. §§ 120.53, .55 (1989) (APA provisions requiring public access to orders and rules, public notice of administrative agency meetings, and the subject matter to be discussed).

246. 570 So. 2d 1325 (Fla. 2d Dist. Ct. App. 1990).

One very significant case was decided too late for discussion in this survey article. *Locke v. Hawkes*, 16 Fla. L. Weekly S716 (1991). The decision in *Locke* may significantly limit the power of the legislature to impose the requirements of the Sunshine

Statute. The Sunshine Statute provides that official action taken by state and local agencies must occur only at "public meetings open to the public at all times" unless the Florida Constitution provides otherwise.²⁴⁷ In *News-Press Publishing Co.*,²⁴⁸ the issue was whether the mediation process entered pursuant to a circuit court order could be lawfully closed to the public. The statute authorizing court sanctioned mediations specifically provided that any party or person participating in the proceeding may, as a matter of right, prevent the disclosure of any communication made during the proceeding.²⁴⁹ On this basis, *News-Press Publishing Co.* involved court sanctioned mediation between two governmental entities concerning where a bridge should be located. Because of the nature of these entities, negotiations would otherwise have been covered by the Sunshine Statute and open to the public. However, the court ordered mediation statute presented a situation where the mediation would be closed to the public. The court avoided resolving the broader issue about this conflict between the Sunshine Statute and the court mandated mediation statute by specifically noting that court sanctioned could not result in any final settlement if the parties choose not to send anyone to the mediation conference with the authority to make such a decision. The court held that given "the narrow scope of the mediation proceedings in this case . . . [it did not result in] a substantial delegation effecting the decision-making function of any board, commissioner, agency, or authority sufficient to require that this mediation proceeding be opened to the public."²⁵⁰ The decision in *News-Press Publishing Co.* clearly indicates that the Sunshine Law would require, when governmental parties do send authorized representatives capable of making binding decisions upon governmental entities to the mediation process, that the mediation be open to the public.²⁵¹

Statute on other constitutionally created institutions. This decision is not final because the court has granted a motion for reconsideration.

247. FLA. STAT. § 286.011 (1989). The purpose of the law is to insure that shaping of public policy by governmental institutions occurs in the public realm. Courts have generally interpreted the statute very broadly in order to allow full achievement of its purpose.

248. 570 So. 2d 1325.

249. See FLA. STAT. § 44.302(2) (1989).

250. *News-Press Publishing Co.*, 570 So. 2d at 1327.

251. The decision in *Locke*, 16 Fla. L. Weekly S716, indicates that possibly the legislature could not require the courts to open the mediation conference to the public. If the mediation process is open to the public, then it may result may limit the effec-

IV. THE ADMINISTRATIVE PROCEDURE ACT

In order for an administrative agency to escape the requirements of the APA, the agency must be excluded from coverage pursuant to the terms of the APA,²⁵² or expressly excluded from APA coverage by a subsequent statute.²⁵³ Courts are reluctant to find that such an express, subsequent statutory exemption was created, and will not imply one in order to further efficiency or conservation of the limited resources available to an administrative agency. To do so would undermine the legislative commitment to general administrative process and structure for all administrative agencies, imposed through the APA.²⁵⁴

As the court noted in *Friends of the Hatchineha, Inc. v. Department of Environmental Regulation*,²⁵⁵ one of the primary goals of the APA was "to expose policy errors in an [administrative] agency's free-form routine, and to subject agency heads 'to the sobering realization [that] their policies [may] lack convincing wisdom.'"²⁵⁶ To this end, the legislature used a strong process oriented approach²⁵⁷ in the APA to govern the exercise of administrative agency power, by guaranteeing that the public and/or effected persons would: 1) receive notice of administrative agency proposed actions; 2) have an opportunity to present contrary points of view and evidence; 3) receive an adequate statement of the facts and policy reasons supporting the administrative agency's final action; 4) have an adequate opportunity for judicial review of administrative agency actions; and 5) receive notice of and access to past administrative agency policy decisions.²⁵⁸ Further, if an administrative

tiveness of court mandated mediation where governmental entities are involved. See generally ROGER FISHER & WILLIAM URY, GETTING TO YES (1981).

252. See, e.g., FLA. STAT. § 120.50 (1989) (exclusion of courts and legislature); FLA. STAT. § 120.52(1)(c) (1989) (exclusion of judges of compensation claims). The decision in *Locke*, 16 Fla. L. Weekly S716, re-opens the question of whether the legislature may impose the requirements of the APA on constitutionally created governmental institutions. Compare *Locke*, 16 Fla. L. Weekly S716 with *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 577-78 (Fla. 1st Dist. Ct. App. 1977).

253. FLA. STAT. § 120.72(1)(a)-(b) (1989).

254. See *Friends of the Hatchineha, Inc. v. Department of Env'tl. Regulation*, 580 So. 2d 267, 273 n.6 (Fla. 1st Dist. Ct. App. 1991).

255. *Id.* at 267.

256. *Id.* at 271 (quoting *McDonald v. Department of Banking & Fin.* 346 So. 2d 569, 583 (Fla. 1st Dist. Ct. App. 1977)).

257. See, e.g., *Burris IV*, *supra* note 4, at 667-68; *Levinson*, *supra* note 4, at 750-55, 765; *Maher*, *supra* note 4, at 770-98.

258. *Friends of the Hatchineha, Inc.*, 580 So. 2d at 271.

agency was exempted from the APA, then, unless the legislature created an alternative administrative process, the courts would have to determine what procedure the administrative agency would have to follow to exercising its delegated authority. This judicial decision process would involve the constant resolution of constitutional issues concerning procedural due process and separation of powers.

A. *Rules Versus Orders*

While it is relatively clear that the legislature preferred that administrative agencies develop public policy through the rule making process,²⁵⁹ the courts permitted administrative agencies to develop many controversial and important public policy positions via the adjudicatory process.²⁶⁰ The net result has been that administrative agencies can create legally binding policy of general applicability by either using their rule making authority or by properly developing policy positions in adjudicatory proceedings.²⁶¹ The former process' results are

259. There are primarily two processes which administrative agencies can use in developing legally binding public policy—rule making and adjudication. In theory, administrative agencies should use the rule making process to establish legally binding public policy of general applicability. The adjudication process to determine the substantial interests of parties under the relevant statutes and administrative rules and only incidentally to develop legally binding public policy The distinction between these two means for exercising administrative agency authority to develop public policy was diminished in the APA by providing in some cases for additional procedural protection during the rule making process. In cases where these procedural protections are invoked during the rule making process it would closely resemble adjudication. Despite the procedural convergence of rule making and adjudication there still was a general consensus that administrative agencies, at least in theory, should prefer the rule making process over adjudication as the means for developing public policy, because the rule making process was designed to maximize public participation and fairness through its notice, hearing, and publication requirements.

Burris IV, *supra* note 4, at 665-66; see FLA. STAT. § 120.54 (1989). *But see* Dore II, *supra* note 4, at 708-09 (legislature never made its preference for the rule making process sufficiently clear in the statute). Any dispute about whether there was a legislative preference for rule making as compared to nonrule policy making has been resolved in favor of rule making. FLA. STAT. § 120.535(1) (1991) (required rule making; effective March 1, 1992).

260. See McDonald v. Department of Banking & Fin., 346 So. 2d 569 (Fla. 1st Dist. Ct. App. 1977) (leading case supporting concept of nonrule policy making); Burris IV, *supra* note 4, at 673; Dore II, *supra* note 4, at 710-11.

261. See Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So.

promulgated as administrative rules and found in the Florida Administrative Code. The latter's results are characterized by the courts as incipient rules or nonrule policies,²⁶² because they are developed in the case by case adjudicative process through a series of orders. These results are generally found in the Florida Administrative Law Reporter or administrative agency files.²⁶³

To date, a substantial amount of litigation concerning whether the nonrule policy was properly documented and supported in the adjudicatory record has occurred.²⁶⁴ This continual relitigation of the validity of nonrule policies is a waste of the limited resources of the administrative agencies, the courts and private parties, because many, if not most, of the nonrule policies should have been adopted through the more cost efficient rule making process.²⁶⁵ Several cases during the survey period demonstrated the perils of an administrative agency relying on nonrule policy.

*Rabren v. Department of Professional Regulation*²⁶⁶ concerned an order issued by the Department of Professional Regulation dismissing the administrative charges against Rabren, a licensed pilot. The court affirmed the dismissal of the charges against Rabren and reversed the finding that certain docking facilities in the Tampa Bay area were ports.²⁶⁷ Florida statutes required that vessels which were not exempt or which drew less than seven feet of water "shall have a licensed pilot on board when entering or leaving ports of this state,"²⁶⁸ and that it was improper for a pilot licensed in the State of Florida to delegate his or her responsibilities to any person who he or she knew or should have known was not qualified "by training, experience, or license to perform them."²⁶⁹ This latter statutory provision clearly prohibited a state li-

2d 1177, 1182 (Fla. 1st Dist. Ct. App. 1981); Burris IV, *supra* note 4, at 677-85.

262. See Burris IV, *supra* note 4, at 670 & n.36.

263. See *id.* at 693-96; see also FLA. STAT. §§ 120.53-.533 (1991); Dore III, *supra* note 4, at 450-54.

264. See, e.g., *Ganson v. Florida Dep't of Admin.*, 554 So. 2d 516, 520 (Fla. 1st Dist. Ct. App. 1989). In *Ganson*, the court noted that if administrative agencies chose to rely upon nonrule policy, then when a hearing was held, a "record foundation for the policy decisions in its orders, by expert testimony, documentary opinion or other evidence appropriate in form to the nature of the issues involved" must be offered. *Id.* The court found that the administrative agency had failed to do so in this case. *Id.*

265. Burris IV, *supra* note 4, at 696-97.

266. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990) [hereinafter *Rabren II*].

267. *Id.* at 1284.

268. FLA. STAT. § 310.141 (1987).

269. FLA. STAT. § 310.101(1) (1987).

censed pilot from delegating his or her responsibilities to a pilot who holds only a federal license. Any violation of this section may result in a reprimand, fine, suspension, or revocation of license.²⁷⁰

Based on this statute, the Board of Pilot Commissioners accused Rabren of assigning pilots, who held only a federal license, to shift two vessels from one port to another in the Tampa Bay area when a state licensed pilot was required. Rabren admitted that these events had occurred.²⁷¹ However, he claimed that the shifts involved transfers within the port of Tampa Bay, and, relying upon *Rabren v. Board of Commissioners*,²⁷² that such actions did not require a state pilot. The hearing officer agreed, holding that while the Tampa Bay area may functionally consist of four ports for purposes of the statute, it was actually considered one port. Thus, any shifting of vessels between the ports located within the Tampa Bay area did not require the presence of a state licensed pilot, because such shifting did not involve a vessel leaving and entering the Tampa Bay port area.²⁷³

The Board of Pilot Commissioners reversed the decision of the hearing officer, finding that as a matter of law the hearing officer had erred. The Board concluded that the statute had been misinterpreted by the hearing officer, because the shifting of a vessel between ports in the Tampa Bay area was an act that involved leaving one Florida port and entering another, which required a state licensed pilot.²⁷⁴ In announcing this policy, the Board functionally adopted a nonrule policy interpreting the statute.

The court noted that the Board of Pilot Commissioners had the

270. *Rabren II*, 568 So. 2d at 1285. The Board of Pilot Commissioners was delegated the authority by the Florida legislature to enforce Florida Statutes Chapter 310. FLA. STAT. § 310.185(1) (1987).

271. *Rabren II*, 568 So. 2d at 1286.

272. 497 So. 2d 1245 (Fla. 1st Dist. Ct. App. 1986), *rev. denied*, 508 So. 2d 13 (Fla. 1987) [hereinafter *Rabren I*]. The court held that the Board of Pilot Commissioners had exceeded its delegated authority in promulgating a rule which required a state pilot on board when a vessel was shifted from one docking facility to another while in port, because the Florida House of Representatives had rejected a similar provision as part of Chapter 310. However, in that case, the court noted that the Tampa Bay area included four ports, and that the rule might well have been a proper exercise of delegated authority when a vessel is shifted from a docking facility in one port to another facility in another Tampa Bay area port. *Id.* at 1249; *see Rabren II*, 568 So. 2d at 1285-86.

273. *Rabren II*, 568 So. 2d at 1287.

274. *Id.* The Board of Pilot Commissioners completely accepted the hearing officer's factual conclusions set forth in the recommended order.

authority to promulgate nonrule policy through adjudicatory orders. Whether to adopt certain public policy positions through the rule making or adjudicatory process was within the scope of discretion delegated to the Board of Pilot Commissioners by the legislature. However, when an administrative agency chooses to rely upon nonrule policy adopted in an adjudicatory context, the adjudicatory record must provide adequate support for that policy, both in law and fact. In this case, because the parties chose not to make the factual records available to the court on appeal, there was no such factual basis for the nonrule policy before the court. Further, the court noted that the order failed to "offer an explanation or justification for the policy."²⁷⁵ The Board of Pilot Commissioners' finding that these facilities in the Tampa Bay area were each ports under the statute was a bare assertion unsupported by any factual predicate.²⁷⁶

Similarly, in *Health Care and Retirement Corp. of America v. Department of Health and Rehabilitative Services*,²⁷⁷ the court noted:

[W]hen an [administrative] agency seeks to validate its action based upon a policy that is not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action.²⁷⁸

In this case, the court found that the nonrule policy was merely stated as a bare assertion during the course of the administrative hearing.²⁷⁹

275. *Id.* at 1289.

276. "If the [Board of Pilot Commissioners] wishes to avoid rulemaking and opt for policy development through adjudication, then it must accept the procedural safeguards that apply in formal hearings . . ." *Id.* at 1290.

277. 559 So. 2d 665 (Fla. 1st Dist. Ct. App. 1990).

278. *Id.* at 667-68 (citing *St. Francis Hosp., Inc. v. Department of Health & Rehabilitative Servs.*, 553 So. 2d 1351, 1354 (Fla. 1st Dist. Ct. App. 1989)).

279. *See also* *Bajrangi v. Department of Business Regulation*, 561 So. 2d 410, 415-16 (Fla. 5th Dist. Ct. App. 1990). In *Bajrangi*, the court noted that the testimony concerning the usual penalties, which apparently were based upon informal guidelines that did not appear in any statute or administrative rule and were not adequately documented as nonrule policy, cannot constitute a basis for rejecting a hearing officer's decision. *Id.* The error committed by the administrative agency was that it failed to provide actual testimony which would prove the factual predicate necessary for the adoption of such a nonrule policy. The witness just testified in a conclusory fashion that this was the usual penalty. *Id.*

The nonrule policy was not discoverable in any administrative agency precedent. The Department of Health and Rehabilitative Services also failed to adequately document the nonrule policy during the course of the administrative hearing by providing expert testimony, documents and other evidence to support its nonrule policy. Without adequate documentation to support the nonrule policy, the decision of the Department of Health and Rehabilitative Services was not supported by competent substantial evidence. Further, it may well be that it was inconsistent with prior administrative agency practices, a deviation from which has not been adequately explained on the record.²⁸⁰

In *Schiffman v. Department of Professional Regulation*,²⁸¹ the court concluded that the decision of the Board of Pharmacy imposing a permanent revocation of license was an invalid nonrule policy, because it lacked adequate evidentiary support in the administrative hearing record.²⁸² The Board of Pharmacy was authorized by the legislature to adopt administrative rules concerning revocation of a license.²⁸³ The Board of Pharmacy did not adopt administrative rules and relied upon nonrule policy developed in the adjudicatory hearing process. While the Board of Pharmacy was free to choose to develop its policies concerning sanctions in this manner, it may not do so without establishing the following requirements in each order: 1) an explanation of the nonrule policy; 2) adequate factual support in the record for the nonrule policy; and 3) an explanation of how the nonrule policy was within the scope of the administrative agency's delegated authority.²⁸⁴ In *Schiffman*, the Board of Pharmacy failed to provide any policy reasons justifying the nonrule policy which it applied.²⁸⁵ Further, the order of the Board of Pharmacy was unclear, because one part of the order could be read as finding that Schiffman would never be eligible for reinstatement, while another part of order could be read as indicating that he may be eligible for reinstatement if he offered some, albeit undefined, evidence of rehabilitation. Such an internally inconsistent order was not an adequate explanation of the nonrule policy.²⁸⁶

280. *Health Care & Retirement Corp. of Am.*, 559 So. 2d at 668. The court remanded the case for further action in light of its opinion. See FLA. STAT. § 120.68(12) (1989).

281. 581 So. 2d 1375 (Fla. 1st Dist. Ct. App. 1991).

282. *Id.* at 1376.

283. See FLA. STAT. § 465.016(4) (1989).

284. See *Schiffman*, 581 So. 2d at 1377; *Burris IV*, *supra* note 4, at 676-77.

285. *Schiffman*, 581 So. 2d at 1377.

286. *Id.* at 1378.

In *Beverly Enterprises-Florida v. Department of Health and Rehabilitative Services*,²⁸⁷ the court held, in part, that the Department of Health and Rehabilitative Services acted improperly in altering its nonrule policy without adequately supporting it in the administrative hearing record.²⁸⁸ The court found that when an administrative agency takes a position adverse to the party's understanding of the administrative agency's prior position in a matter, then the agency has effectively denied the party's request for action. When a party requested a formal administrative hearing in response to this decision, then the hearing must be de novo in nature to the extent that it addressed the formulation of the new administrative agency nonrule policy and was not a review of any action taken earlier based upon pre-existing administrative agency nonrule policy.²⁸⁹ The court found that the Department of Health and Rehabilitative Services had abandoned its prior interpretation of the statute during the course of this proceeding without offering sufficient support in the evidentiary record or a reasonable explanation for its shift in policy.²⁹⁰

However, one case suggested that in some circumstances the courts might compel an administrative agency to adopt its policy positions through the rule making process. In *Department of Natural Resources v. Wingfield Development Company*,²⁹¹ the court considered whether a letter from the Department of Natural Resources requiring a

287. 573 So. 2d 19 (Fla. 1st Dist. Ct. App. 1990).

288. *Id.* at 23.

289. *Id.*

290. *Id.* The court stated:

When an [administrative] agency seeks to validate agency action based upon a policy that is not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action. The agency may apply incipient or developing policy in a section 120.57 administrative hearing, provided the agency explicates, supports and defends such policy with competent, substantial evidence on the record in such proceeding. [Whenever an administrative agency's] policy does not simply reiterate a legislative mandate and is not readily apparent from a literal reading of the statutes involved . . . [it is] required to show the reasonableness and factual accuracy of its policy [in the administrative hearing record].

Id. at 22-23 (quoting in part *St. Francis Hospital, Inc.*, 553 So. 2d at 1354 (citation omitted)).

291. 581 So. 2d 193 (Fla. 1st Dist. Ct. App. 1991).

developer to make periodic reports on construction progress, not cease making significant construction progress on any part of the project for a period of six or more months and complete the resort project within two years or lose its exemption from the modified coastal construction control line permit requirements for those parts of the resort project located seaward of the modified line was a valid exercise of administrative discretion.²⁹² These constraints on exempt status from the permit requirements imposed by the adoption of a coastal construction control line did not appear in the statutes or the administrative rules. The court agreed with the hearing officer that the Department of Natural Resources letter containing these limitations was an "illicit rule not adopted in the manner required by law."²⁹³

The court further noted that "any agency statement is a rule [under the APA²⁹⁴] if it purports in and of itself to create certain rights and adversely affect others, or if it serves by its own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law."²⁹⁵ The court read the Department of Natural Resources letter as easily qualifying as a rule under the APA, because it "implements, interprets or prescribes law or policy, describes procedure or practice requirements of the [administrative] agency, and imposes requirements or information not specifically required by statute or by existing rule."²⁹⁶ As such, the letter was an invalid exercise of delegated authority, because it was not adopted through the rule making process mandated by the APA.²⁹⁷ This opinion is of special note because the language indicates that these requirements could only be imposed through the rule making process. Thus, it implicitly rejects the possibility that these requirements could be imposed through the nonrule policy route.

During the last legislative session the hesitancy of the courts to require administrative agencies to engage in rule making rather than

292. *Id.* at 194-95 (extensively quoting the specific language of the letter). The Department of Natural Resources imposed these limitations to assure that exemption from the coastal construction control line permit requirements "was obtained in good faith and that the builder intends to go forward with the construction in a timely manner." *Id.* at 195.

293. *Id.* at 196.

294. FLA. STAT. § 120.52(16) (1989).

295. *Wingfield Dev. Co.*, 581 So. 2d at 196.

296. *Id.*

297. *Id.*; see FLA. STAT. § 120.54 (1989); see also *supra* notes 74-79 and accompanying text.

rely upon nonrule policy was addressed. The legislature amended the APA to require administrative agencies in most circumstances to adopt policy positions²⁹⁸ through the rule making process.²⁹⁹ An administrative agency can escape the rule making preference only if 1) the policy at issue is not a matter within the scope of the definition of a rule,³⁰⁰ or 2) it is not feasible or practicable to currently adopt the policy through the rule making process.³⁰¹ The burden is on an administrative agency to prove that it should be exempt from the rule making preference.³⁰² If a hearing officer determines that an administrative agency should have adopted the nonrule policy or statement as a rule, then the administrative agency "shall immediately discontinue *all* reliance upon the statement or any substantially similar statement as a basis for agency action."³⁰³ If an administrative agency nevertheless continues to rely upon the nonrule policy or statement in agency action, then the person whose substantial interests were affected by the agency action may recover attorney's fees and costs,³⁰⁴ unless an administrative agency is engaged in a good faith attempt to adopt the nonrule policy or statement as a rule.³⁰⁵

These amendments to the APA should impact on the administrative process in four ways. First, the threat of attorney's fees and costs awards should create a substantial incentive for administrative agencies to promulgate their policy positions through the rule making process.

298. See FLA. STAT. § 120.52(16) (1991). See generally Dore III, *supra* note 4, at 450-54.

299. FLA. STAT. § 120.535(1) (1991). See generally Dore III, *supra* note 4, at 450-54.

300. See FLA. STAT. § 120.52(16) (1991). See generally Dore III, *supra* note 4, at 450-54.

301. FLA. STAT. §§ 120.535(1)(a), (b) (1991). See generally Dore III, *supra* note 4, at 450-54.

302. If the party meets its initial burden of showing that it is substantially affected by the nonrule policy or statement which meets the definition of a rule, but has not been adopted as a rule, then an administrative agency has the burden of offering persuasive proof that the nonrule policy or statement is not within the scope of the definition of rule and/or that it is not feasible or practicable to adopt it as a rule at this time. FLA. STAT. § 120.535(2)(b) (1991); see FLA. STAT. § 120.535(2)(a) (1991). See generally Dore III, *supra* note 4, at 450-54.

303. FLA. STAT. § 120.535(4) (1991). See generally Dore III, *supra* note 4, at 450-54.

304. FLA. STAT. § 120.535(6) (1991). See generally Dore III, *supra* note 4, at 450-54.

305. FLA. STAT. §§ 120.535(5), (6) (1991). See generally Dore III, *supra* note 4, at 450-54.

Second, the courts should no longer tolerate the use of nonrule policies by administrative agencies, except in very rare circumstances, because administrative agencies will no longer be able to merely assert it is not feasible or practical to adopt a policy as a rule; they will have to prove it.³⁰⁶ Third, there should be a dramatic increase in the use of the rule making process³⁰⁷ and challenges to proposed and promulgated rules.³⁰⁸ Fourth, once administrative agencies have promulgated most of their nonrule policies and statements as rules, the legislature should be able to better exercise its oversight function and assure that administrative agencies are exercising their delegated authority in a manner consistent with the legislative purpose and intent.³⁰⁹

B. *Adjudicatory Structure and Procedure*

The courts decided several cases during the survey period which generally concerned the structure of the adjudicatory process and the procedures used.

In *Southeast Grove Management Inc. v. McKiness*,³¹⁰ the court reversed and remanded a nonfinal administrative order, in part, because the hearing officer improperly allocated the burden of persuasion and failed to appreciate that the hearing concerned an administrative order which had already been rendered, not the original complaints.³¹¹ In such a case, the party requesting the hearing has the "burden of showing by competent, substantial evidence that . . . [the] findings [in the administrative order] were incorrect."³¹²

306. See *Burris IV*, *supra* note 4, at 683-85. See generally *Dore III*, *supra* note 4, at 450-54.

307. HOUSE COMM. ON GOVERNMENTAL OPERATIONS, H.R. REP. *in* H.R. BILL NO. 1879 (Fla. May 22, 1991). See generally *Dore III*, *supra* note 4, at 450-54.

308. FLA. STAT. § 120.54(4) (1991) (administrative challenges to proposed rules); FLA. STAT. § 120.56(1) (administrative challenges to adopted rules). See generally *Dore III*, *supra* note 4, at 450-54.

309. See *Burris IV*, *supra* note 4, at 667-73. See generally *Dore III*, *supra* note 4, at 450-54.

310. 578 So. 2d 883 (Fla. 1st Dist. Ct. App. 1991).

311. *Id.* at 886-87. The court found that the notice given concerning the complaints and right to request an administrative hearing was sufficient even though it never mentioned whether a hearing request was made—the right to a hearing on the complaint was waived. *Id.* at 887 n.6. The other issues concerned estoppel claims. See *id.* at 885-86.

312. *Id.* at 887 (also noting that the factual findings in the order carried a rebuttable presumption of correctness).

The courts in two cases addressed the question of when administrative agencies and private parties could successfully use procedural errors as a basis for seeking default orders. In *Coon Clothing Co. v. Eggers*,³¹³ the court noted that public policy considerations required that, whenever possible, the merits of a case should be the basis for its resolution, rather than procedural default mechanisms. When notice of an administrative hearing arrives only three working days prior to the hearing, there was evidence that the party was absent from the place where the notice was served, and there was no evidence of any prejudice to the administrative agency arising from the delay in the response by the party, then a default order should not be entered, and the case should be reopened with a hearing.³¹⁴

*Department of Environmental Regulation v. Puckett Oil Co.*³¹⁵ is consistent with the *Eggers* case. *Puckett Oil Co.* concerned under what circumstances it was appropriate for a hearing officer to enter a summary final order.³¹⁶ In this case, the hearing officer entered a "summary final order awarding \$15,000 in attorney's fees and costs to Puckett," because the Department of Environmental Regulation failed to respond in a timely fashion to the petition filed by Puckett Oil, waiving its right to a hearing on the petition and admitting that there was no material issue of fact involved in resolving the petition.³¹⁷ The court held that the hearing officer erred in doing so. The court found that the use of the word "shall" in the administrative rule establishing the time for filing a response to a petition was not designed to create a circumstance where every failure to respond in a timely fashion should be treated as depriving the hearing officer of jurisdiction to entertain a request for permission to file a late response to the petition. Rather, the mandatory language was used for the purpose of only generally providing for "the orderly conduct of business."³¹⁸ In such cases the use of the word "shall" was not intended as mandatory, but directory. Because the word "shall" was used in this way, the trier of fact retained jurisdiction to determine whether to exercise his or her "discretion to

313. 560 So. 2d 1357 (Fla. 3rd Dist. Ct. App. 1990).

314. *Id.* at 1357-58.

315. 577 So. 2d 988 (Fla. 1st Dist. Ct. App. 1991).

316. The court avoided deciding under what circumstances a party should be permitted to escape any adverse consequences for failing to timely respond to a petition.

317. *Id.* at 990-91.

318. *Id.* at 991.

extend the time for the filing of a responsive pleading.”³¹⁹ The hearing officer cannot refuse to exercise its discretionary authority to grant an administrative agency permission to file an untimely response as a means of sanctioning the administrative agency for failing to strictly adhere to the rules.

Of course, there are circumstances where it is appropriate for a hearing officer to conclude that the administrative agency’s failure to file a response was a waiver of its right to a hearing.³²⁰

But, in order for waiver to be applied based on the passage of time, we consider it essential for a showing to be made that the party against whom waiver is asserted has received notice sufficient to commence the running of the time period within which the response is required. Thus, if it is clearly established that a party has received notice informing him or her of the requirement of taking certain action within a specified period of time, and such party delays for a protracted length of time in taking the required action,

319. *Id.* The court noted that any contrary reading of the rule would require it to hold that the rule was an ultra vires exercise of delegated authority. *Id.* at 991-92. The court stated:

[N]o statutory authority, either expressly or reasonably implied therefrom, empowered DOAH to set a jurisdictional time limitation on the right of an agency to respond to a petition for fees and costs. To the contrary, we consider that the division’s power to permit a late-filed response is reasonably implied from the very statutes that rule 22I-6.035 referenced as authorizing its adoption: Section 120.57, Florida Statutes (1989), specifically subsection (1)(b)4, authorizing parties “to respond, to present evidence and argument on all issues,” and sections 57.111(4)(c) and (d), allowing a state agency against which a small business party has prevailed to oppose an application for attorney’s fees and costs by affidavit, and requiring the hearing officer to conduct an evidentiary hearing on the application. Clearly the two statutes, which the rule was designed to implement, imply that the agency shall be given a fair opportunity to defend against an application for fees and costs. We find nothing in the statutes reasonably suggesting that if an agency fails to comply with the time limitations required for its response, a summary final order, regardless of any mitigating circumstances, must thereafter be entered.

Id. at 992; see *supra* notes 38-81 and accompanying text.

320. In circumstances in which no response whatsoever has been filed, the division obviously has the right, in its supervision of orderly administrative proceedings, to conclude that a party has waived his or her right to respond, as more fully discussed *infra*, and to thereafter enter a summary final order, pursuant to Florida Administrative Code Rule 22I-6.030.

Puckett Oil, 577 So. 2d at 992.

we consider that the party may be deemed to have waived his or her right to so act.³²¹

However, because waiver of a right to a hearing should not be lightly implied, it should be imposed only where a party clearly has waived its right to a hearing, or any delay in the filing of a timely response results in prejudice to another party's interests.³²²

The hostility of the courts toward the use of procedural default mechanisms for resolving cases also can be seen in the one case during the survey period that concerned the legal sufficiency of notice given by an administrative agency. In *Baker v. Office of the Treasurer*,³²³ a fire-fighter, Baker, appealed the final order which revoked his fire-fighter certification, claiming that he was not given appropriate notice of an opportunity to seek a hearing challenging the allegations in the complaint. The State Fire Marshal sent Baker notice of the complaint by certified mail. The notice was returned to the Marshal's office, noting a forwarding address. The Marshal again mailed the complaint to the forwarding address, but it was returned. The Marshal then employed a private investigator who looked for Baker at the first address and also checked an address listed in the telephone book, none of which led him to Baker. The Marshal, after taking these steps, published notice of the complaint against Baker in the Orlando Sentinel on four consecutive Wednesdays. Baker never did respond to these notices, and a final order revoking his certification was issued by default.

Baker claimed that the State Fire Marshal's office failed to make a diligent search before resorting to notice by publication. The APA provided that an administrative agency, prior to revoking any license based upon an administrative complaint, shall serve the person with notice of the complaint either by personal service or certified mail. If both personal service and certified mail service are unsuccessful, then the agency may publish notice in an appropriate newspaper.³²⁴

The resolution of whether the State Fire Marshal's office properly resorted to the use of notice through publication turned on whether the private investigator made a diligent search for Baker.³²⁵ The court found that the private investigator's affidavit did not demonstrate what

321. *Id.* at 993 (citation omitted).

322. *Id.* at 993-94.

323. 575 So. 2d 727 (Fla. 1st Dist. Ct. App. 1991).

324. FLA. STAT. § 120.60(7) (1989).

325. *Baker*, 575 So. 2d at 728.

steps he had taken in attempting to locate Baker. Rather, the affidavit evidenced a mere conclusory statement that the investigator had visited one address in an attempt to locate Baker, and that his present address remained unknown. Based upon the affidavit, the court could not know what steps the private investigator took in attempting to locate Baker's other addresses.³²⁶

The court held that "the requirements of the statute authorizing service by publication were not met in this case in that there was an absence of diligent inquiry and a conscious effort to locate appellant reasonably employing knowledge known by or readily available to the appellee."³²⁷ Because there was no proof that notice by publication was necessary in this case, Baker was denied his opportunity to request a hearing and contest the allegations contained in the complaint.³²⁸

Two cases during the survey period concerned the question of when the jurisdiction of the administrative agency or hearing officer was terminated. *New v. Department of Banking and Finance*³²⁹ concerned an agreement reached between New and the Department of Health and Rehabilitative Services just prior to the commencement of a section 120.57 formal hearing. The agreement provided for repayment of an overpayment of certain amounts via an electronic funds transfer. The hearing officer closed the file and discontinued the hearing at that point. However, the Department of Health and Rehabilitative Services was unable to persuade the Comptroller that it had lawfully appropriated funds for the purpose of making its portion of the repayment, and therefore, the settlement agreement was not implemented.

The court noted that a settlement agreement did not deprive a hearing officer of jurisdiction when the hearing concerning the case was merely discontinued as a result. The hearing officer loses jurisdiction over the matter only after the case is dismissed. When, for reasons unforeseen by the parties at the time, the settlement agreement was not implemented, then the case must be re-opened, and the formal administrative hearing process should be resumed for the purpose of entering

326. *Id.* at 729. The court noted that there were several obvious steps which should have been taken including seeking his address from his employer, the City of Orlando Fire Department. *Id.*

327. *Id.*

328. *Id.* at 729-30. The court ordered that the case be remanded and a hearing date set in compliance with the requirements of the APA.

329. 554 So. 2d 1203 (Fla. 1st Dist. Ct. App. 1989).

an order adopting the terms of the settlement agreement.³³⁰ The Comptroller erred in unilaterally entering a final order requiring repayment by New.³³¹

In *Kalbach v. Department of Health and Rehabilitative Services*,³³² the Department of Health and Rehabilitative Services and Kalbach “had agreed that the arrearage owed for [child support] as of March 22, 1988, was \$1,020.40.”³³³ This was adopted as a finding of fact in the final order by the Department. In a subsequent letter, the Department asserted that the correct arrearage amount for child support “was actually \$2,084.97 as June 15, 1988.”³³⁴ After a second hearing, the hearing officer determined that the Department was bound by its earlier finding that the arrearage in child support was \$1,020.40, even though this figure was in conflict with the circuit court’s order concerning child support obligations. The Department rejected this finding in its final administrative order, and held that any error in the determination of arrearages in child support, whether the error is an over- or under-statement, should be corrected at the point in time when the error is discovered.

The court rejected this position, finding that after an administrative order became final and the time for judicial review had passed, the Department of Health of Rehabilitative Services was precluded from modifying the order. “While administrative agencies do have inherent power to reconsider final orders that are still under their control . . . [, where the] order . . . passed out of . . . [their] control . . . [it] be-

330. *Id.* at 1207. This may appear nonsensical. However, it is necessary so that the parties can seek enforcement of the settlement agreement in court.

331. The court noted that the Comptroller incorrectly concluded there were no appropriated funds available to repay the amount of the overpayment. *Id.*

The court also granted New’s motion for attorney’s fees and costs because, the agency’s actions which precipitated this appeal was gross abuse of [the] agency’s discretion. The Comptroller who was a mere party to a valid section 120.57 proceeding took charge of the proceedings and without jurisdiction or authority entered a void order adversely affecting the substantive rights of New. It was necessary that she appeal the order in order to protect her rights.

Id. The Division of Administrative Hearing was directed to hold a hearing on the matter of the appropriate amount of attorney’s fees and costs if the parties were unable to agree on the amount. *Id.* at 1208.

332. 563 So. 2d 809 (Fla. 2d Dist. Ct. App. 1990).

333. *Id.* at 810.

334. *Id.*

came final and was no longer subject to modification."³³⁵ The only occasion when the agency might successfully argue for an exception to this general rule occurs where it is able to demonstrate that modification of the order is necessary due to a "change in circumstances or any demonstrated public need or interest."³³⁶ No such showing was offered in this case.

It is clear that the APA requires an administrative agency to maintain an accurate transcript of any section 120.57(1) hearing.³³⁷ In *Citrus Central v. Gardner*,³³⁸ the court noted that when circumstances required a hearing de novo to be held, because the record of the original hearing was not available, then "the presentation of new and additional evidence, by which the matter might be determined as if it had not been previously addressed" was admissible.³³⁹

Further, in *E.H. v. Department of Health and Rehabilitative Service*,³⁴⁰ a hearing was held by the Department of Health and Rehabilitative Services pursuant to section 120.57(1), but because the court reporter who kept the transcript of the record had left the jurisdiction, and all efforts by the parties to contact the court reporter had failed, no record was available for the appeal.³⁴¹ The remedy in such a case was for both parties, along with the hearing officer, to submit their recollections of what transpired at the hearing, and this would constitute the record on appeal.³⁴² An administrative agency was not considered exonerated from this duty by mere allegations that it made a good faith attempt to preserve the record. While in this case the failure of the agency to maintain the transcript of the proceeding did not result in its being unable to meet its burden of showing that there was substantial and competent evidence to support its decision, in some future case it may well do so.³⁴³

Generally, under the APA, ex parte communication is prohibited.³⁴⁴ But in *Citizens of Florida v. Wilson*,³⁴⁵ the court noted that

335. *Id.*

336. *Id.* at 811; *cf. supra* notes 235-42 and accompanying text.

337. FLA. STAT. § 120.57(1)(b)(7) (1989); *see supra* notes 123-44 and accompanying text.

338. 569 So. 2d 936 (Fla. 1st Dist. Ct. App. 1990).

339. *Id.* at 937.

340. 571 So. 2d 50 (Fla. 1st Dist. Ct. App. 1990).

341. *Id.* at 50.

342. *Id.* at 51; *see* FLA. R. CIV. P. 9.200(b)(4).

343. *E.H.*, 571 So. 2d at 51.

344. FLA. STAT. § 120.66 (1989).

this prohibition was not designed to forbid contact between Public Service Commission members and their staff during the course of a rate hearing. The Court found that section 120.66 was limited to circumstances where a hearing officer was involved, or after an administrative agency had received a recommended order. Neither of these circumstances were present in this case. The court also noted that the communication occurred during the course of a public hearing and, therefore, lacked the characteristic of an *ex parte* communication which generally is contact made outside of the public hearing context.³⁴⁶

C. *Licensing*³⁴⁷

In *Patmilt Corp. v. Department of Business Regulation*,³⁴⁸ the court held that where the Department of Business Regulation had orally agreed to accept a lesser penalty than revocation of a license, and where the licensee relied upon that oral agreement, the Department of Business Regulation cannot enter a default order revoking the license because of the Department's perception that the licensee was late in submitting a completed copy of the written agreement based upon the prior oral agreement. The process used by the Department was not fair and constituted a material error, because it failed to give the licensee specific notice of the possible consequences of not timely submitting an executed copy of the written agreement.³⁴⁹ The court indicated that the Department may adopt such an approach if it provides adequate notice to a licensee so that the licensee knows it must submit the agreement in a timely fashion, or, in a timely fashion, request an administrative hearing, or otherwise risk having waived the right to a hearing.³⁵⁰

345. 569 So. 2d 1268 (Fla. 1990).

346. *Id.* at 1270.

347. Several other cases concerning licensing are discussed elsewhere in this article. *See, e.g., supra* notes 70-73, 103-113, 266-76 and accompanying text.

348. 581 So. 2d 997 (Fla. 1st Dist. Ct. App. 1991).

349. *Id.* at 998-99. The court also noted that the written agreement provided by the Department of Business Regulation stated that if the agreement was not accepted by the director, then it would constitute notice of a request for an administrative hearing on the matter.

350. *But see supra* notes 313-28 and accompanying text.

D. Contract Bidding

Only one decision during the survey period directly concerned the contract bidding process. *Mercedes Lighting and Electrical Supply Co. v. Department of General Services*³⁵¹ concerned an appeal from a final order issued by a hearing officer awarding attorney's fees to the Department of General Services and Marpan Supply because Mercedes Lighting had filed a "frivolous bid protest."³⁵² Mercedes Lighting's low bid was rejected, because it did not include a list of in-state service representatives, as required by the invitation to bid issued by the Department of General Services. Mercedes Lighting contended that it filed a bid with in-state service representatives named,³⁵³ or, in the alternative, that the omission of an in-state service representative from the bid was a minor irregularity which could be waived.³⁵⁴

The hearing officer rejected both contentions finding that naming of manufacture's sales employees could not reasonably be understood as having designated an in-state service representative, and holding that the minor bid irregularity claim was waived, as it was not asserted in a timely fashion.³⁵⁵ The hearing officer characterized the protest as frivolous, because it had no basis in law or fact. The hearing officer specifically found that Mercedes Lighting had simply forgotten to include the in-state service representative information in its bid, and that the bid protest was filed merely to provide an opportunity for it to correct this oversight. The hearing officer considered this an inappropriate use of the bid protest process³⁵⁶ and awarded attorney's fees and costs to the parties to the bid protest.³⁵⁷

The court, when interpreting under what circumstances attorney's fees and costs could be awarded under section 120.57(1)(b)5, drew

351. 560 So. 2d 272 (Fla. 1st Dist. Ct. App. 1990).

352. *Id.* at 273.

353. Mercedes Lighting maintained that the names were found among the plant manufacturer's sales employees listed in their bid. *Id.* at 274.

354. *Id.*

355. The hearing officer found that Mercedes Lighting would gain an advantage if it was allowed to re-open its bid to correct the deficiency, because it could choose to withdraw its bid by failing to correct the deficiency—an opportunity not offered to other bidders on the contract.

356. *Id.* at 275. The hearing officer did not find that the bid protest was instituted for the purpose of creating unnecessary delay or to establish an advantage.

357. *Mercedes Lighting*, 560 So. 2d at 276. "The hearing officer entered a final order granting the Department \$24,312.00 in fees plus costs, and Marpan \$20,281.00 plus costs." *Id.*

upon the policy arguments underlying Rule 11 of the Federal Rules of Civil Procedure.³⁵⁸ The APA provision concerning awards of attorney's fees and costs provided that an award should occur only when the action was filed for an improper purpose, such as a frivolous bid protest. The APA provision did not require that the party or attorney signing the papers, which were the basis for the administrative action believe that "the paper is well-grounded in fact, and is . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."³⁵⁹

The court reasoned that if the legislature intended to have these factors considered in the decision process concerning awards of attorney's fees, it would have listed them explicitly in section 120.57(1)(b)5.³⁶⁰ The court found that the hearing officer erred in concluding that the bid protest was frivolous, because there was no clear binding precedent which established a position contrary to that asserted by Mercedes Lighting during the bid protest process.³⁶¹ A critical element in this decision process was that the administrative agency always had an opportunity to change its mind as a result of the hearing in the case before it. The fact that the hearing officer ultimately chose to reject the position advocated by Mercedes Lighting was not sufficient justification for holding that the bid protest was frivolous, especially where there was a reasonably clear legal justification for bringing the protest.³⁶² In dicta, the court noted that there were other remedies availa-

358. *Id.* at 276-77.

359. *Id.* at 277; FLA. STAT. § 120.57(1)(b)5 (1989)

The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation.

360. *Mercedes Lighting*, 560 So. 2d at 277. The court noted that it is appropriate for the legislature to make clear its intent if it wished to have the two-prongs of Rule 11 apply in this statutory circumstance. The court's imposition of this requirement in this instance would violate the tenets of the separation of powers doctrine. *Id.* at 277-78.

361. *Id.* at 278. The Department of General Services did not move to dismiss the bid protest petition "on the grounds that it was baseless or filed for an improper purpose." *Id.* at 274.

362. The court noted that a decision by a hearing officer should not normally be given the effect of *stare decisis*, as in the case of judicial decisions, because such decisions turn on the specific facts of each case and are easily distinguishable. It would be

ble to a hearing officer besides an awarding of attorney's fees and costs. A hearing officer also had authority to order a pleading struck if it was filed for an improper purpose, or to order it withdrawn or amended.³⁶³

E. *Emergency Rules and Orders*

In *Bank of Credit and Commerce International (Overseas) Ltd. v. Lewis*,³⁶⁴ the now infamous Bank of Credit and Commerce International³⁶⁵ (BCCI) appealed the final administrative order by the Comptroller denying BCCI's petition for renewal of a license to operate an office in Miami, Florida.³⁶⁶ Despite a very checkered past operation,³⁶⁷ the Comptroller granted BCCI a renewal of its Miami office license for the year ending on March 4, 1990. In that renewal order, the Comptroller stated that "BCCI has satisfactorily demonstrated that the statutory requirements for renewal of its license have been met."³⁶⁸

After this renewal was granted, BCCI and the Comptroller entered into another agreement further detailing monitoring and compliance requirements. In early January 1990, BCCI entered a guilty plea to money laundering charges and agreed to pay a civil forfeiture of approximately \$15,000,000. Although the plea agreement was subject to a gag order, the Comptroller was given permission to review the terms of the plea agreement and the details of BCCI's compliance with its terms. In February 1990, BCCI timely filed another application for renewal of its license for the Miami office. Notice of the renewal was published in the Florida Administrative Weekly on March 2, 1990.

contrary to the purpose of the bid protest proceedings, as these were designed to provide "a person, whose substantial interest ha[d] been determined by agency action, an opportunity to attack the agency's position by appropriate means, subject to judicial review under § 120.68, Florida Statutes." *Id.* at 278. *But see* *Burris IV, supra* note 4, at 693-97.

363. *Id.* at 279.

364. 570 So. 2d 383 (Fla. 1st Dist. Ct. App. 1990).

365. BCCI has been labeled the sleaziest bank in the world by both *Time* and *Newsweek*. *See* 138 *TIME* July 29, 1991, at 42-47.

366. *BCCI*, 570 So. 2d at 384.

367. BCCI was indicted in October of 1988, had been subject to an emergency order calling for it to cease all unsafe and unsound banking practices and activities, and had entered into a subsequent agreement with the Comptroller in which BCCI promised to operate using safe and sound banking practices, to cease violation of any laws, to maintain adequate monetary reserves, and to make periodic reports concerning compliance with these requirements. *Id.*

368. *BCCI*, 570 So. 2d at 384.

“On March 5, 1990, three days after publication, Lewis issued a final order denying the renewal of BCCI’s Miami agency license.”³⁶⁹ The order concluded that “(a) the [\$15,000,000] civil forfeiture affect[ed] the financial condition of BCCI so as to constitute an unsafe and unsound banking practice; (b) the activities described in the indictment constitute[d] criminal violations of law; and (c) renewal of the Miami agency license [was] not in the public interest.”³⁷⁰ The Comptroller notified BCCI that it could challenge the order through an administrative hearing process or by seeking appellate review within thirty days.

Under the APA, summary orders should be issued only in an emergency situation. In all other situations, the APA requires that a party which will be adversely effected should be given notice and an opportunity to be heard before any final order or action is taken.³⁷¹ The court rejected any claim that the legislature had totally abrogated a pre-deprivation hearing right of applicants for a banking license. The court found that the APA guaranteed an applicant, as well as any other person, the opportunity to request a hearing within twenty-one days of publication of the notice of the license renewal request.³⁷² The court concluded that “[t]his statute, by its own terms, gives an applicant, as well as other parties, [twenty-one] days to request a hearing. We find nothing in the statute which authorizes the [D]epartment [of Banking and Financing] to issue a final order prior to giving the applicant a reasonable opportunity to request a hearing.”³⁷³ If an administrative agency chooses to rely upon the presence of an emergency to justify summary action, then it must explain how the circumstances present an “immediate danger to the public health, safety or welfare.”³⁷⁴ In this case, the Department of Banking and Financing failed to properly demonstrate, on the face of the order, that such an emergency existed as required by a section 120.59(3).³⁷⁵

In *Allied Education Corp. v. Department of Education*,³⁷⁶ the court noted that a cease and desist order entered against a post-secondary vocational school and ordering that it cease operations, presented an appropriate circumstance for interlocutory judicial review, “because

369. *Id.* at 385.

370. *Id.*

371. *Id.*

372. FLA. STAT. § 120.60(5)(a)2 (1989).

373. *BCCI*, 570 So. 2d at 385.

374. FLA. STAT. § 120.59(3) (1989); *see* FLA. STAT. 120.60(8) (1989).

375. *BCCI*, 570 So. 2d at 386.

376. 573 So. 2d 959 (Fla. 1st Dist. Ct. App. 1991).

review of final agency action would not provide an adequate remedy."³⁷⁷ The court entered an order quashing the cease and desist order without prejudice, because the Department of Education did not allege and was unable to substantiate "any threat or danger to the public health, safety, or welfare."³⁷⁸ The court rejected the attempt by the Department of Education to remedy these defects by alleging and offering evidence on these issues during the hearing conducted by the Division of Administrative Hearings as untimely, because these allegations and findings should have been set forth in the emergency order itself.³⁷⁹

In dicta, the court noted that Florida Statute section 246.2265, which delegated to the Department of Education the authority to suspend the license of educational institutions in an emergency,³⁸⁰ did not require the Department of Education to comply with any of the procedural safeguards which normally are applicable when an emergency suspension, restriction, or limitation of a license is imposed.³⁸¹ Without these procedural safeguards, the "emergency action taken by an agency prior to providing an opportunity for the effected person(s) to be heard would run afoul of well-established constitutional guarantees of procedural due process."³⁸² In order to assure that section 246.2265 was not unconstitutional, the court found that the procedure provided for in the APA for emergency suspension of a license was required in any action under the section. The court found that the action of the Department of Education did not comply with this procedure, because its cease and desist order "did not set forth specific facts and reasons for finding an immediate danger to the public health, safety or welfare, nor did it state why the action taken was only that necessary to protect the public interest, nor did it give reasons for concluding that the procedures utilized were fair under the circumstances."³⁸³

377. *Id.* at 960. The court noted that Allied Education sought interlocutory review through a notice of appeal process. This was not considered the proper method for invoking the appellate court's jurisdiction based on an interlocutory circumstance. Allied Educational should have filed a petition for review of a non-final agency action pursuant to FLA. R. APP. P. 9.100(c). The court treated the notice of appeal filed by Allied Educational as such a notice for purposes of this case. *Id.* at 960 n.1.

378. *Id.*

379. *Id.* at 961.

380. FLA. STAT. § 246.2265 (1989).

381. *See* FLA. STAT. §§ 120.54(9) (1989); FLA. STAT. § 120.60(8) (1989).

382. *Allied Educ. Corp.*, 573 So. 2d at 961.

383. *Id.* at 961. The court also noted that Allied Education was not offered an

Similar principles constrain the power of administrative agencies to issue emergency rules.³⁸⁴ The decision in *Little v. Coler*³⁸⁵ concerned a challenge to emergency rules promulgated by the Department of Health and Rehabilitative Services.³⁸⁶ Under the APA, in order for an emergency rule promulgated by an administrative agency to be valid, the agency must publish "the facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances."³⁸⁷ In this case, the Department of Health and Rehabilitative Services, in its published notice concerning these emergency rules, stated that the reduction in appropriations for the aid to families with dependent children program required an immediate implementation of cost reduction plans, or the program would have insufficient funds to continue operation until the end of the fiscal year. The Department of Health and Rehabilitative Services asserted in its notice that the process being adopted was fair, because it was impossible to promulgate a permanent rule in time to implement the savings required by the reduced appropriation.³⁸⁸

The court held that reduction in appropriation for the program qualified as an emergency circumstance under the APA.³⁸⁹ The court found that the possibility of a transfer of funds from state trust funds by the Governor, if an excess of those funds existed, was not a sufficient basis for holding that no emergency existed as result of the reduced appropriation.³⁹⁰ The emergency rules were justified as long as they were needed to assure compliance with the appropriate statutes gov-

evidentiary hearing concerning the matters alleged in the emergency cease and desist order. *Id.*

384. See FLA. STAT. § 120.54(9) (1989).

385. 557 So. 2d 157 (Fla. 1st Dist. Ct. App. 1990).

386. The court noted that initially the case was properly before it, because when a petitioner asserts that emergency rules will have a real and substantial impact on him or her, then rules may be challenged in a direct appeal to the court. *Id.* at 158; see FLA. STAT. §§ 120.54(9), .68 (1989).

387. *Little*, 557 So. 2d at 158.

388. *Id.* The reductions implemented by the rules chiefly concerned methods by which the amount of benefits paid out would be reduced through delays in the first benefit payments to new applicants. *Id.* at 159.

389. *Id.* at 160.

390. *Id.* at 159. The court specifically found that the transfer of such funds was far too contingent to be relied upon in avoiding the possible shortfall in the funding of the program as it was currently constituted. *Id.*

erning the program.³⁹¹ The failure of the Department of Health and Rehabilitative Services to notify, as suggested by Florida Administrative Code Rule 28-3.037, major wire services and other effected persons of the purpose of the emergency rule was not a basis for invalidating the emergency rules which were ultimately promulgated. The language of rule 28-3.037 is not mandatory, so providing these types of notice is a matter left to administrative discretion. Discretionary decisions of this nature should be overturned by the courts only when an abuse of discretion has occurred. The court found no evidence in this case to support the claim that the Department of Health and Rehabilitative Services abused its discretion.³⁹²

F. *What Counts As Evidence In An Administrative Proceeding?*

Part of what makes the hearing processes under the APA unique is that the traditional complex rules of evidence do not constrain what evidence may be admitted at a hearing. "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida."³⁹³ Under this statutory scheme, hearing officers have "considerable discretion in determining what evidence should be admitted at an administrative hearing."³⁹⁴ However, there are limits to this discretion both as to the admission and exclusion of evidence.

For example, in *Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*,³⁹⁵ the court held that it was reversible error for the hearing officer to exclude evidence of secondary impact in determining cumulative impact of a dredge and fill permit. The court found that this was relevant non-repetitive evidence on a critical issue.³⁹⁶ However, in *Faucher v.*

391. *Little*, 557 So. 2d at 160.

392. *Id.*

393. FLA. STAT. § 120.58(1)(a) (1989). *But see* Martin Marietta Corp. v. Roop, 566 So. 2d 40, 42 (Fla. 1st Dist. Ct. App. 1990) (noting that administrative proceedings under Chapter 120 are exempted from the rules of evidence, but that the workers' compensation system of adjudication is governed not by the APA, but by the Florida Rules of Evidence).

394. *Burris II*, *supra* note 4, at 755; *see also* *Burris III*, *supra* note 4, at 623.

395. 580 So. 2d 771 (Fla. 1st Dist. Ct. App. 1991).

396. *Id.* at 779.

R.C.F. Developers,³⁹⁷ the court noted that when medical records and documents are not legible, then such medical documents and records “cannot be regarded as competent and substantial proof of anything, and will be disregarded in the evaluation of the evidence in the record on appeal.”³⁹⁸ The court was clearly indicating that such information should never have been admitted as evidence.

1. Hearsay

Hearsay evidence is generally admissible in an administrative proceeding, but the use of hearsay evidence to support an administrative agency decision is significantly restricted under the APA.³⁹⁹ Standing alone, hearsay evidence cannot constitute competent substantial evidence, but it can “be used for the purpose of supplementing or explaining other evidence.”⁴⁰⁰ In *Doran v. Department of Health and Rehabilitative Services*,⁴⁰¹ the court held that “[t]he documents presented before the hearing officer were hearsay and did not come within any recognized exception which would have made them admissible in a civil action.”⁴⁰² Because the documents offered in this case were uncorroborated hearsay evidence, the APA provides that such evidence cannot by itself constitute competent and substantial evidence in a case.⁴⁰³ Because there was no other evidence offered in this case to prove the critical disputed factual issues, the order of the Office of Public Assistance Appeals Hearings was reversed.⁴⁰⁴ However, if the hearsay evidence offered had been admissible in a civil action, then it may have by itself

397. 569 So. 2d 794 (Fla. 1st Dist. Ct. App. 1990).

398. *Id.* at 798 n.2.

399. *Cf.* *Nowicki v. St. Petersburg Kennel Club*, 558 So. 2d 181 (Fla. 1st Dist. Ct. App. 1990). In *Nowicki*, the court noted once again that judges of compensation claim are required to follow the rules of evidence more closely than hearing officers in a normal APA adjudicatory proceeding. In such a case, documents which are hearsay must be excluded from evidence unless they are qualified for admission under one of the hearsay exceptions. *Id.* at 183.

400. FLA. STAT. § 120.58(1)(a) (1989). “The use of hearsay evidence in this limited manner, supplementing or explaining other evidence, is often erroneously cited by boards or commissions in reversing the decisions of referees [or] hearing officers” Burris III, *supra* note 4, at 624.

401. 558 So. 2d 87 (Fla. 1st Dist. Ct. App. 1990).

402. *Id.* at 88.

403. *See* FLA. STAT. § 120.58(1)(a) (1989).

404. *Doran*, 558 So. 2d at 88.

constituted competent substantial evidence.⁴⁰⁵

G. *An Agency Must Follow Its Own Rules*

Administrative agencies may not take action which is inconsistent with their own rules.⁴⁰⁶ Generally, if an administrative agency does so, then the reviewing court must remand the case to the agency for proceedings consistent with the agency rules.⁴⁰⁷

The court used this basic principle in resolving the issue presented in *Florida Optometric Ass'n v. Department of Professional Regulation*.⁴⁰⁸ In *Florida Optometric Ass'n*, the court considered whether the Board properly determined that the petition for intervention was filed untimely. The structure of the APA and the Florida Administrative Code clearly envisions that a person who may be affected by declaratory statements must be offered a clear point of entry into the formal proceeding, allowing that person to contest the possible resolution of the matter to be addressed.

The court noted that this required a notice which was "sufficient to give persons with standing to initiate [section] 120.57 proceedings a *clear point of entry* to either initiate [section] 120.57 proceedings or intervene in already existing proceedings directed to the same agency decision."⁴⁰⁹ Because no statute or rule superseded the notice timing requirements found in Administrative Code Rule 28-5.111,

the Board was required to comply with the requirements of Rule 28-5.111 in giving notice of the declaratory statement proceedings. The published notice of the declaratory statement petition obviously failed to comply with Rule 28-5.111, in that it neither specified the time limit for requesting a hearing, nor referenced the relevant procedural rules. Further, even if the published notice of the petition for declaratory statement had complied with rule 28-5.111, the optometrists' petition would have been timely, because it was filed just eleven days following the April 21, 1989 publication [of

405. See FLA. STAT. § 120.58(1)(a) (1989); Burriss III, *supra* note 4, at 625.

406. See *Phibro Resources Corp. v. Department of Env'tl. Regulation*, 579 So. 2d 118, 123 (Fla. 1st Dist. Ct. App. 1991). The court was troubled by the failure of the Department of Environmental Regulation to follow its own rules concerning consent orders. *Id.*

407. See FLA. STAT. § 120.68(12)(b) (1989).

408. 567 So. 2d 928 (Fla. 1st Dist. Ct. App. 1990).

409. *Id.* at 935.

the notice concerning the declaratory statement proceeding].⁴¹⁰

The court also noted that normally, petitions for declaratory statement do not concern anyone other than the particular petitioner, because they are limited to the petitioner's circumstance only. In such a case, there is no right to a section 120.57 hearing. But if a petition for a declaratory statement is not so narrowly drawn, it will affect "the substantial interest of other parties," or have the potential to affect the substantial interest of other parties so that an opportunity for a section 120.57 hearing must be offered in order to provide them with a clear point of entry into the declaratory statement proceeding.⁴¹¹

However, when the deviation from the requirements of the administrative rules has been slight or minor, then the courts have been unwilling to reverse an administrative agency decision. Cases along this line apparently rely on a harmless error rationale to justify the decision not to reverse.⁴¹² In *State v. Donaldson*,⁴¹³ the court noted that the

410. *Id.* Further, the court noted that there was no indication here that the filing of the petition for intervention was occurring after a waiver of the right to a clear point of entry had occurred. The court also stated that the optometrists could not have been held to have waived their right to a clear point of entry, because they never received adequate notice under Rule 28-5.111 that a section 120.57 hearing was going to be held concerning the declaratory statement petition. *Id.*

411. *Id.* at 936. The court declined to address the issue of whether the declaratory statement sought in this case would be invalid due to the attempt to promulgate a rule via a non-rulemaking process. In doing so, the court noted that,

although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted where the petition has clearly set for specific facts and circumstances which show that the question presented relates only to the petitioner and his particular sets of circumstances. Thus, petitions which provide only a cursory factual recitation or which use broad undefined terms . . . should be carefully scrutinized. Similarly, petitions by associations rather than individuals, should be inherently suspect. When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of section 120.54 governing rulemaking.

Id. at 937.

412. *Cf. Krischer v. School Bd.*, 555 So. 2d 436 (Fla. 3d Dist. Ct. App. 1990). In *Krischer*, the court held that a technical violation of the notice requirements provided

legislature did not intend for minor deviations from the requirements set forth in the administrative rules concerning storage and maintenance schedules for a breathalyzer machine, which do not impact on its reliability,⁴¹⁴ to prohibit the use of the test results in court.⁴¹⁵

H. Rule Making Process

Generally, courts will rigorously enforce the procedural requirements of the rule making process. In *Martin County Liquors v. Department of Business Regulation*,⁴¹⁶ the Division of Alcoholic Beverages and Tobacco challenged the decision of the hearing officer who "found the Department's requirements that applicants for quota liquor licenses provide documentation supporting financial arrangements and demonstrate 'right of occupancy' are an invalid exercise of delegated legislative authority."⁴¹⁷ The hearing officer found that the attempt to

for in the Florida statutes did not require reversal of an otherwise appropriate order terminating a teacher's employment absent a showing that the teacher was prejudiced by the failure to comply with the notice requirements. There was more than adequate documentation that the teacher had received numerous notices concerning her inadequate performance, and that she was offered many opportunities to attempt correction of this unsatisfactory performance. Any technical violation of the notice requirement was considered harmless error. *Id.* at 437; see also *School Bd. v. Weaver*, 556 So. 2d 443 (Fla. 1st Dist. Ct. App. 1990). In *Weaver*, the court noted that when an administrative agency failed to timely act upon a recommended order, such failure was not grounds generally for reversal of the final order. A violation of the time frame for rendering a final order as provided for in the APA did not require reversal "if the fairness of the proceedings or the correctness of the action taken is found to have been impaired by virtue of the statute's violation." *Id.* at 446. The court found in this case that there was no evidence showing that the delay "impaired the fairness of the proceeding nor the correctness of the action." *Id.*

413. 579 So. 2d 728 (Fla. 1991).

414. The court agreed that when no evidence was offered by the prosecution that the breathalyzer machine was reliable, then the results of the breathalyzer test must not be admitted. *Id.* at 729.

415. *Id.*

416. 574 So. 2d 170 (Fla. 1st Dist. Ct. App. 1991). The rule challenge was filed under section 120.56. FLA. STAT. § 120.56 (1989). This case also involved a section 120.57 formal hearing in which the rule was applied concerning quota liquor licenses to deny the application of Martin County Liquors, Inc. *Id.* at 172.

417. *Id.* at 172. Martin County Liquors, Inc. was denied its liquor license because it had failed to file with its application a right of occupancy certification for the location where it planned to operate its business. Martin County Liquors filed a rule challenge concerning the Department of Beverage Regulations rule 700L and 710L, alleging that "they were not filed with the Office of Secretary of State, as well as the

impose the requirements of rule 700L was an invalid exercise of delegated authority, because it was not filed with the Secretary of State, as required by the APA.⁴¹⁸ The hearing officer also concluded that section 302 of the manual was an attempt to promulgate a rule without complying with the rulemaking process, and was an invalid exercise of delegated legislative authority.⁴¹⁹ The court agreed that the failure to file rule 700L with the Secretary of State's office rendered it an invalid exercise of delegated legislative authority. The court found that this was a material failure to follow the applicable process concerning rule making.⁴²⁰

In *Department of Health and Rehabilitative Services v. Florida Medical Center*,⁴²¹ the court addressed the issue of what remedy was available when a proposed rule, which was substantively amended, was renoticed by the administrative agency rather than beginning the rule making process anew. While the APA provides that an administrative agency may adopt rules "only after the public has been notified of the content of proposed rules and reasonable opportunity for public comment has been given,"⁴²² it also provides that an administrative agency in several circumstances need not begin the rule making process again

validity of [section] 302 of the Division's, a policy and procedure since it constituted a rule and was not properly promulgated as such." *Id.* at 173.

418. FLA. STAT. § 120.54(11), (13)(a) (1989).

419. *Martin County Liquors, Inc.*, 574 So. 2d at 173.

420. *Id.* The court noted in dicta that there was no statutory requirement concerning the items listed in rule 700L, but that if the agency had properly promulgated such requirements through its rule making authority, they could be legally imposed on all applicants. *Id.* The court also found that the manual provision of section 302 was an attempt to impose the requirements of a rule on license applicants without complying with the rule making process:

Applicants for quota liquor licenses are initially approved or disapproved based on the requirements established in the DABT's policy section 302. No other standard definition of the complete application exists, and it is to be applied uniformly and generally to the public at large. It clearly does not fall within the exceptions under section 120.52(16)(a). Thus, we find that DABT's assertion that section 302 was irrelevant to their denial of Martin County Liquors' application because their field office accepted the incomplete application to be without merit. DABT's policy section 302 meets the definition of rule pursuant to section 120.52(16), and because it was not promulgated as such, it constitutes an invalid exercise of delegative legislative authority.

Id. at 174.

421. 578 So. 2d 351 (Fla. 1st Dist. Ct. App. 1991).

422. *Id.* at 354.

because it amended a proposed rule.⁴²³ Rather, all that is required in those circumstances is that the amended proposed rule be renoticed. The court noted that administrative agencies may,

make changes during the course of the rulemaking process without the necessity of beginning the process anew, so long as the changes (1) are supported by the record of public hearings held on the rule, (2) are merely technical and do not affect the substance of the rule, (3) are in response to written material contained in the record and submitted to the agency within [twenty-one] days following the first publication of notice of the proposed rule, or (4) are in response to a proposed objection by the Administrative Procedures Committee.⁴²⁴

423. FLA. STAT. § 120.54(13)(b) (1989); see *J.B. Coxwell Contracting, Inc. v. Department of Transp.*, 580 So. 2d 621 (Fla. 1st Dist. Ct. App. 1991). In *Coxwell*, the court noted that under the APA, an administrative agency need not re-notice its proposed rule before promulgating, it even if it was amended, so long as the rule amendment was adopted as "a result of testimony presented at a public hearing prior to the rule's adoption." *Id.* at 623-24. The court rejected the rule challenge and held that this was exactly what happened in this case. *Id.*

424. *Florida Medical Ctr.*, 578 So. 2d at 353. FLA. STAT. § 120.54(13)(b) (1989) provides:

After the notice required in subsection (1) and prior to adoption, the agency may withdraw the rule in whole or in part or may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, changes in response to written material relating to the rule received by the agency within 21 days after the notice and made a part of the record of the proceeding, or changes in response to a proposed objection by the committee. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published and shall notify the Department of State if the rule is required to be filed with the Department of State. After a rule has become effective, it may be repealed or amended only through regular rulemaking procedures.

See also FLA. STAT. § 120.54(11)(a) (1989) which provides:

After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, the adopting agency shall file any changes in the proposed rule and the reasons therefor with the committee or advise the committee that there are no changes. In addition, when any change is made in a proposed rule, other than a technical change, the

However, it is equally clear that the APA provides: “[S]ubstantially affected persons [must have] a reasonable opportunity to challenge proposed rules prior to their adoption.”⁴²⁵

When an administrative agency materially amends or modifies the proposed rule after the time for challenging the rule has run⁴²⁶ and the opportunity for public comment has passed,⁴²⁷ then interested persons are effectively deprived of any meaningful point of access to the rule making process. The court held such a result is contrary to the fundamental structure of the APA rule making process, because it would permit an administrative agency to circumvent all meaningful public input into the rule making process, as well as foreclosure any challenge to the validity of the proposed rule prior to its promulgation.⁴²⁸ Clearly,

adopting agency shall provide a detailed statement of such change by certified mail or actual delivery to any person who requests it in writing at the public hearing. The agency shall file the change with the committee, and provide the statement of change to persons requesting it, at least 7 days prior to filing the rule for adoption.

425. *Florida Medical Ctr.*, 578 So. 2d at 354 (emphasis omitted).

426. The APA provides:

(4)(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

(b) The request seeking a determination under this subsection shall be in writing and must be filed with the division within 21 days after the date of publication of the notice. It must state with particularity the provisions of the rule or economic impact statement alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging the proposed rule would be substantially affected by it.

FLA. STAT. § 120.54(4)(a)-(b) (Supp. 1990).

427. Under the APA,

[i]f the intended action concerns any rule other than one relating exclusively to organization, procedure, or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice, give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of their contentions The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule.

FLA. STAT. § 120.54(3)(a) (Supp. 1990). Thus, any affected person has an absolute right to a public hearing on a proposed rule, if a timely request was made.

428. [A]n agency need only publish notice of an innocuous proposed rule, wait 21 days so that the time for demanding a public hearing under 120.54(3) or petitioning for a determination of invalidity under 120.54(4)

in this case the amendment of the proposed rule was substantial, because it fundamentally changed the criteria for awarding certificates of need.⁴²⁹ Therefore, the rule making process must begin anew and the parties must be offered an adequate point of entry.⁴³⁰

In *Florida Medical Center*, the court also noted that any time an administrative agency publishes notice of a change in a proposed rule, a substantially affected person has a new twenty-one day period within which to file notice of a rule challenge under section 120.54(4) claiming that the administrative agency violated the limitation imposed by section 120.54(13)(b) on the amendment or modification of a proposed rule.⁴³¹ Any successful challenge to the amended proposed rule under this process will require the administrative agency to withdraw the amended proposed rule, or begin the rule making process anew.⁴³² The court specifically found that this reading of the time frame for filing a section 120.54(4) challenge to a proposed rule was required, because the post-promulgation rule challenge provisions are not as complete or adequate a set of safeguards as the pre-promulgation rule challenge provision under section 120.54(4).⁴³³

has passed, and then simply change the rule however it wishes. The fact that such changes might be in excess of the limitations of Section 120.54(13)(b), and might bear no resemblance to the original proposed rule, would not matter, at least so far as the public right to be heard *prior* to rule adoption. In our view, such a holding would not comport with the legislative intent. Rather, it would effectively defeat the legislative purposes undergirding Section 120.54.

Florida Medical Ctr., 578 So. 2d at 354 (emphasis in original).

429. The original proposed rule provided that certificates of need should be issued in a manner to assure that "unnecessary duplication of services" did not occur in the area of adult cardiac catheterization programs. *Id.* at 353. The amended proposed rule dropped this focus and substituted a concern for "foster[ing] competition among [adult cardiac catheterization] providers." *Id.*

430. *Id.* at 354-55.

431. *Id.* at 355.

432. *Florida Medical Ctr.*, 578 So. 2d at 355. The court found that competent, substantial evidence existed that the proposed rule amendment in this case was designed to give effect to private negotiations between the administrative agency and a substantially affected person who had filed a section 120.54(4) challenge to the original proposed rule. These negotiations and the subsequent amendment of the proposed rule were not within the permitted scope of amendments authorized under section 120.54(13)(b). *Id.*

433. *Id.* at 355. Judge Miner dissented because once the rule became effective, as it had in this case, section 120.56 should have been used to bring a rule challenge, not section 120.54(4). *Id.* (Miner, J., dissenting). If the limitations found in section

In an unusual case concerning a challenge to an administrative rule, the court addressed the question of when the Division of Administrative Hearings could legitimately reject a rule challenge as a pretext for circumventing the prohibition against prisoners filing section 120.57 petitions challenging the administration of rules by prison officials.⁴³⁴ In *Ramadanovic v. Department of Corrections*,⁴³⁵ a prisoner challenged a rule adopted by the Bureau of Prisons. His rule challenge was dismissed by the Director of the Department of Administrative Hearings, because it did not comply with the requirements of section 120.56 for a rule challenge. The court found that when Ramadanovic made specific allegations in his petition about how the rule was being applied to his particular circumstance, it was not cause to hold that the petition was an attempt to file a section 120.57(1) petition in the guise of a section 120.56 rule challenge. The court noted that any rule challenge petition under section 120.56 must "state with particularity facts sufficient to show the person seeking relief is substantially effected by the rule."⁴³⁶ Thus, the fact that Ramadanovic's petition contained allegations about how the rule applied to him was not sufficient evidence to show that he had filed a section 120.57(1) claim in the form of a section 120.56 rule challenge.⁴³⁷

1. Economic Impact Statement

In *Cataract Surgery Center v. Health Care Cost Containment Board*,⁴³⁸ the court, in what it admitted was the most flagrant dicta,⁴³⁹

120.54(13)(b) on amending a proposed rule were violated, then a basis for declaring the rule invalid in a section 120.56 rule challenge existed. *Id.* at 356.

434. Prisoners are prohibited under the APA from participating in any administrative proceeding other than rule challenges. FLA. STAT. § 120.52(12)(d) (1989).

435. 575 So. 2d 1333 (Fla. 1st Dist. Ct. App. 1991).

436. FLA. STAT. § 120.56(2) (1989) quoted in *Ramadanovic*, 575 So. 2d at 1335.

437. *Ramadanovic*, 575 So. 2d at 1334-35. The court remanded the case to the Department of Administrative Hearings "for entry of an order stating with specificity grounds warranting dismissal of Ramadanovic's petition, or for further proceedings on petition, pursuant to section 120.56(2)." *Id.* at 1335.

438. 581 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1991).

439. The court held that the proposed rules were invalid ultra vires acts. *See supra* notes 44-55 and accompanying text. The discourse on the adequacy of the economic impact statement was wholly unnecessary. The issue should have been dismissed as one which the court need not reach, as it did concerning at least one other issue raised by the parties. *Cataract Surgery Ctr.*, 581 So. 2d at 1360 n.1. Not only did the court not need to decide the issue in order to resolve the case, it also acknowledged that

noted that the inadequate economic impact statement was a possible independent basis for declaring the proposed rules invalid. The court found that the economic impact statement prepared by the Health Care Cost Containment Board was grossly insufficient and violated the APA rule making requirements concerning such statements. The court correctly noted both the purpose of an economic impact statement and the limited circumstances under which any defect in an economic impact statement justified holding a rule or proposed rule invalid:

The purpose of an economic impact statement is "to promote agency introspection in administrative rulemaking; to ensure a comprehensive and accurate analysis of economic factors, which factors will work together with social factors and legislative goals underlying agency action; to direct agency attention to key considerations and thereby facilitate informed decision making."

. . . .
Preparation of an economic impact statement is a procedural requirement, and any defect in its preparation will not defeat an otherwise valid rule as long as evidence proves that an agency fully considered the economic impact of its action or if it is established that the agency's proposed action will have no economic impact . . . [or the] deficiencies in the economic impact statement [did not] impair the fairness of the rulemaking proceedings.⁴⁴⁰

The hearing officer in this case determined, after an extensive consideration of the evidence, that the weight of the evidence demonstrated that any deficiencies in the economic impact statement were harmless error. The court rejected this conclusion, because the Health Care Cost Containment Board had "ignored its statutory duty" when it failed to evaluate whether there would be substantial ongoing costs in complying with the proposed rules.⁴⁴¹ The court found that "these costs were reasonably ascertainable[,] . . . the board took no action to discover that information . . . [and] had the board been fully aware of these costs, that knowledge may have had an impact on the board's decision as to what data to require and what method to utilize in col-

probably no one had standing to raise the issue. As the court noted, "it is unnecessary for us to rule on this issue or the standing of the appellants in regard to the small and minority business issue." *Id.* at 1365.

440. *Id.* at 1363-64 (quoting *Department of Health & Rehabilitative Servs. v. Wright*, 439 So. 2d 937, 940 (Fla. 1st Dist. Ct. App. 1983)).

441. *Id.* at 1364.

lecting that data."⁴⁴²

The court also criticized the Health Care Cost Containment Board for failing to follow the required procedures to assess whether the proposed rules would have an impact on small and minority businesses. By failing to determine whether such an impact existed, the Health Care Cost Containment Board effectively circumvented the APA rule making requirement that when such an impact exists notice must be sent to the Small and Minority Business Advocate, the Minority Business Enterprise Assistance Office, and the Division of Economic Development of the Department of Commerce,⁴⁴³ and further, that each of these entities must be given an opportunity, prior to final agency action on the proposed rule, "to present evidence and argument and to offer alternatives regarding the impact of the rule on small business."⁴⁴⁴ The court believed that these procedural requirements were not designed as a futile process offering little or no hope for the amendment of the proposed rule, because the administrative agency must adopt the proposed alternatives or file with the Administrative Procedures Committee a written statement explaining why it did not adopt the alternatives.⁴⁴⁵ By failing to properly assess any impact on small and minority businesses, the Health Care Cost Containment Board "precluded these parties from providing input essential to protecting small businesses" as mandated by the statute.⁴⁴⁶

This aspect of the decision in *Cataract Surgery Center* is a classic example of a court offering its opinion on an issue which was totally irrelevant to the resolution of the case. It was particularly offensive in this case, as the discussion of the small and minority businesses requirements was totally gratuitous, because the parties before the court in all probability lacked standing to raise the issue. Finally, the court did not offer a persuasive explanation of why it should reject the factual findings of the hearing officer on the economic impact statement issues. While the court concluded that the Health Care Cost Contain-

442. *Id.*

443. FLA. STAT. § 120.54(3)(b) (1989).

444. FLA. STAT. § 120.54(3)(b)1 (1989); see *Cataract Surgery Ctr.*, 581 So. 2d at 1364. The author knows of no case, nor did my informal survey of individuals who practice in the area disclose any cases, where any of these entities has offered any comment as a result of receiving notice.

445. See *Health Care Cost Containment Bd.*, 581 So. 2d at 1365 ("It cannot be assumed that the Board would have rejected the input from these representatives."); FLA. STAT. § 120.54(3)(b)2-3 (1989).

446. *Cataract Surgery Ctr.*, 581 So. 2d at 1364-65.

ment Board had failed to make any reasonable attempt to develop a legitimate economic impact statement, the hearing officer found sufficient evidence to reach a contrary result. The court, in rejecting the findings of the hearing officer on these factual issues, was engaged in substitution of judgment.

The APA provides that judicial review of factual issues is very limited:⁴⁴⁷

If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of [section] 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency action depends on any finding of fact that is not supported by competent substantial evidence in the record.⁴⁴⁸

In this case, the court ignored the limited scope of judicial review, or attempted to avoid it by characterizing the factual issues as a question of law—whether the Health Care Cost Containment Board had filed an economic impact statement. The former was as gross a violation of the requirements of the APA as the court accused the Health Care Cost Containment Board of committing, while the latter was a subterfuge given the fact that the Health Care Cost Containment Board had prepared an economic impact statement.

V. JUDICIAL REVIEW

A. *Preservation of the Right to Review*

The APA⁴⁴⁹ and the Florida Constitution⁴⁵⁰ guarantee the right to judicial review of administrative decisions. However, this right is not absolute,⁴⁵¹ and there are several ways in which a party may lose or

447. See *infra* notes 552-75 and accompanying text; Burris III, *supra* note 4, at 633-36.

448. FLA. STAT. § 120.68(10) (1989).

449. FLA. STAT. § 120.68 (1989); see FLA. STAT. § 120.69 (1989).

450. See FLA. CONST. art. I, §§ 9, 18, 21; FLA. CONST. art. V, § 4(b)(1).

451. Any party seeking judicial review must satisfy standing requirements. Failure to do so is generally, but not always, fatal to obtaining judicial review. See *Cattract Surgery Ctr.*, 581 So. 2d at 1365 (discussing issue concerning the adequacy of the economic impact statement without first determining whether any party had stand-

waive, either intentionally or unintentionally,⁴⁶² its right to judicial review,⁴⁶³ or fail to qualify for judicial review.

If a party failed to timely request or fulfill the statutory prerequisites for judicial review, then the right to judicial review may be lost.⁴⁶⁴ However, in *Stewart v. Department of Corrections*,⁴⁶⁵ the court noted that even though a party had failed to timely file a notice of appeal concerning an administrative order, it should not preclude the judicial review process from going forward. The court found that such time limitations, especially where, as here, there was only a one day violation, may be avoided by the application of the doctrine of equitable tolling. In such a case, the burden was on the party seeking the benefit of the equitable tolling doctrine to show either "excusable ignorance of the limitations" or a lack of prejudice to the administrative agency arising from the untimely filing of the notice of appeal. The court found that there was no evidence here that the administrative agency had been prejudiced, and permitted the late filing of the notice of appeal to preserve the rights to judicial review.⁴⁶⁶

Besides a timely filing of a petition for judicial review, other factors must also be satisfied before judicial review can occur. In *Rabren v. Department of Professional Regulation*,⁴⁶⁷ the court noted that in order for judicial review to be available, the following must be shown:

ing to raise the issue); *City of Destin v. Department of Transp.*, 541 So. 2d 123, 127 (Fla. 4th Dist. Ct. App. 1989) (holding, in part, that the Department of Transportation waived its right to question whether the City of Destin had standing to invoke a formal hearing under the APA by not raising the issue before or during the formal hearing.)

452. See *Prestressed Decking Corp. v. Medrano*, 556 So. 2d 406, 409 (Fla. 1st Dist. Ct. App. 1989) (When a party fails to properly raise an issue as part of the administrative hearing process, the hearing officer is precluded from considering that issue in its recommended order.)

453. Without a stay of enforcement of the administrative agency decision, judicial review may result in a correction of a wrong that may not have an adequate remedy. See FLA. STAT. §§ 120.68(3), .69(5) (1989); *Stables v. Rivers*, 559 So. 2d 440 (Fla. 1st Dist. Ct. App. 1990) (noting that filing a motion for protective order did not constitute an automatic stay for any scheduled depositions).

454. *Markham v. Moriarty*, 575 So. 2d 1307 (Fla. 4th Dist. Ct. App.), cert. denied, *Abundant Life Ctr. v. Markham*, 112 S. Ct. 440 (1991) (per curiam); see also *Machin v. Lumber Transp., Inc.*, 556 So. 2d 446, 447 (Fla. 1st Dist. Ct. App. 1990) (noting that while there may be circumstances under which the requirements for timely filing notice of appeal may be tolled, a judge of compensation claims cannot grant a time extension when he no longer has jurisdiction over the matter).

455. 561 So. 2d 15 (Fla. 4th Dist. Ct. App. 1990).

456. *Id.* at 16; cf. *supra* notes 313-28 and accompanying text.

457. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990).

“(1) the action is final; (2) the agency is subject to the provisions of the APA; (3) he was a party to the action which he seeks to appeal, and (4) he was adversely affected by the decision.”⁴⁵⁸

During the survey period, several decisions considered the question of what constitutes final administrative agency action. In *Friends of the Hatchineha, Inc. v. Department of Environmental Regulation*,⁴⁵⁹ the court noted that before a person is entitled to a formal administrative hearing “there must be final agency action affecting the petitioner’s substantial interests, coupled with a disputed issue of material fact.”⁴⁶⁰ A variety of decisions can satisfy this requirement of final agency action. In *Friends of the Hatchineha, Inc.*, the court held that a letter granting an agricultural exemption constitutes final agency action when it was used to justify the dismissal of a complaint filed by the Department of Environmental Regulation concerning the building of an access road or driveway through wetlands.⁴⁶¹ The court found that the Department of Environmental Regulation “exercised its discretion by determining that no permits were required. The exercise of such discretion constituted final agency action.”⁴⁶²

*Palm Springs General Hospital v. Health Care Cost Containment Board*⁴⁶³ concerned an agreement between the Health Care Cost Containment Board and Palm Springs General Hospital on how medicaid reimbursement pays should be calculated. This agreement was the basis for termination of the administration hearing concerning the dispute. However, after the matter was removed from the hearing officer’s docket, the Health Care Cost Containment Board notified Palm Springs General Hospital by letter that it would not honor the written agreement settling the dispute. Palm Springs General Hospital, Inc. sought judicial review of the decision contained in the letter notifying it that the Health Care Cost Containment Board would not honor the written agreement concerning this matter.⁴⁶⁴ The court held that although the letter was a form of informal administrative agency action, it was final for purposes of judicial review. The court reversed and re-

458. *Id.* at 1288.

459. 580 So. 2d 267 (Fla. 1st Dist. Ct. App. 1991).

460. *Id.* at 269.

461. *Id.* at 271. The court properly noted that a long line of cases had established that a decision by an administrative agency that it lacked jurisdiction was a form of final agency action. *Id.* at 271-72; *see supra* notes 152-60 and accompanying text.

462. *Id.* at 272.

463. 560 So. 2d 1348 (Fla. 3d Dist. Ct. App. 1990).

464. *Id.* at 1348-49.

manded the matter to the Health Care Cost Containment Board for implementation of the settlement agreement.⁴⁶⁵

Under some circumstances, even interlocutory orders may be considered final administrative agency action. In *Holland v. Courtesy Corp.*,⁴⁶⁶ the court noted that where a matter was decided which effectively precluded consideration of any other issues in the case, even though the order may resemble a nonfinal decision, it shall be treated as final for purposes of seeking judicial review. “[I]n the classic sense, . . . [an interlocutory] order . . . is a final order . . . [when] it disposed of all matters then pending before the . . . [judge of compensation claims or administrative hearing officer].”⁴⁶⁷

B. *Scope of Hearing Officer's Authority Over Factual Issues, Penalties and Questions of Law*

The dichotomy between factual and legal issues directly effects how courts approach the judicial review process, especially when an administrative agency's final order overturned the recommended order of a hearing officer.⁴⁶⁸ The APA provides that the discretion of an administrative agency to reject the factual findings and penalty recommendation of a hearing officer in a recommended order is very limited.

The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing

465. *Id.* at 1349-50. The court also awarded attorney's fees to Palm Springs General Hospital, finding it was a gross abuse of discretion for the administrative agency to renounce the settlement agreement. It remanded the case to the Division of Administrative Hearings for determination of the appropriate amount of attorney's fees. *Id.* at 1350 n.2.

466. 563 So. 2d 787 (Fla. 1st Dist. Ct. App. 1990).

467. *Id.* at 789-90.

468. FLA. STAT. § 120.57(1)(b)10 (1989); see FLA. STAT. § 120.68(7) (1989).

to the record in justifying the action.⁴⁶⁹

A number of cases addressing these issues during the survey period demonstrated how administrative agencies continue to struggle with the limited scope of their discretion in these areas.

In *Clay County Sheriff's Office v. Loos*,⁴⁷⁰ the court held that the Unemployment Appeals Commission erred in finding that a memo provided a basis for overturning the factual conclusions reached by the appeals referee. The memo, from the sheriff to all personnel, indicated that any employee who did not receive permission to enroll in a training course would have been required to pay for the training course; rather than the Department. The appeals referee denied unemployment benefits to Loos who was terminated from his position as a deputy sheriff, because he attended a radar training course in direct disobedience of a superior officer's denial of his request to attend such a course, as set forth in the memo.⁴⁷¹

The Unemployment Appeals Commission found that the memo created confusion on the part of employees concerning whether they would suffer any other disciplinary action besides having to pay for the training course themselves.⁴⁷² The court found that there was competent substantial evidence to support the appeals referee's finding that direct disobedience of the order of a superior officer not to attend this training program showed an intentional and substantial disregard by the employee of his duty and obligation to the employer, as defined by a superior officer's command.⁴⁷³ The memo was considered by the appeals referee and the Unemployment Appeals Commission was merely substituting its factual judgment for that of the appeals referee—a practice forbidden by the APA.⁴⁷⁴

469. FLA. STAT. § 120.57(1)(b)10 (1989); see FLA. STAT. § 120.57(1)(b)10 & n.1 (1991) (further restrictions on the discretion of an administrative agency to reject the findings of a hearing officer).

470. 570 So. 2d 394 (Fla. 1st Dist. Ct. App. 1990).

471. The appeals referee found that Loos had engaged in misconduct by enrolling in the course in the face of instructions to the contrary, and that successful completion of the course would have increased the employee's salary by \$20 per month. *Id.* at 395. Misconduct is defined by statute as "carelessness or negligence of such a degree . . . as to . . . show an intentional and substantial disregard . . . of the employee's duties and obligations to an employer." FLA. STAT. § 443.036(26) (1989).

472. *Loos*, 570 So. 2d at 395.

473. *Id.* at 395-96.

474. The court also concluded that the Unemployment Appeals Commission erred in concluding that as a matter of law, the definition of misconduct did not cover

*Kan v. P.G. Cook Assocs.*⁴⁷⁵ was another example of an administrative agency overstepping its authority by reweighing or reevaluating the evidence heard by the hearing officer or appeals referee. In this case, the Unemployment Appeals Commission reversed a decision of the appeals referee which had granted Kan unemployment compensation benefits. The appeals referee found that Kan was promised additional training, if necessary, to enable him to meet his employer's expectations concerning the number of bicycles he should assemble per hour. The employer had failed to provide the additional training, and as a result, Kan's earnings were substantially diminished. In such a circumstance, the appeals referee found that a reasonable "average able-bodied qualified worker" would give up his employment as a result.⁴⁷⁶ The Unemployment Appeals Commission found that Kan understood that the initial eighty hours of instruction would permit him to assemble the requisite number of bicycles per hour, and that his employer had never guaranteed him a minimum wage. Because of these factors, which the Unemployment Appeals Commission believed were overlooked by the appeals referee, it reversed and held that Kan was not entitled to unemployment compensation.

The court reversed the decision of the Unemployment Appeals Commission. The court noted that the Commission may reverse the decision of an appeals referee concerning factual findings only if it could demonstrate that such factual findings were not supported by competent substantial evidence.⁴⁷⁷ The court found no indication in the record that any information had been improperly ignored or overlooked by the appeals referee, and the decision of the appeals referee was supported by competent substantial evidence. As a result, the court found that the Commission had improperly reweighed the evidence in overturning the appeals referee's order.⁴⁷⁸

In *Freeze v. Department of Business Regulation*,⁴⁷⁹ a final order by the Department of Business Regulation, revoking an alcoholic beverage license, was reviewed by the court. The court noted that the Department of Business Regulation had "no authority to reject the find-

the circumstance that the hearing officer found present in this case. *See id.*

475. 566 So. 2d 932 (Fla. 3d Dist. Ct. App. 1990).

476. *Id.* at 933 (quoting *Uniweld Prod., Inc. v. Industrial Relations Comm'n.*, 277 So. 2d 827, 829 (Fla. 4th Dist. Ct. App. 1973)).

477. *Id.* at 933.

478. *Id.* at 934.

479. 556 So. 2d 1204 (Fla. 5th Dist. Ct. App. 1990).

ings of fact of the hearing officer which were supported by competent, substantial evidence. Factual issues susceptible of ordinary methods of proof that [were] not infused with policy considerations . . . [were] the prerogative of the hearing officer as finder of fact."⁴⁸⁰ An administrative agency errs when it rejects "the hearing officer's findings of fact and . . . substitut[es] its own where there was conflicting evidence, or sufficient evidence to support the hearing officer's findings. An agency may not reject the hearing officer's findings unless there is *no* competent, substantial evidence from which the finding could reasonably be inferred."⁴⁸¹

The court reviewed the evidence concerning whether smoking pot⁴⁸² on the porch of the establishment occurred, and affirmed the hearing officer's findings of fact on this issue, stating that the Department of Business Regulation had properly relied on it in its final order. As to the other factual findings, the court merely asserted that the Department of Professional Regulation improperly rejected the hearing officer's findings, because it did so based upon credibility of the testimony offered. In doing so, the Department exceeded its review authority and improperly substituted its judgment for that of the hearing officer.⁴⁸³ While these errors required the court to remand the case, the court clearly indicated that the same penalty may be imposed for the "pot smoking" incident.⁴⁸⁴

480. *Id.* at 1205 (citations omitted).

481. *Id.* (emphasis in original).

482. Also known as marijuana.

483. *Freeze*, 556 So. 2d at 1206.

484. *Id.* Judge Gershon, in his dissent, argued that there was insufficient evidence to prove that the owners of the establishment had notice of illegal drug transactions, or that consumption of illegal drugs was occurring on the premises, because there was no evidence that either of the owners were present at the time these transactions occurred, or that their employees were aware of these illegal transactions. *Id.* Further, the Department of Business Regulation erred in disagreeing with the hearing officer's findings that the owners were incapable of determining whether marijuana was being used on the premises, and that the owners had taken adequate steps to diligently police the possibility of such use. "Clearly, the Department rejected the hearing officer's findings and substituted its own findings based upon its re-evaluation of the evidence. Just as clearly, the Department had no authority to reject the hearing officer's finding of fact because the findings are supported by competent, substantial evidence." *Id.* at 1207. Judge Gershon concluded by stating that the Department of Business Regulation erred in substituting its judgment on these factual issues, and that the case should be remanded with instructions to reinstate the alcoholic beverage license of these individuals. *Id.*

In *Greseth v. Department of Health and Rehabilitative Services*,⁴⁸⁵ an employee of the Department of Health and Rehabilitative Services was suspended for "willful violation of rules, regulations, or policies of the Department."⁴⁸⁶ The hearing officer found that Greseth was the only investigator in her unit which was supposed to have three investigators, and that she was overworked in terms of her case assignments.

In the case of L.Y.'s report, Greseth relied on the initial report from the hospital, after it had been confirmed by L.Y.'s grandmother that the baby would not be released for at least two weeks. Therefore, from the information available to Greseth, the baby was not in immediate danger. Greseth intended to contact the hospital to verify the information on January 9, but became ill and was out of work for a week.⁴⁸⁷

The Department of Health and Rehabilitative Services policies required their investigators to contact the mother of the child within twenty-four hours of the abuse report, or to initiate an out-of-town inquiry if the parties involved in the abuse report were not in the vicinity. Greseth was also required by Department policy "to contact the hospital and clarify the abuse report during her initial investigation."⁴⁸⁸ "The hearing officer concluded that Greseth did not wilfully violate policies because she was assigned, with the Department's knowledge, to more cases than she could physically handle."⁴⁸⁹ The hearing officer

485. 573 So. 2d 1004 (Fla. 4th Dist. Ct. App. 1991).

486. *Id.* at 1005. Greseth was assigned a neglect child report for investigation. The concern was that the child was being medically neglected by its parents. The child's grandmother contacted Greseth and informed her that when the child was released from the hospital, both the mother and baby would live at the grandmother's residence. The grandmother further reported that the child would not be released from the hospital for some time. Greseth reported these facts to her supervisor and asked for advice on how to proceed. The supervisor did not respond to her inquiry, and soon thereafter, Greseth became ill and was absent from her job for a period of nine days. During this time, the supervisor failed to review her files or in any way take steps to provide for further investigation of her files during her absence. Upon returning to work, Greseth soon learned that baby L.Y. had been released from the hospital the day before she had become extremely ill. The baby subsequently died, and the death was considered "unrelated to any action or inaction on Greseth's part, or for that matter, as a result from any neglect on the part of the mother." *Id.* at 1005-06.

487. *Id.* at 1006.

488. *Id.*

489. *Id.*

further found that Greseth had acted appropriately, based upon the information she had available, in determining that the case of L.Y. was low priority because of the fact that the child was hospitalized, and that she did not act negligently in reaching such a decision.

The Department of Health and Rehabilitative Services accepted the hearing officer's findings of fact, but concluded that Greseth had actually acted either negligently or willfully in violating these policies by not making "a few phone calls which it claimed would have satisfied [the] regulations."⁴⁹⁰ The Department remanded the case to the hearing officer for consideration of mitigating circumstances. The hearing officer again noted that there was insufficient evidence that Greseth had acted either willfully or negligently in violating the Department's policy, given her case load, the need to prioritize the cases, and the lack of her supervisor's assistance, and recommended that Greseth receive the lightest suspension possible.

Greseth argued that the Public Employees Relation Commission acted improperly in agreeing with the Department of Health and Rehabilitative Services that her conduct constituted negligent or willful violation of Department policy. "An administrative agency may not reject the hearing officer's findings unless there is no competent, substantial evidence from which the finding could reasonably be inferred."⁴⁹¹ The court noted that decisions concerning whether negligent or willful misconduct had occurred are findings of fact traditionally within the scope of a hearing officer's discretion, absent a showing that there was a lack of competent and substantial evidence to support them. The administrative agency may not simply reweigh the evidence and reach contrary conclusions where the record does provide competent and substantial evidence to support the hearing officer's findings on these two issues.⁴⁹²

The court held that the administrative agency could not avoid this limitation on the scope of its authority to overturn the hearing officer's recommended order by merely labeling its contrary findings of fact as conclusions of law. "Substituted factfinding, thinly disguised as a conclusion of law, is wholly improper."⁴⁹³ There was no indication that the Public Employees Relation Commission was making a decision "in an

490. *Greseth*, 573 So. 2d at 1006.

491. *Id.*

492. *Id.* (citing *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st Dist. Ct. App. 1985)).

493. *Id.* at 1006-07.

area of special expertise, and therefore [the court] need not defer to . . . its special knowledge."⁴⁹⁴ The record amply supported the hearing officer's finding that Greseth did not engage in negligent or willful conduct given the case load that she was assigned, lack of support from her supervisor, and her unexpected illness. The court reversed and remanded the case to the Public Employee Relation Commission so that it could enter an order "vacating her suspension and granting her lost wages, attorney's fees, and expenses as a result of the proceeding below."⁴⁹⁵

*Smith v. Department of Health and Rehabilitative Services*⁴⁹⁶ concerned the appeal of a final order issued by the Public Employees Relation Commission which accepted the decision by the Department of Health and Rehabilitative Services to suspend the employee for twenty days, even though the hearing officer had found that no penalty should be imposed in the case. The hearing officer had issued a recommended order finding that the Department of Health and Rehabilitative Services had failed to prove that Smith was negligent in carrying out her duties.⁴⁹⁷ The Public Employees Relations Commission accepted the hearing officer's findings of fact, but disagreed with the hearing officer's inference that such facts demonstrated non-negligence on Smith's part. The court found that while it may have been a close case, the inferences reached by the hearing officer were reasonable. Where reasonable people may differ over the issue of what inferences should be drawn, then the Public Employees Relation Commission must affirm the decision of the hearing officer. In such cases, the findings of the hearing officer are considered supported by competent and substantial evidence.⁴⁹⁸

While on most occasions the restrictions on administrative discretion found in section 120.57(1)(b)10 are violated by administrative agencies improperly overturning factual findings made by hearing officers, in a few cases, administrative agencies erred in refusing to overturn the factual findings of a hearing officer when it was appropriate to do so.⁴⁹⁹ *Department of Professional Regulation v. Wise*⁵⁰⁰ concerned

494. *Greseth*, 573 So. 2d at 1007.

495. *Id.*

496. 555 So. 2d 1254 (Fla. 3d Dist. Ct. App. 1989).

497. *Id.* The Department of Health and Rehabilitative Services found that Smith had failed to make arrangements for children so that they would not have to spend the night in the screening area of the Dade County Juvenile Detention Center.

498. *Id.* at 1256.

499. *Cf. Health Care & Retirement Corp. of Am. v. Department of Health &*

the appeal of a final order by the Board of Medicine which dismissed disciplinary complaints against Dr. Wise. The Board specifically relied on factual findings made by the hearing officer. The complaint against Dr. Wise alleged that he had influenced several female patients to have sexual relations with him. Dr. Wise maintained that these events had never occurred.

At the hearing, five former patients testified on how Dr. Wise had influenced them to have sexual relations with him. Over the objection of the Department of Professional Regulation, the hearing officer permitted Dr. Wise to offer evidence concerning the entire sexual history of each witness. The hearing officer ultimately concluded in his recommended order that "the testimony of the former patients was not clearly convincing,"⁵⁰¹ and recommended that no disciplinary action be taken against Dr. Wise. The hearing officer offered no explanation as to why the testimony of the former patients did not constitute clear and convincing evidence.

After an initial review of the hearing officer's recommended order, the Board of Medicine remanded the case to the Division of Administrative Hearings for reconsideration in light of whether the sexual history of the patients should have been admitted. On remand, the same hearing officer concluded that the evidence of sexual history was relevant as to credibility, and explained why, in light of this information, he found that the former patients did not present credible clear and convincing evidence of misconduct by Dr. Wise. The Board of Medicine again reviewed the officer's recommended order, and concluded that the findings of fact were, in part, based upon what it considered to be inadmissible evidence. However, in light of the Division of Administrative Hearings' position, it concluded that it had no choice but to accept the hearing officer's recommended order, and dismissed the complaint.

In *Wise*, the court held that admission of the sexual history evidence was reversible error.⁵⁰² The court found that the testimony con-

Rehabilitative Servs., 559 So. 2d 665, 667 (Fla. 1st Dist. Ct. App. 1990) (noting that a record may not provide competent, substantial evidence to support a hearing officer's factual findings when he misread the application being reviewed).

500. 575 So 2d 713 (Fla. 1st Dist. Ct. App. 1991).

501. *Id.* at 714.

502. The Department of Professional Regulation also argued that the determination of admissibility of evidence was a question of law which, under the APA, was left to the administrative agency. The Board of Medicine was correct in its initial review of the hearing officer's decision, and in remanding the case to the Department of Admin-

cerning the sexual history of the patients was irrelevant and did not bear on their credibility.⁵⁰³ The court noted that "evidence of a witness' relationship with a person other than the accused, standing alone, ha[d] no probative value in the credibility determination."⁵⁰⁴ The only time that sexual history would be relevant in determining the credibility of a witness was when the defendant claimed that it explained the witness' motive for testifying falsely against him. Because the sexual histories in this case did not concern sexual relationships with Dr. Wise, they were not relevant to any claim that the witnesses were motivated to testify falsely against him. The sexual relationships related in these histories were completely unrelated to those which occurred with

Administrative Hearings for the exclusion of what it viewed as irrelevant testimony, because the Board of Medicine was acting within the scope of its delegated authority and not interfering with the factual finding process by the hearing officer. When the case was remanded to the Division of Administrative Hearings, the Division erred in refusing to comply with the direction from the Board of Medicine concerning the admissibility of the irrelevant sexual history evidence. *Id.* at 716-17. The court refused to address this issue because it was moot given its resolution of the admissibility issue. The court noted it would have been a different case if the Department had petitioned the court for a writ of mandamus when the Division of Administrative Hearings refused to comply with its request on remand. *Id.* at 717.

However, the position of the Department of Professional Regulation on this issue was not sound for three reasons. First, the hearing officers are generally the triers of fact, and if anybody in the APA administrative process has expertise on admissibility questions, it would be the hearing officers who deal with these issues on a day-to-day basis, not the administrative agencies performing their review function prior to issuing final orders. *See* FLA. STAT. § 120.65(4) (1989) (requiring hearing officers to be experienced members of the Florida Bar); FLA. STAT. § 120.58 (1989) (hearing shall be conducted by the presiding officer, in most cases a hearing officer). Second, if administrative agencies do have the authority to overrule the decisions of hearing officers on admissibility questions, then their role as the initial finders of fact would be substantially undermined, and potentially, the APA preference for using initial fact finders who are independent of the administrative agencies would be functionally destroyed. *See* FLA. STAT. § 120.57(1)(a) (1989). Third, it would become another device for administrative agencies to use in attempting to avoid the limited scope of their discretion to reject the factual findings of hearing officers. FLA. STAT. § 120.57(1)(b)(10) (1989).

503. The court rejected the Department of Professional Regulation's position that the rape shield statute prohibited admission of evidence concerning the patient's sexual history. FLA. STAT. § 794.022 (1989). The court noted that the rape shield statute was designed to reach only prosecutions under the criminal statutes. FLA. STAT. § 794.011 (1989). Because this was not a criminal prosecution for sexual battery, the rape shield statute was not applicable to this administrative hearing which concerned whether Wise should be disciplined by the Board of Medicine. *Wise*, 575 So. 2d at 715.

504. *Wise*, 575 So. 2d at 715.

Dr. Wise.⁵⁰⁵ It was therefore error for the hearing office to admit this irrelevant evidence in such a case,⁵⁰⁶ and the court ordered the case remanded to the Board of Medicine.⁵⁰⁷

505. *Id.* The court noted that the Department of Professional Regulation agreed by stipulation to the admission of medical records which did contain information concerning the sexual histories of the witnesses for purposes of proving that they were Dr. Wise's patients. This did not in any way waive the Department of Professional Regulation's objection to the use of these medical histories in trying to impeach the credibility of the patients. The court also noted that the medical records did not contain much of the information which was brought out at the hearing, and therefore the records could not be said to have been the source of most or even the majority of the objectionable testimony. *Id.*

506. The court went on to note that just because irrelevant testimony had been permitted in the hearing, reversal of the Board of Medicine's decision is not necessarily justified. "Where unfairness has not otherwise infected the fact-finding process, findings which are founded solely upon evidence which is competent and substantial will not be disturbed on appeal." *Id.*; FLA. STAT. § 120.68(8) (1989). It was clear in this case that the irrelevant testimony concerning the witnesses' sexual history played a critical role in the hearing officer's determination of their credibility. This precluded the court from being able to determine whether there was competent, substantial evidence supporting the hearing officer's findings independent of the irrelevant testimony. "Under these circumstances, we cannot say with any certainty that the improper admission of irrelevant evidence did not impair the fairness or correctness of the fact-finding process. We, therefore, determine that remand for clarification of the recommended findings is required." *Wise*, 575 So. 2d at 716. The court also noted that the Board of Medicine, given the status of the record with the irrelevant testimony playing what was apparently a key role, was also precluded from finding whether the hearing officer's determinations were supported by competent, substantial evidence. *Id.*

507. The court remanded, with directions that the Board further remand the case to the hearing officer. The hearing officer shall review the record from the hearing previously held before him and enter a new recommended order, either on the record before him, taking into account only the legally relevant evidence previously admitted, or he may, at his option, consider additional evidence in deciding the issue. We direct that the new recommended order shall set forth a concise and explicit statement of the underlying facts of record supporting the findings of fact.

Id. at 717. The court also found that the Department of Professional Regulation was correct in arguing that the factual finding by the hearing officer that "the testimony of L.H. was no more persuasive in this case than it was before the psychiatric society, was not supported by competent substantial evidence." *Id.*

Judge Ervin, in his concurring opinion, noted that the court should have resolved the question of whether the Board of Medicine had the power, on the initial remand, to direct the Division of Administrative Hearings that it not consider certain evidence which it had concluded was irrelevant. *Id.* at 717-18. Normally, an administrative agency may:

Perhaps the most controversial APA restriction on administrative agency authority to overturn a hearing officer's conclusions concerns recommended penalties.⁵⁰⁸ The restriction "generally denies . . . [an administrative] agency authority to vary the penalty once it accepts the hearing officer's factual conclusions as supported by substantial competent evidence."⁵⁰⁹

In *Bradley v. Criminal Justice Standards and Training Commission*,⁵¹⁰ after an administrative hearing, the hearing officer recommended that Bradley, a certified correctional officer, receive a six month suspension of his certificate. The Criminal Justice Standards and Training Commission rejected this recommended penalty, and revoked Bradley's correctional officer certificate. The Commission offered

adopt the recommended order as its final order, or the agency, in its final order may reject or modify the recommended conclusions of law, but only if it determines from the record and states with particularity that the findings were either not based on competent, substantial evidence, or that the proceeding in which the findings were based did not comply with the essential requirements of law.

Wise, 575 So. 2d at 718. Judge Ervin indicated that absent a showing of prejudice on the part of the hearing officer, it was not appropriate for administrative agency to remand a case for a new hearing or reevaluation of the record by another hearing officer.

However, Judge Ervin noted that nothing in this scheme precluded the Board of Medicine from remanding to the hearing officer for clarification of the recommended order, if it determined that it was unable to, based upon the original recommended order, determine whether there were erroneous conclusions of law or whether the record adequately supported the findings of fact by the hearing officer. Judge Ervin noted that there was no specific statutory authorization for this clarification remand, but he believed that it was a reasonable inference to be drawn from section 120.57(1)(B)10 and section 120.59(2) of the APA. *Id.* This was so because without the remand, the Board would have been unable to determine "whether the recommended order would have been entered without such evidence, could hardly be expected to comply with its statutory obligation either to adopt, reject, or modify the submitted findings of fact, or to recite its final order explicit and concise statements of underlying facts of record in support of its findings." *Id.* at 718-19. He noted "that [administrative] agencies have the same authority as appellate courts to remand for clarification in circumstances where it is uncertain whether a finder of fact would have reached the same result if the evidence which the finder of fact incorrectly admitted had not been received." *Id.* at 719. The Board of Medicine was correct in remanding the case for clarification.

508. "The [administrative] agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action." FLA. STAT. § 120.57(1)(b)(10) (1989).

509. *Burriss III*, *supra* note 4, at 629.

510. 577 So. 2d 638 (Fla. 1st Dist. Ct. App. 1991) (motion for certification).

no new grounds or policy reasons for why it rejected the hearing officer's recommended penalty. In fact, the Commission's decision was based solely on the factors specifically considered by the hearing officer.

The court found that this was a classic case of the administrative agency imposing a higher penalty by substituting its judgment for that of the hearing officer. The only basis for the substitution of judgment offered by the Commission was that it simply disagreed with the hearing officer's assessment of the seriousness of the offense committed by corrections officer Bradley. Under the APA "[a]n [administrative] agency should not reject the recommended penalty without properly rejecting, amending, or substituting at least one recommended finding of fact or conclusion of law."⁵¹¹ The Commission thus violated this dictate by enhancing the penalty in this case.⁵¹²

*Bajrangi v. Department of Business Regulation*⁵¹³ also concerned the validity of a punishment imposed in a final administrative order. Bajrangi was charged by the Department of Business Regulation with having sold an alcoholic beverage to an underage individual without first requesting identification. The Department issued a notice of violation, and requested that Bajrangi "show cause why his license should not be suspended or revoked."⁵¹⁴ After a formal administrative hearing, "[t]he hearing officer . . . found as fact that[,] '[t]he usual penalty for a licensee selling to an underage person is [a] \$1,000 civil penalty accompanied by a [twenty] day license suspension.'"⁵¹⁵ However, in the section of the hearing officer's recommended order concerning conclusions of law, he found that there were no rules promulgated concerning appropriate penalties for a first offense violation. Lacking such rules or guidelines from the administrative agency, the hearing officer concluded that a twenty day suspension and \$1,000 fine were inappropriate for a first offense, and not supported by any evidence or argument. The hearing officer instead recommended a penalty consisting of a three day

511. *Id.* at 639.

512. The court acknowledged that this decision was in conflict with *Allen v. School Board* where the Third District Court of Appeal approved of an administrative agency imposing a penalty beyond that imposed by the hearing officer, even though the agency had fully adopted the hearing officer's findings of fact and conclusions of law. 571 So. 2d 568 (Fla. 3d Dist. Ct. App. 1990). The court certified the question to the Florida Supreme Court, noting that its decision and that of the Fifth District Court of Appeal conflicted with the decision in *Allen. Bradley*, 577 So. 2d at 639.

513. 561 So. 2d 410 (Fla. 5th Dist. Ct. App. 1990).

514. *Id.* at 411.

515. *Id.* at 412.

license suspension and a \$1,000 fine.⁵¹⁶

The final order entered by the Division of Alcoholic Beverages and Tobacco adopted the decision of the hearing officer, except that it found a three day license suspension inappropriate, and it imposed the twenty day suspension originally suggested. The Division characterized the hearing officer's conclusion concerning the appropriate number of days for license suspension as a conclusion of law. The Division found in fact that there were penalty guidelines in existence, and pointed to the Ramey's testimony asserting that the appropriate penalty for a first time offense was a twenty day suspension and \$1,000 fine.⁵¹⁷

Since 1984, the APA has provided that an administrative agency "may no longer reduce or increase a recommended penalty without a review of the complete record *and* without stating with particularity its reasons in the order, by citing to the record 'in justifying the action.'" ⁵¹⁸ Thus, the court read the decision by the supreme court in *Department of Professional Regulation v. Bernal*⁵¹⁹ as merely reaffirming that the APA required an administrative agency to state on the record valid reasons for disregarding the recommended penalty contained in the hearing officer's recommended order. The decision in *Bernal* did not indicate when an administrative agency's "rationale for increasing a penalty [was] 'legally insufficient' or 'valid' and there is some disagreement concerning the circumstances in which an appellate court should invalidate agency orders that alter penalties recommended by hearing officers."⁵²⁰ In this case, it appeared that the Division of Alcoholic Beverages and Tobacco and the hearing officer "simply disagree[d] about the appropriate penalty for the . . . single act of sale of a beer to a minor."⁵²¹ Such disagreement did not fall within the area where an administrative agency's expertise can be used to justify imposing an enhanced penalty. Any other scheme would threaten the independence of the hearing officer, which the APA envisioned.⁵²²

516. *Id.*

517. *Id.* at 411-12.

518. *Bajrangi*, 561 So. 2d at 413 (emphasis in original).

519. 531 So. 2d 967 (Fla. 1988).

520. *Bajrangi*, 561 So. 2d at 414; *Department of Professional Regulation v. Bernal*, 531 So. 2d 967 (Fla. 1988).

521. 561 So. 2d at 415.

522. The APA makes clear that:

[T]he virtue of neutrality is greater than the virtue of expertise. Given that the hearing officer and the agency should always be working from the same record, the circumstances under which the agency would be justified

Both *Bradley* and *Bajrangi* demonstrated continued approval of a two track approach to an administrative agency overturning recommended penalties. To overturn the recommendations, the administrative agency can state the particular reasons for rejecting it and cite to support in the record for its position, or the agency can claim it is a policy matter within the agency's expertise. The former is an approach which parallels that adopted for rejecting factual findings by a hearing officer. An administrative agency can review the complete record and state with particularity its reasons for deviating from the hearing officer's recommended penalty. However, if the agency merely disagrees with the assessment of the seriousness of the offense by the hearing officer in a particular case, then it is not an adequate justification for rejecting the hearing officer's recommended penalties.

The latter approach closely resembles a non-rule policy in that it permits a general claim of expertise to establish a policy which justifies imposing a penalty not recommended by the hearing officer. The danger posed by this approach is three fold:

First, it opens the door for [administrative] agencies to rejecting recommended penalties as long as they used the magic words 'general policy disagreement' to characterize why they rejected the recommended penalty of the hearing officer. This may be permitted even though the nature of the penalty to be imposed in a case is generally a fact specific determination. Second, it invites a general abuse of the law/fact dichotomy by approving of the characterization of what in most cases is a factual issue as a legal or policy matter.⁵²³

Third, it permits an administrative agency to avoid providing adequate explanation and documentation of a nonrule policy governing the nature of penalties to be imposed for certain administrative offenses.⁵²⁴

While an administrative agency's discretion to reject a hearing officer's findings of fact is limited, no such constraint is imposed on its discretion regarding findings concerning questions of law. In *Ritenour*

in substituting its judgment concerning the appropriate penalty for that of the hearing officer should not arise except where one or more of the hearing officer's recommended findings of fact and conclusions of law are properly rejected, substituted or amended by the [administrative] agency.

Id.

523. *Burris III*, *supra* note 4, at 632-33.

524. *See supra* notes 258-309 and accompanying text.

v. Unemployment Appeals Commission,⁵²⁵ a referee, after hearing extensive testimony, concluded that the employee had not voluntarily left her employment, but rather, had been forced out for good cause due to the irrational if not abusive treatment.⁵²⁶ The Unemployment Appeals Commission reversed the appeals referee, holding that given the facts of the case, the good cause legal standard had not been met.⁵²⁷

The court stated that the appeals referee was the trier of fact in unemployment compensation cases. It was thus the duty of the appeals referee to weigh and reject conflicting evidence. On this basis, questions of whether a person left his or her employment voluntarily clearly were questions of fact, including whether a person left for good cause. However, before questions of fact can be properly addressed, the appeals referee must correctly understand the legal standard of good cause. This focuses on the question of whether the circumstances "would impel the average, able-bodied, qualified worker to give up his employment."⁵²⁸ Thus, the court stated:

While the appeals referee found that a good cause to terminate existed because of the employer's irrational or abusive conduct, there was no finding (except perhaps by inference) that this irrational, abusive conduct would cause the average, able-bodied, qualified worker to quit his or her employment.⁵²⁹

It was this very question of what the average person would do in response to the conduct of the employer which caused the Unemployment Appeals Commission to reverse the findings of the appeals referee. This was considered a legal error by the appeals referee. Under the APA, it is clearly permissible for an administrative agency to overturn an erroneous legal interpretation adopted by an appeals referee or hearing officer.⁵³⁰ "The commission in this case, basing its decision on the appeals referee's facts, concluded that the appeals referee's conclusion of law was erroneous. The legislature had given the Commission that authority."⁵³¹

525. 570 So. 2d 1106 (Fla. 5th Dist. Ct. App. 1990).

526. *Id.* at 1107.

527. *Id.*

528. *Id.*

529. *Id.*

530. FLA. STAT. § 120.57(1)(b)(10) (1989).

531. *Ritenour*, 570 So. 2d at 1108.

*Harloff v. City of Sarasota*⁵³² concerned an appeal of a final order of the Southwest Florida Water Management District which granted Harloff a consumptive use permit for water allowances which were substantially less than the amounts he had requested.⁵³³ The District accepted the factual findings of the hearing officer,⁵³⁴ but rejected the hearing officer's legal conclusions and adopted those which had been advocated by its staff.⁵³⁵

The issue before the hearing officer was whether the District had properly determined the extent to which Harloff should have been permitted to withdraw water in order to safeguard the interest of the City of Sarasota which had a pre-existing water use permit.⁵³⁶ Chapter 373 of the Florida Statutes required that an applicant for a water use permit demonstrate the following: 1) that the use must be a reasonable and beneficial one; 2) that granting the application will not interfere with any pre-existing permitted water use; and 3) that granting the permit would be consistent with the public interest.⁵³⁷ Everyone in-

532. 575 So. 2d 1324 (Fla. 2d Dist. Ct. App. 1991).

533. *Id.* at 1328.

534. The hearing officer found that the City of Sarasota had maintained a wellfield since 1966 adjacent to Harloff's farm land. Until January 1991, the wellfield was permitted by the Southwest Florida Water Management District to withdraw between six and seven million gallons per day. *Id.* at 1325-26. Since 1966, the water table at the wellfield site had been substantially lowered. By 1989, the water table dropped to such an extent that the wellfield could not pump the maximum number of gallons per day authorized by District. This threatened the continued viability of the wellfield until steps were taken to adequately preserve the water table level in the future.

Harloff used a semi-closed ditch irrigation system in order to water his 8,500 acres of farm land. A drip irrigation system, which would have been more expensive to operate, would have resulted in substantial water savings, but the officer made no finding as to whether it was economically feasible for Harloff to adopt this system. Harloff requested that District grant him a permit authorizing him to withdraw 26 million gallons per day as a seasonal average and 32 million gallons per day as a seasonal daily maximum with 15 million gallons per day as an annual average. The District granted him 15.6 million gallons per day as a seasonal average, 21 million gallons per day as a daily maximum, and 11.1 million gallons per day as an annual average. The District's staff had specifically found that the Harloff's withdrawal of water would effect the continuing viability of the wellfield for the City of Sarasota. *Id.* at 1326.

535. The staff recommendations were specifically rejected by the hearing officer.

536. *Harloff*, 575 So. 2d at 1326.

537. See FLA. STAT. § 373.019(4) (1989) (A "reasonable-beneficial use" means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."); FLA. STAT. § 373.223 (1989).

volved agreed that Harloff's agricultural enterprise was a reasonable and beneficial use. However, the City of Sarasota contested whether the request was consistent with the City's existing permit for water use.⁵³⁸ The City also alleged that any threat to the City's existing water use posed by Harloff's request would be inconsistent with the public interest.⁵³⁹

The hearing officer concluded that if Harloff's request for water consumption was granted, substantial damage to the functional ability of the City's wellfield would result. Despite this factual finding, "the hearing officer recommended that Mr. Harloff receive a consumptive use permit for the entire allowance of water that he had requested."⁵⁴⁰ The District rejected this legal conclusion based upon the findings of fact, and ruled that Harloff had failed to establish that his requested consumptive use would not interfere with any existing permitted water use, and that the requested use was not inconsistent with the public interest.

The court "affirm[ed] the decision because the District's board was free to substitute its own legal conclusions for those of the hearing officer, so long as competent substantial evidence supported the substituted legal conclusions."⁵⁴¹ The final order of the District essentially required that Harloff substantially curtail his agricultural activities, or alter those activities, in order to provide adequate protection to the wellfield permitted for water supply to the City of Sarasota.⁵⁴² The court found that the District failed to point to or explain what legal error was committed by the hearing officer.

Nonetheless, the court concluded "[o]n full review of the record, however, we are convinced that the District correctly found errors of law in the hearing officer's proposal and that the District's final order [was] supported by competent, substantial evidence."⁵⁴³ The court reasoned that while an administrative agency may be required to adequately explain its reasons with particularity concerning any rejection of a proposed penalty, there was no such requirement when an agency rejected a conclusion of law that did not involve the imposition of any

538. *Harloff*, 575 So. 2d at 1326-27.

539. *Id.* at 1327.

540. *Id.*

541. *Id.* at 1325.

542. *Id.*

543. *Harloff*, 575 So. 2d at 1327.

penalty.⁵⁴⁴ The court noted that the District had been granted broad powers by the legislature to implement the water management plan for that area. An essential element in the exercise of those powers was that they be carried out in a logical and consistent fashion.

If the legal interpretation of these policies were left to various hearing officers, the concepts would inevitably receive different meanings before different hearing officers. Because agency boards are charged with the responsibility of enforcing the statutes which govern their area of regulation, courts give great weight to their interpretation of those statutes.⁵⁴⁵

Thus, determinations of what constitutes a reasonable and beneficial use, an interference with existing permanent water use, or what is in the public interest are matters which involve important policy questions. It would be impossible to maintain consistent policies if individual hearing officers were allowed to exercise their discretion in interpreting the legal concepts and their meaning.⁵⁴⁶ The court noted that such decisions involved both questions of law and fact. However, the court determined that “[a]n agency’s decision on such a mixed question is entitled to ‘increased weight when it is infused by policy considerations for which the agency has special responsibility.’”⁵⁴⁷ The court concluded that the District, in reaching its decision, concerning the scope of permitted water use that Harloff was entitled to, engaged in an interpretation of the statute, not a substitution of its judgment concerning factual matters.⁵⁴⁸

The court went on to note that the hearing officer made two errors in interpreting the scope of the law:

First, the hearing officer’s recommended order appears to place the burden of proof on the City or the District staff to establish that Mr. Harloff’s requested permit would interfere with the water supply at the . . . wellfield. The statute, however, clearly places the burden on Mr. Harloff to prove that his request would *not* interfere.⁵⁴⁹

544. *Id.*; FLA. STAT. § 120.57(1)(b)10 (1989).

545. *Harloff*, 575 So. 2d at 1327.

546. *Id.*

547. *Id.* at 1328 (quoting *Santaniello v. Department of Professional Regulation*, 432 So. 2d 84, 85 (Fla. 2d Dist. Ct. App. 1983)).

548. *Id.*

549. *Id.*

In light of this allocation of the burden of proof, Harloff failed to demonstrate that his requested permit use would not substantially interfere with the continued viability of the wellfield and the City of Sarasota's preexisting use permit.⁵⁵⁰ While the court did not explicitly find, it clearly indicated that Harloff had failed to carry his burden of persuasion on this point.

Second, the hearing officer erred in concluding that the City of Sarasota should take steps to improve the ability of a wellfield to retrieve water from the lowered water table. This may well have been an issue if the City of Sarasota's permit for use of the wellfield was before the District, but it was not an issue when considering Harloff's request for a water use permit. The statute made it clear that the City's prior permit for water use was entitled to non-interference in its current condition, and that the hearing officer erred in imposing any additional burden on the City to modify the wellfield in order to permit Mr. Harloff to use water at the level he requested.⁵⁵¹

C. *Deferential Judicial Review of Factual Issues*

The competent and substantial evidence standard of judicial review for factual determinations made by administrative agencies⁵⁵² is designed to restrain reviewing courts from reweighing the evidence and substituting their judgment for that of the administrative agency on factual issues.⁵⁵³ "[C]ourts will not review conflicting evidence, or

550. *Harloff*, 575 So. 2d at 1328.

551. *Id.*

552. The competent and substantial evidence standard of judicial review does not apply in every case. It is limited to those records developed in hearings which meet the requirements of section 120.57. FLA. STAT. § 120.68(10) (1989). If the record of the administrative hearing is destroyed, then generally the appropriate remedy is to vacate the order and remand to the agency for a de novo hearing. *Gay v. Department of State*, 550 So. 2d 137, 138 (Fla. 1st Dist. Ct. App. 1989) (per curiam).

553. *See, e.g., Department of General Serv. v. English*, 534 So. 2d 726, 728 (Fla. 1st Dist. Ct. App. 1988) (courts are prohibited from making credibility judgments or substituting their own judgment for that of the administrative agency, hearing officer, or referee). The prohibition against reweighing of the evidence also applies when there has been no administrative agency hearing. In such a case, the reviewing court may order an administrative agency to conduct a "factfinding proceeding under this act" in order to resolve disputed factual issues necessary to determining whether an administrative agency's action in the case was valid. FLA. STAT. § 120.68(6) (1989). After an administrative agency has made the necessary factual findings, the reviewing court is restricted to setting aside, modifying, or ordering agency action when "the facts compel

make any determination with respect to the weight of the evidence, as these are usually matters for administrative agency determination."⁵⁵⁴ This is a very deferential standard of judicial review which generally requires courts to construe the record in the light most favorable to the administrative agency decision.⁵⁵⁵ Also, the courts will not permit parties, during the judicial review process, to supply facts not found in the administrative record.⁵⁵⁶ In *Hillsborough County School Board v. Williams*,⁵⁵⁷ the court noted that a disputed factual issue which was not resolved at the hearing may not be "supplied at the appellate level."⁵⁵⁸ In such a case, the reviewing court must remand the case to the administrative agency for a determination of the disputed factual issue.⁵⁵⁹

The burden is on the party attacking the agency's factual determinations to demonstrate that these determinations are not supported by competent substantial evidence in the record.⁵⁶⁰ This burden cannot be

a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility." FLA. STAT. § 120.68(11) (1989). Because this standard of judicial review appears to foreclose any judicial overturning of the factual determinations made by an administrative agency, it is even more of a deferential standard of review than that imposed on the court under the competent and substantial evidence standard. While this approach is both time consuming and in some cases wastes the limited resources of administrative agencies and the courts, it does insure that an administrative agency has made the initial factual determinations and that the reviewing court is not free to reject the administrative agency's factual determinations or independently evaluate the record to reach its own factual conclusions.

554. *Rolling Oaks Utils. v. Public Serv. Comm'n*, 533 So. 2d 770, 772 (Fla. 1st Dist. Ct. App. 1988) (clarified on rehearing).

555. *See Faucher v. R.C.F. Developers*, 569 So. 2d 794, 797 (Fla. 1st Dist. Ct. App. 1990) (noting that in reviewing a record under the competent and substantial evidence standard of review, the evidence should be interpreted and construed in light of the whole record for the purpose of "find[ing] as much consistency as possible in the testimony of the various witnesses, and determine what irreconcilable conflicts remain in the evidence").

556. *Cf. Palm Beach Community College v. Department of Admin.*, 579 So. 2d 300, 302-03 (Fla. 4th Dist. Ct. App. 1991) (per curiam) (where parties to an administrative proceeding have agreed to a stipulated set of facts, then it was reversible error for the administrative agency to base the decision on new findings of facts).

557. 565 So. 2d 852 (Fla. 1st Dist. Ct. App. 1990).

558. *Id.* at 854.

559. *See Schultz v. Mr. Donut of Am.*, 564 So. 2d 236, 238 (Fla. 1st Dist. Ct. App. 1990).

560. Administrative "[a]gency determinations may be set aside if the . . . court finds that the agency's conclusions are derived from findings of fact not supported by competent record evidence." *Health Care and Retirement Corp. of Am. v. Department*

met if the administrative record is not before the court, or if the administrative agency never resolved the disputed factual issue. In *City of Sarasota v. AFSCME Council 1979*,⁵⁶¹ the court noted that a party seeking judicial review of a decision by an administrative agency had the burden of providing the court with an appropriate record so that the judicial review process could go forward. When a party is seeking judicial review of an administrative order relating to an automatic stay, “[a]t a minimum . . . this court [should receive] . . . a copy of the final order, any pleadings regarding the stay and the lower tribunal’s order on the stay.”⁵⁶² Without a record for review, the court must affirm the administrative agency’s decision to deny the automatic stay, because it had no basis for determining that the decision was an abuse of discretion.⁵⁶³

Similarly, in *Rabren II*,⁵⁶⁴ the court noted that it was the duty of the Department of Professional Regulation, as the party seeking judicial review in this case on the issue of the appropriateness of the recommended penalty, to provide a transcript of the proceedings. Because it failed to do so both before the Board of Pilot Commissioners and also on appeal before the court, there was no basis for overturning the recommended penalty, because an administrative agency is prohibited from “deviating from the recommended penalty without reviewing the ‘complete record’”⁵⁶⁵ The failure to provide a transcript in such a circumstance cannot be characterized as harmless error, because there may well have been evidence in the record indicating whether these docking facilities should or should not have been characterized as independent ports within the Tampa Bay port area.⁵⁶⁶

The net result is that in most cases, the reviewing courts write opinions demonstrating how agency factual determinations were adequately supported by the record.⁵⁶⁷ For example, in *Manasota-88, Inc. v. Agrico Chemical Co.*,⁵⁶⁸ the court noted that the decision of the De-

of Health and Rehabilitative Serv., 559 So. 2d 665, 667 (Fla. 1st Dist. Ct. App. 1990); *Rolling Oaks Utils.*, 533 So. 2d at 772.

561. 563 So. 2d 830 (Fla. 1st Dist. Ct. App. 1990) (per curiam).

562. *Id.* at 830.

563. *Id.* at 830-31.

564. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990).

565. *Id.* at 1289-90; see FLA. STAT. § 120.57(1)(b)10 (1989).

566. *Rabren II*, 568 So. 2d at 1290.

567. See *Martin County Liquors v. Department of Business Regulation*, 574 So. 2d 170, 175 (Fla. 1st Dist. Ct. App. 1991).

568. 576 So. 2d 781 (Fla. 2d Dist. Ct. App. 1991).

partment of Environmental Regulation was supported by substantial competent evidence, and that it would not reweigh such evidence. Accordingly, no factual error was committed by the Department in this case.⁵⁶⁹

Also, *Citizens of Florida v. Wilson*,⁵⁷⁰ after extensively reviewing the testimony of the only witness before the Public Service Commission, the supreme court concluded that the record provided competent and substantial evidence in support of the Commission's decision concerning the facts, and that its order was not arbitrary as a matter of law. In doing so, the court reaffirmed that the competent and substantial evidence standard of review should be applied in reviewing the records of hearings before the Public Service Commission. This standard of judicial review prohibited the court from reevaluating or reweighing the evidence heard by the Commission. This prohibition was considered to extend to any inferences that should have been drawn from the testimony that the Commission heard during the course of the proceedings.⁵⁷¹

These cases, and others, do not imply that convincing a court to reject an administrative agency's findings of fact is an impossible task.⁵⁷² However, they do require a record that clearly demonstrates that the factual findings of the administrative agency were not supported by competent substantial evidence, which is a relatively rare circumstance.⁵⁷³

*Burd v. Division of Retirement*⁵⁷⁴ is a classic example of the type of record which will convince an appellate court to reject an administrative agency's findings of fact. In *Burd*, the court noted that it was appropriate for it to reverse and remand an administrative order when the fact finder overlooked unrefuted testimony on the central factual issue in the case. In such cases, there was no inappropriate substitution of judgment by the court on a factual issue, but rather an appropriate reversal, because the factual finding of the administrative agency was

569. *Id.* at 782-83.

570. 569 So. 2d 1268 (Fla. 1990).

571. *Id.* at 1270.

572. One of the best arguments is that the administrative agency improperly rejected the factual findings of the hearing officer. *See supra* notes 468-551 and accompanying text.

573. Far too often the courts are presented with arguments by counsel which essentially are requests for the courts to reweigh the evidence or reevaluate the credibility of witnesses.

574. 581 So. 2d 973 (Fla. 1st Dist. Ct. App. 1991).

not supported by competent substantial evidence.⁵⁷⁵

D. *Deferential Judicial Review of Questions of Law*

The power of an administrative agency to interpret a statute or rule could be viewed as an invasion of the core judicial function of interpreting the law.⁵⁷⁶ However logical this extreme position may be, it has never enjoyed much support.⁵⁷⁷ The principle is well settled "that administrative agencies are necessarily called upon to interpret statutes."⁵⁷⁸ Courts have gone even further; not only can an administrative agency interpret statutes, "agency determinations with regard to a statute's interpretation will receive great deference [from reviewing courts] in the absence of clear error or conflict with legislative intent."⁵⁷⁹

The . . . general rule is that agencies are to be accorded wide dis-

575. *See id.* at 974; *cf. Faucher v. R.C.F. Developers*, 569 So. 2d 794 (Fla. 1st Dist. Ct. App. 1990) In *Faucher*, the court noted that in order for the judge of compensation claims to reject the medical opinions offered by doctors who testified during the course of the hearing, an adequate demonstration on the record must be made that such opinions were based upon false or incomplete medical history given by the claimant to these doctors. In order to demonstrate this, the record must reflect that questions were addressed to the doctors "specifically inquiring about the effect of the false or admitted information on the doctor's previously expressed opinion." 569 So. 2d at 801. *But see id.* at 804 (Nimmons, J., dissenting).

576. Perhaps the most famous statement along these lines is found in *Marbury v. Madison*; "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

577. Rather, the position has been that the courts must always retain the power to determine whether the administrative agency acted within the scope of its delegated authority. *See supra* notes 38-81 and accompanying text; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

578. *Laborers' Int'l Union of N. Am., Local 478 v. Burroughs*, 541 So. 2d 1160, 1162 (Fla. 1989).

579. *E.g., Martin County Liquors v. Department of Business Regulation*, 574 So. 2d 170, 175 (Fla. 1st Dist. Ct. App. 1991); *Florida Sugar Cane League v. State*, 580 So. 2d 846, 851 (Fla. 1st Dist. Ct. App. 1991) ("We are disinclined to disturb their conclusions based on the established principle that [administrative] agency policy determinations should be accorded deference by a reviewing court."); *accord Chevron, U.S.A., Inc.*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

cretion in the exercise of their lawful rule making authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties. An agency's construction of the statute it administers is entitled to great weight and is not to be overturned unless *clearly erroneous*. [Moreover,] [t]he agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of *possible* interpretations.⁵⁸⁰

This approach generally results in the courts affirming agency interpretations of statutes.⁵⁸¹ Similarly, a court will defer to an administrative agency's interpretation of its rules "unless the interpretation is clearly erroneous."⁵⁸² The classic circumstance that will satisfy this standard of judicial review occurs when a court finds that an administrative agency's interpretation was "contrary to the plain and unequivocal language" of the statute or rule.⁵⁸³

E. *Nondeferential Judicial Review of Questions of Law*

Courts most often abandon the deferential approach of judicial review when it involves an administrative agency's interpretation of the law.⁵⁸⁴ During the survey period, the courts consistently held that two circumstances justified abandoning the usual deference given to administrative agency resolution of questions of law.⁵⁸⁵ First, if the adminis-

580. *Department of Professional Regulation v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st Dist. Ct. App. 1984) (citations omitted) (emphasis added).

581. *See* *Burriss III*, *supra* note 4, at 636-38. The degree of deference courts should extend to an administrative agency's interpretation of a statute has been much debated in both the federal and state courts. In *Chevron, U.S.A., Inc.*, 467 U.S. at 842-45, the Supreme Court explained its current position on this question.

582. *Eager v. Florida Key Aqueduct Auth.*, 580 So. 2d 771, 772 (Fla. 3d Dist. Ct. App. 1991) (*per curiam*); *see also* *Meridian, Inc. v. Department of Health & Rehabilitative Servs.*, 548 So. 2d 1169, 1170 (Fla. 1st Dist. Ct. App. 1989) (stating that the court must affirm an administrative agency's interpretation of agency rules unless "arbitrary, capricious, or not in compliance with the . . . [relevant statutory provisions]).

583. *See id.*; *see also* *Town of Palm Beach v. Department of Natural Resources*, 577 So. 2d 1383, 1386 (Fla. 4th Dist. Ct. App. 1991).

584. The courts in some cases have abandoned the deferential approach of judicial review of factual issues. *See Burriss III*, *supra* note 4, at 635-36; *Burriss II*, *supra* note 4, at 776-78.

585. There are few examples of other circumstances when the courts will not defer to an agency interpretation of the law. *See Cataract Surgery Ctr. v. Health Care*

trative agency's interpretation of a statute or administrative rule was contrary to express language or purpose, then the court will not hesitate to overturn the interpretation.⁵⁸⁶ Second, if the interpretation adopted by the administrative agency would result in the court's declaration that the statute was an impermissible delegation of authority or that the administrative rule was an ultra vires act, then, if it is reasonable to do so, the court will reject the administrative agency's interpretation and impose one which avoids these problems.⁵⁸⁷

In *Elmariah v. Department of Professional Regulation*,⁵⁸⁸ the court considered the issue of whether the hearing officer correctly concluded that the false and deceptive statements made by Dr. Elmariah in his application for staff privileges at various hospitals were not sufficiently related to the practice of medicine to justify disciplinary action by the Board of Medicine. The Board was delegated the authority to discipline doctors for "making deceptive, untrue, or fraudulent representations in the practice of medicine"⁵⁸⁹ The Board rejected the hearing officer's conclusion and found that staff privileges "directly related to the practice of medicine or to the attempt to practice medicine."⁵⁹⁰

The court noted that:

Although it is generally held that an agency has wide discretion in interpreting a statute which it administers, this discretion is somewhat more limited where the statute being interpreted authorizes sanctions or penalties against a person's professional license. Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed,

Cost Containment Bd., 581 So. 2d 1359, 1364-65 (Fla. 1st Dist. Ct. App. 1991); *St. Johns N. Util. Corp. v. Public Serv. Comm'n*, 549 So. 2d 1066, 1069-70 (Fla. 1st Dist. Ct. App. 1989) (noting that an "agency bears the burden of providing a reasonable explanation for inconsistent results based upon similar facts;" if the explanation is reasonable, then the court must affirm the agency's interpretation); *Ford Motor Credit Co. v. Department of Revenue*, 537 So. 2d 1011 (Fla. 1st Dist. Ct. App. 1988) (stating that a court in reviewing constitutional challenge to an agency decision will give no deference to the agency's resolution of such constitutional claims).

586. See, e.g., *Town of Palm Beach v. Department of Natural Resources*, 577 So. 2d 1383, 1386 (Fla. 4th Dist. Ct. App. 1991).

587. See *Department of Envtl. Regulation v. Puckett Oil Co.*, 577 So. 2d 988 (Fla. 1st Dist. Ct. App. 1991).

588. 574 So. 2d 164 (Fla. 1st Dist. Ct. App. 1990).

589. FLA. STAT. § 458.331(k) (1983).

590. *Elmariah*, 574 So. 2d at 165.

with any ambiguity interpreted in favor of the licensee.⁵⁹¹

The practice of medicine for purposes of Florida Statutes Chapter 458 is defined as "the diagnosis, treatment, operation, or prescription of any human disease, pain, injury, deformity, or other physical or mental condition."⁵⁹² While common sense may have indicated that staff privileges bore some relationship to the practice or the attempt to practice medicine, the court found that the statutory definition of the practice of medicine clearly prohibited the Board of Medicine from punishing a doctor for this type of misconduct, because the responses did not concern any form of a diagnosis, treatment, operation, or prescription for any human disease, and as such could not form the basis for disciplinary action.⁵⁹³

F. *Judicial Review of Agency Rule Making Activity*

While much of the decision in *Cataract Surgery Center v. Health Care Cost Containment Board*⁵⁹⁴ may be criticized,⁵⁹⁵ the court did avoid the pitfalls associated with trying to apply the new paradigm for judicial review announced in *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*.⁵⁹⁶ In *Cataract Surgery Center*, the court echoed the decision of *Agrico Chemical Co. v. Department of Environmental Regulation*⁵⁹⁷ when it noted that the standard of judi-

591. *Id.*

592. FLA. STAT. § 458.305(3) (1983).

593. The misrepresentations made by Dr. Elmariah were somehow related to his practice or attempt to practice, but it cannot be said that they were made "in" the practice of medicine. *Elmariah*, 574 So. 2d at 165; see FLA. STAT. § 458.331(k) (1983).

594. 581 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1991).

595. See *supra* notes 438-48 and accompanying text.

596. 553 So. 2d 1260 (Fla. 1st Dist. Ct. App. 1989).

597. 365 So. 2d 759 (Fla. 1st Dist. Ct. App.), *cert. denied*, 376 So. 2d 74 (Fla 1979). In *Agrico Chemical Co.*, the court described the conceptual approach and standard of judicial review for administrative agency rule making activity:

Given a proposed rule within the general area of regulation delegated by the legislature to an [administrative] agency, the test of arbitrariness is the same for the proposed rule as it would be for a statute having the same effect.

Rulemaking by an [administrative] agency is quasi-legislative action and must be considered with deference to that function The challenge [to a proposed rule] under [FLA. STAT.]§ 120.54(4) is a two-step process: The challenge is first heard before an administrative hearing officer whose

cial review applied when determining the validity or invalidity of an administrative agency's rules or proposed rules is very deferential.

An agency's construction of the statute it administers is entitled to great weight and is not overturned unless clearly erroneous. An agency is given broad discretion in the exercise of its lawful authority and the burden is on a petitioner to demonstrate that a rule is arbitrary and capricious.⁵⁹⁸

However, such broad administrative agency discretion in the rule making context was not recognized in *Manasota-88, Inc. v. Department of Environmental Regulation*⁵⁹⁹ where the court embraced the *Adam Smith Enterprises'* two tier approach,⁶⁰⁰ and through its application

order "shall be final [administrative] agency action." That final [administrative] agency action is subject to judicial review. Both the hearing officer (acting in a detached quasi-judicial capacity) and this Court should determine from the evidence presented whether or not there is competent, substantial evidence to support the validity of the rule.

Thus, in a [section] 120.54 hearing, the hearing officer must look to the legislative authority for the rule and determine whether or not the proposed rule is encompassed within that grant. The burden is upon one who attacks the proposed rule to show that the [administrative] agency, if it adopts the rule, would exceed its authority; that the requirements of the rule are not appropriate to the ends specified in the legislative act; that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation or that the proposed rule or the requirements thereof are arbitrary or capricious.

A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Competent substantial evidence has been described as such evidence as a reasonable person would accept as adequate to support a conclusion.

The requirement that a challenger has the burden of demonstrating [administrative] agency action to be arbitrary or capricious or an abuse of administrative discretion is a stringent one indeed. However, the degree of such required proof is by a preponderance of the evidence

Id. at 762-63 (citations omitted).

598. *Cataract Surgery Cir.*, 581 So. 2d at 1360-61.

599. 567 So. 2d 895 (Fla. 1st Dist. Ct. 1990), *rev. denied*, 581 So. 2d 164 (Fla. 1991).

600. In *Adam Smith Enters.*,

[the] court indicated that the standard of judicial review applied in evaluating the validity of a rule depends on how the issue reached the courts. If judicial review is conducted pursuant to a direct appeal from an adopted

demonstrated the dangers inherent in the technique of judicial review urged on the courts in *Adam Smith Enterprises*. The decision in *Manasota-88, Inc.* involved a challenge to the Department of Environmental Regulation amended rules concerning discharge source standards for groundwater. The primary standards addressed health-threatening contaminants, and the secondary standards addressed aesthetic factors in judging the effect of a discharge into a groundwater source.⁶⁰¹ The amended rules exempted "all existing dischargers from compliance with secondary standards unless [the Department of Environmental Regulation] determined that compliance was necessary to protect groundwater used or reasonably likely to be used as a potable water source."⁶⁰²

However, even in these latter cases, an exemption was available if the discharger could "demonstrat[e] that the economic, social, and environmental costs of compliance outweighed the economic, social, and environmental benefits of compliance . . . [as long as it involved no violation of] secondary standards at any private or public water supply

agency rule using the informal rule making procedures, then the standard of judicial review is arbitrary and capricious. This is a less stringent standard of judicial review of the factual record than the competent substantial evidence which is applied in the review of adjudicatory decisions. "Under th[e] arbitrary and capricious standard . . . an agency is . . . subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether a rulemaker's empirical conclusions have support in substantial evidence. Rather, the arbitrary and capricious standard requires an inquiry into the basic orderliness of the rulemaking process, and authorizes the courts to scrutinize the actual making of the rule for signs of blind prejudice or inattention to crucial facts. [This requires] the reviewing court . . . [to] consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." However, if judicial review of an administrative rule arises out of the context of adjudicatory proceedings used during the rule making process, then the agency's quasi-legislative rule making process is converted to an adjudicatory process and the standard of judicial review for factual conclusions supporting the rule is the competent substantial evidence standard. This occurs because the hearing officer's factual conclusions become the basic record for the court to review.

Burris III, *supra* note 4, at 645-46 (citations omitted) (quoting *Adam Smith Enters.*, 553 So. 2d at 1273).

601. *Manasota-88, Inc.*, 567 So. 2d at 896.

602. *Id.*

well beyond the discharger's property boundary."⁶⁰³ Manasota-88, Inc. and other environmental groups were parties participating in the rule making process. After the amended rules were adopted, they sought judicial review of their validity.⁶⁰⁴

The court noted that because of this procedural posture of the case, there was no administrative adjudicatory hearing record. In such cases, the standard of judicial review required that the rule be "reasonably related to the purposes of the enabling legislation, and . . . not arbitrary or capricious."⁶⁰⁵ In such circumstances, all the reviewing court need do is determine that the administrative agency addressed "all [the] relevant factors . . . [in] good faith . . . and . . . used reason rather than whim to progress from consideration of these factors to its final decision."⁶⁰⁶ The critical question was what constituted an adequate record in a case where no section 120.57 formal adjudicatory hearing was held.

On this point, the court ruled that a record in such cases consisted of:

(1) the agency's initial proposal, its tentative empirical findings, important advice received from experts, and the description of the critical experimental and methodological techniques on which the agency intends to rely; (2) the written or oral replies of interested parties to the agency's proposals and to all the materials considered by the agency; and (3) the final rule accompanied by a statement both justifying the rule and explaining its normative and empirical predicates.⁶⁰⁷

. . . .

[A] statement of the relevant facts considered by the rulemaker . . . [which] should reveal "if and how the rulemaker considered each factor throughout the process of policy formation," detailing for the reviewing court "the actual attention [the rulemaker] gave to the factors, and explain[ing] his final disposition with respect to each of them."⁶⁰⁸

603. *Id.* at 896-97.

604. *Id.* at 897; see FLA. STAT. § 120.56 (1989).

605. *Id.* (quoting *General Tel. Co. v. Public Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984)).

606. *Manasota-88, Inc.*, 567 So. 2d at 897 (quoting *Adam Smith Enterps.*, 553 So. 2d at 1273).

607. *Id.* at 898 (citations omitted) (quoting *Adam Smith Enterps.*, 553 So. 2d at 1270).

608. *Id.* (quoting *Adam Smith Enterps.*, 553 So. 2d at 1273).

The court found that there was no detailed explanation of the consideration of each factor or evidence offered concerning each, and the reason for the ultimate disposition in the record. The court ordered the case remanded, because, albeit not explicitly stated, the inadequate record prevented the court from performing its judicial review function. The court also held that the rule was an invalid exercise of delegated authority, because the rule was not supported by an adequate record on file with the Secretary of State.⁶⁰⁹ The APA requires that an administrative agency file “a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule.”⁶¹⁰

The problem with the reasoning and result in *Manasota-88, Inc.* is four-fold. First, the APA does not require administrative agencies to provide a detailed statement of how each factor was *precisely considered*. This requirement was a judicial invention. All the APA on its face or in the legislative history require is a statement of the facts *found* and the *circumstances* justifying the rule. The court erred in reaching a contrary conclusion. The statements filed with the rule should enable the court to determine that all the relevant facts were considered, as well as that the rule had adequate support in the record at least for application of the deferential “arbitrary and capricious” standard of review. By requiring more, the court must have envisioned applying a non-deferential version of the arbitrary and capricious standard of judicial review.⁶¹¹ Further, this case *must* call into question thousands of rules which do not have this type of detailed statement of consideration and resolution of the appropriate factors on file as part of the rule making record.

Second, the *Manasota-88, Inc.* decision is another example of the courts creating a serious disincentive for administrative agency use of the rule making process. If the rule making process requires an administrative agency to provide a detailed examination of the evidence pro and con for each factor considered, an expensive and onerous process, there would be no reason to prefer it over developing public policy

609. *Id.* In some cases the filing must be made in the office of the head of the administrative agency. FLA. STAT. § 120.54(11)(b) (1989).

610. FLA. STAT. § 120.54(11)(b) (1989).

611. A more diabolical explanation would be that the court may foresee continually remanding to matter to the administrative agency for more detailed factual findings on the assumption that eventually, the administrative agency will figure out either that the court is opposed to the rule or wants it adopted only after a drawn out hearing. *See* FLA. STAT. § 120.54(17) (1989).

through the use of nonrule policy orders. In fact, because the adjudicatory process limits participation, it may well be that it is a more manageable process than that imposed by *Manasota-88, Inc.*⁶¹²

Third, even assuming an administrative agency has adequately detailed its decisions during the rule making process, it is extremely unlikely that the facts disclosed will provide new relevant information which will persuade the court to find that the administrative rule is invalid under the arbitrary and capricious standard of judicial review. This is so because the court is even more deferential toward administrative agency findings of fact than the competent substantial evidence standard of judicial review.

Fourth, the approach offered by the court will paralyze the informal rule making process because of the uncertainty over the question of what constitutes an adequate record. Administrative agencies will opt to hold hearings resembling a section 120.57 proceeding in order to avoid prolonged litigation over the issue of the adequacy of the statement in support of the rule. This will waste the limited resources of both the administrative agencies and the courts.

G. *Unenlightening Judicial Review*⁶¹³

During the survey period, the courts continued, on occasion, to render opinions which provided little or no guidance on the nature of the issue decided, and little or no explanation for why the court reached its decision. Particularly troubling are those opinions where the courts provided only a brief cursory discussion of a case, and summarily concluded that an agency's factual findings either did or did not satisfy the competent and substantial evidence standard of judicial review. For example in *Garcia v. Department of Professional Regulation*,⁶¹⁴ the court, after briefly restating the facts as found by the Secretary of the Department of Professional Regulation, summarily concluded that the "findings . . . [we]re sufficient to establish an immediate danger to the public."⁶¹⁵

Similarly, in *Kan v. P.G. Cook Associates*,⁶¹⁶ the court recited in conclusory fashion that the appeals referee heard the evidence, and

612. Burriss IV, *supra* note 4, at 667-73, 677-85.

613. Burriss I, *supra* note 4, at 407-10; Burriss II, *supra* note 4, at 779-81.

614. 581 So. 2d 960 (Fla. 3d Dist. Ct. App. 1991).

615. *Id.* at 961.

616. 566 So. 2d 932 (Fla. 3d Dist. Ct. App. 1990).

that the record provided competent and substantial evidence to support the findings of fact as reached by the appeals referee.

The shortcoming of . . . [this type] of opinion[] is "that the court[] ha[s] not engaged in any articulation of the reasons why these records are sufficient or insufficient to support an agency's factual findings." Such a failure is inconsistent with the vision of how a reviewing court would determine the adequacy of the factual record under the APA. Under the APA an appellate court is required to "deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated authority." The function of [the] appellate court[] is limited in each of these categories. The only way to know if an appellate court has remained true to its limited role is by reviewing its explanation. Where there is no explanation or it is an unenlightening explanation, one merely stating a conclusion, then there is no basis for making this judgment. Th[is] type[] of opinion[] [is] also inconsistent with the general role appellate court opinions are designed to play in our legal system, providing "a reasoned justification for the result . . . [by] testing the decision against experience and against acceptability, buttressing it and making it persuasive to self and others." Such "justification and elaboration are expected in . . . [any] mature legal system." This requirement guards against judicial fiat and assures that the law is known and knowable rather than a body of hidden principles.⁶¹⁷

While there may be a few circumstances when it is, for policy reasons, impractical for the court to provide a full explanation of why it reached a decision, it occurs far too often in Florida, solely because, for some unknown reason, the court is unwilling to offer a full explanation of its reasons for a decision.

VI. CONCLUDING THOUGHTS

With perhaps the exception of the *Adam Smith Enterprises* decision, there has been relatively little fundamental change in administrative law in recent years. However, this period of relative calm and stability concerning the basic principles of administrative law is about to pass. The recent amendment to the APA, designed to curtail the use of nonrule policy,⁶¹⁸ and the likelihood of amendment of the APA rule

617. Burris III, *supra* note 4, at 650-51 (citations omitted).

618. FLA. STAT. §§ 120.52(16), .535 (1991).

making process, as a result of the current executive and legislative efforts reconsidering that process, will restructure the administrative process in Florida.⁶¹⁹ It will take time for the courts to have an opportunity to examine the new structure. Until then, there will be some heated arguments over the scope of change brought about, and the meaning of specific provisions in the new processes. The recent decisions in *Chiles*⁶²⁰ and *Locke*⁶²¹ based upon separation of powers also raise questions which may fundamentally affect the power of the legislature to control executive branch exercise of delegated authority and the scope of powers which may be delegated to administrative agencies.⁶²² The next five years will be a time of uncertainty in the administrative law area, as well as an interesting and challenging time for those who are practicing in this area of the law.

Sadly, during this period we will not have the benefit of the thoughtful insights of Professor Dore who recently passed away. Professor Dore was part of the original group who drafted the new APA in 1974. She zealously followed its implementation and the adoption of many amendments to the APA in subsequent years. When called upon she never hesitated to take the time from her busy schedule to offer advice to the legislative and executive branches of the government. She also did not hesitate to criticize and praise court decisions concerning the Florida administrative process. She devoted much of her professional life to trying to improve the administrative process as well as other aspects of Florida law. She was never shy about sharing her opinion and was always a source of witty and informative stories concerning how many of the changes in Florida law occurred. She will be missed by all, even those who disagreed with her on many issues.

619. See Dore III, *supra* note 4, at 454-55 & n.114.

620. *Chiles v. Children A, B, C, D, E & F*, 16 Fla. L. Weekly S699 (1991).

621. *Locke v. Hawkes*, 16 Fla. L. Weekly S716 (1991).

622. See *supra* notes 5-37, 243-52 and accompanying text.

Admiralty: 1991 Survey of Florida Law

Robert M. Jarvis*

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I. INTRODUCTION

This survey collects and discusses Florida admiralty cases that were reported between October 1, 1990, and June 30, 1991.¹ Although

* Professor of Law, Nova University Shepard Broad Law Center. B.A., Northwestern University; J.D., University of Pennsylvania; LL.M., New York University. An early draft of this survey was presented in Orlando to the Admiralty Law Committee of The Florida Bar during the Bar's 1991 Annual Meeting. The author received many helpful comments from the members in attendance, and hereby expresses his appreciation.

1. Not included in this survey are cases that touch only incidentally on admiralty law. *See, e.g.,* *Belcher Oil Co. v. Florida Fuels, Inc.*, 749 F. Supp. 1104, 1991 AMC 911 (S.D. Fla. 1990) (South Florida fuel supplier that enjoyed dominant market position would not be heard to say that it had suffered an anti-trust injury when various cruise ship operators attempted to create competition by encouraging the formation of a rival fuel supplier); *Carner-Mason Assocs. v. Heller Fin., Inc.*, 581 So. 2d 1324 (Fla. 3d Dist. Ct. App. 1991) (foreclosure judgment was properly entered in favor of plaintiff who lent money to defendant so that it could build a marina on Miami Beach); *Stewart v. Stewart*, 581 So. 2d 246 (Fla. 3d Dist. Ct. App. 1991) (judgment ordering defendants to turn over their marina to the plaintiffs pursuant to a lease and option agreement reversed upon defendants' showing that they had terminated properly the

the survey period generated only a handful of decisions, the ones that it did produce were among the most unique issued in recent years.

Three opinions, each concerning the professional responsibility of admiralty lawyers, were particularly noteworthy. The first two dealt with the reprimanding of individual attorneys, while the third changed the manner in which those who practice admiralty law may advertise their services.

In *The Florida Bar v. Herrick*,² Peter S. Herrick, a seasoned admiralty practitioner,³ received a public reprimand from the Florida Supreme Court for attempting to solicit business. Herrick had learned that the United States Customs Service had taken possession of a vessel⁴ and was planning to forfeit it unless a claim and bond for \$2,500 were posted by the owners by August 15, 1985.⁵ He therefore sent to a couple who had an interest in the boat an unsolicited letter that said in pertinent part: "Our law firm specializes in Customs laws relating to vessel seizures. If you have any questions, please call."⁶

Herrick's actions were reported to The Florida Bar. After an investigation, a Bar referee recommended that Herrick be publicly reprimanded.⁷ In the view of the referee, Herrick had committed three violations of the Code of Professional Responsibility.⁸ First, his unsolicited

lease and extinguished the option); *Shofner v. Giles*, 579 So. 2d 861 (Fla. 4th Dist. Ct. App. 1991) (new trial on damages ordered in yacht buyer's fraud suit due to inconsistencies in the jury's verdict form); *City of Miami Beach v. Carner*, 579 So. 2d 248 (Fla. 3d Dist. Ct. App. 1991) (new trial ordered to determine whether City of Miami Beach and the Miami Beach Redevelopment Authority had violated the terms of a thirty year lease under which the plaintiffs were to build and operate a marina on city property); *Sheridan v. Deep Lagoon Marina*, 576 So. 2d 771 (Fla. 1st Dist. Ct. App. 1991) (property owners who lived near site of proposed marina expansion project could challenge state's finding that the project complied with the Federal Water Pollution Control Act); *Black v. Marine Engineering Specialists*, 574 So. 2d 283 (Fla. 2d Dist. Ct. App. 1991) (engineer who had installed air conditioner and generator on yacht failed to prove that seller of yacht had been acting as the apparent agent of the buyer of the yacht).

2. 571 So. 2d 1303 (Fla. 1990), *cert. denied*, 111 S. Ct. 2798 (1991).

3. Herrick received a B.S. from the United States Merchant Marine Academy in 1961 and a J.D. from Georgetown University in 1967. He was admitted to practice in the District of Columbia in 1968 and in Florida in 1977.

4. The seized vessel was a thirty foot long 1981 Formula Thunderbird racing boat. *Id.* at 1304.

5. *Id.*

6. *Id.*

7. *Id.* at 1304-05.

8. Because Herrick's letter had been sent in 1985, his conduct was judged by the

letter did not contain a disclaimer indicting that it was an advertisement.⁹ Second, Herrick's letter stated that he was a specialist in customs law, thereby representing that he had competence in a particular area of law.¹⁰ Third, Herrick's letter claimed that he specialized in an area of law that had not been recognized by either the Florida Certification Plan or the Florida Designation Plan.¹¹

Upon learning of the referee's recommendation, Herrick appealed to the Florida Supreme Court.¹² The court, however, in a per curiam opinion,¹³ rejected the appeal and entered an order publicly reprimanding Herrick and requiring him to pay the costs of the proceeding.¹⁴

In its relatively lengthy opinion, the court first found that the requirement that all unsolicited letters from attorneys be stamped "Advertisement" was reasonable and did not violate any of Herrick's constitutional rights.¹⁵ The court then turned to the question of whether Herrick had held himself out as a specialist.¹⁶ According to Herrick, he had not claimed to be a specialist, but had merely indicated that he specialized in a particular area of law.¹⁷ As such, Herrick believed that

now superseded Code of Professional Responsibility. *Herrick*, 571 So. 2d at 1304 n.1.

9. *Id.* at 1305.

10. *Id.*

11. *Id.*

12. *Id.* at 1304.

13. By tradition, the court always issues per curiam opinions in attorney discipline cases.

14. *Herrick*, 571 So. 2d at 1307.

15. Herrick had claimed that the requirement violated his first amendment rights. *Id.* at 1305. The court, however, disagreed. Relying on *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988), it explained:

[W]e believe that . . . [the rule] . . . is constitutional as one of these "less restrictive and more precise means" of regulation envisioned by the Supreme Court. The use of the term "Advertisement" printed on the letter acts to disclose the nature of the letter to the recipient. Its purpose is to assuage any concerns the recipient may have due to receiving a personalized letter from an attorney.

Herrick, 571 So. 2d at 1305-06.

16. Because it found that the charges against Herrick under count three were subsumed by those contained in count two, the court elected to treat the two together. *Id.* at 1307.

17. Herrick's argument rested on a dictionary definition of the word "specialize." In the dictionary relied on by Herrick, WEBSTER'S NEW COLLEGE DICTIONARY (1974), the word "specialize" was defined as meaning "to concentrate one's efforts in a special activity or field." *Id.* at 1306. Thus, Herrick sought to argue that when he claimed he specialized in customs law, he really was saying only that his practice concentrated on

he had not violated any ethical prohibition. The court, however, was not impressed with the tendered distinction. In finding that the referee's conclusion had been sound, the court wrote:

By prohibiting the general use of the term "specialist," the rule seeks to restrain advertising which can be false, deceptive, or misleading. By characterizing himself as a specialist, an attorney does more than merely indicate that he practices within a particular field. The term "specialist" carries with it the implication that the attorney has special competence and expertise in an area of law. We reject Herrick's argument that the word "specialize" carries a different connotation than "specialist."¹⁸

Peter Herrick was not the only experienced admiralty attorney to run afoul of the Bar's ethical rules during the survey period. In *The Florida Bar v. Huggett*,¹⁹ William T. Huggett, a twenty year veteran of the admiralty bar,²⁰ continued his fight with the Bar over his dealings with two injured seamen.

On December 7, 1989, the Bar had instituted disciplinary proceedings against Huggett by filing a four count complaint.²¹ counts one and two related to Huggett's solicitation in 1988 of a seaman who had been injured as a result of an accident involving petrochemical fumes. When the seaman died, Huggett, through his investigator, continued his attempt to be retained by soliciting the seaman's widow.²² Counts three and four grew out of Huggett's representation of Jonathan Chacon, a seaman who had been injured aboard a cargo vessel in February, 1982. While representing Chacon, Huggett allegedly advanced funds to Chacon for living expenses and paid six witnesses for their testimony contingent upon the outcome of the case.²³

such cases. *Id.*

18. *Id.* at 1307.

19. 16 Fla. L. Weekly S51 (1991).

20. Huggett received his A.B. from Emory University in 1962 and his J.D. from the University of Florida in 1965. He was admitted to practice in Florida in 1966.

21. *Id.* at S51.

22. *Id.*

23. *Id.* Although the jury found for Chacon, the judgment was reversed due to the prejudicial actions and statements of Huggett during the course of the trial. See *Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167 (Fla. 3d Dist. Ct. App. 1985). After the case was remanded for a second trial, the trial court ultimately dismissed the suit with prejudice because of Chacon's repeated failure to make himself available for depositions. Huggett then instituted suit in federal court. That suit was found to be

In February, 1990, the Bar served Huggett with a set of interrogatories and a document production request.²⁴ When Huggett refused to comply fully with the Bar's demands, the Bar filed a motion to compel discovery.²⁵ In May, 1990, a Bar referee entered an order granting the Bar's motion.²⁶ When Huggett failed to heed the order, the Bar in June, 1990 obtained a judgment of contempt that included a recommendation that Huggett be suspended from the practice of law for ten days and until such time as he had fully complied with the discovery order.²⁷ Upon receiving the referee's decision, Huggett petitioned the Florida Supreme Court for a review of the judgment while the Bar moved for approval and enforcement of the suggested sanction.²⁸

Before the court, Huggett made the same arguments that he had made before the referee. He contended that the discovery requests were improper because the information sought by the Bar was protected by the fifth amendment's privilege against self-incrimination, the attorney-client privilege, and the work product rule.²⁹ To buttress his position, Huggett submitted an affidavit from Adela Molian De Chacon, Jonathan Chacon's widow, that asserted that she would be put in great jeopardy if the ultimate outcome of her husband's suit were to become known in his native Guatemala.³⁰

After a careful and detailed review, the court agreed to an extent with Huggett. Although it found that most of the Bar's discovery requests were proper, it held that Huggett had a good faith basis for arguing that three of the Bar's interrogatories were likely to lead to evidence that Huggett had engaged in the illegal solicitation of legal

time-barred, however, and was dismissed despite Huggett's argument that the state suit had tolled the running of the statute of limitations. *See* Chacon-Gordon v. M/V Eugenio "C", 1987 AMC 1886 (S.D. Fla. 1987). A short time later, the dismissal of Chacon's state suit was affirmed. *See* Costa Line, Inc. v. Chacon-Gordon, 530 So. 2d 312 (Fla. 3d Dist. Ct. App. 1988).

24. *Huggett*, 16 Fla. L. Weekly at S52.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at S51.

29. *Huggett*, 16 Fla. L. Weekly at S52.

30. *Id.* Although each of the suits instituted by Chacon had been thrown out one by one, *see supra* note 23, a partial settlement had been reached in 1986 while Chacon was still alive. According to his widow, it had been agreed at the time of the settlement that the terms would remain confidential "to protect the Chacones against extortion, theft and kidnapping, which . . . are common in Guatemala when it is learned that a person has acquired wealth." *Huggett*, 16 Fla. L. Weekly at S52.

business.³¹ Since such solicitation, if proved, would constitute a first degree misdemeanor,³² the court reversed the order of contempt.³³ Instead, it directed Huggett to comply with all aspects of the referee's discovery order, except for the three improper interrogatories, within twenty days.³⁴ The court further directed that if Huggett failed to do so within the stated twenty day period, he would be suspended from practice for ten days and continuously thereafter until he complied.³⁵

The final case of the survey period involving attorney ethics was *The Florida Bar: Petition to Amend The Rules Regulating The Florida Bar—Advertising Issues*.³⁶ The case grew out of a petition filed by the Bar that asked the Florida Supreme court to make a number of changes in the rules governing lawyer advertising.³⁷ Following a lengthy review period and the receipt of numerous public comments, the court, in an opinion written by Justice Overton and dissented from in part by Chief Justice Shaw and Justices Barkett and Kogan, granted the petition with certain modifications.³⁸ As modified, the new rules went into effect on April 1, 1991.³⁹

Because the Bar's petition recommended drastic changes in how attorneys may advertise on the radio and television,⁴⁰ almost no atten-

31. *Id.* at S53. The three interrogatories were numbered 20, 24, and 25g. Interrogatories 20 and 25g asked Huggett about his retention of an investigator and the matters assigned to the investigator. Interrogatory 24 asked Huggett to "list any seaman, religious or benevolence organization" in which he had been involved since 1988 and to identify the specific nature of his involvement. *Id.*

32. *Id.* (citing FLA. STAT. §§ 877.02(1), 775.15(2)(c) (1987)).

33. *Id.*

34. *Huggett*, 16 Fla. L. Weekly at S53.

35. *Id.* In an ironic twist, a short time after the supreme court's decision Huggett received The Florida Bar President's Pro Bono Service Award for his work with indigent seamen. See *Pro Bono Awards*, FLA. B. NEWS, Apr. 1, 1991, at 23, col. 1.

36. 571 So. 2d 451 (Fla. 1990).

37. *Id.* at 452.

38. *Id.*

39. The changes originally were scheduled to go into effect on January 1, 1991. This date was extended, however, when it was pointed out that many lawyers, as well as the Bar itself, would find it difficult to comply so quickly. See Mark D. Killian, *Court Adopts Bar Ad Restrictions*, FLA. B. NEWS, Jan. 15, 1991, at 1, col. 1. On April 2, 1991, a lawsuit was filed in federal court in Tallahassee by Professor Bruce S. Rogow challenging the constitutionality of the changes. See *Ad Rule Opponents Seek Injunction*, FLA. B. NEWS, May 1, 1991, at 1, col. 4. The suit remained pending at the close of the current survey period. See Elizabeth Willson, *A Troublesome Fly vs. The Bar*, FLA. TREND, July 1991, at 29.

40. *Advertising Issues*, 571 So. 2d at 452-54 (describing revised rule 4-7.2).

tion was paid to the remainder of the proposals. As a result, admiralty lawyers failed to object to the bar's suggested rewriting of rule 4-7.5(b).

Rule 4-7.5, entitled "Communication of Fields of Practice," had gone into effect on January 1, 1987, as part of Florida's switch from the American Bar Association's 1969 Model Code of Professional Responsibility to its 1983 Model Rules of Professional Conduct.⁴¹ Like its predecessors, rule 4-7.5(b) continued to carve out an exception for lawyers engaged in admiralty practice by permitting such lawyers to call themselves "proctors in admiralty" and to otherwise identify themselves as being admiralty practitioners.⁴² As the rule noted in its accompanying comment, this exception to the general ban on lawyers holding themselves out as specialists in a given field of law was rooted in the "long historical tradition associated with maritime commerce and the federal courts."⁴³

In 1975, Florida instituted a program under which attorneys can designate themselves as being competent in a given field if they met (and thereafter continued to meet) certain basic requirements.⁴⁴ Later, in 1982, Florida began a second program through which lawyers can be certified by the bar as having expertise in certain fields.⁴⁵

In 1990, the United States Supreme Court, in the Illinois case of *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,⁴⁶ held that attorneys who are certified as proficient in a given area of law by a bona fide national organization cannot be denied the right to list such certifications on their letterheads and in their advertising.⁴⁷ Worried that rule 4-7.5 might be unconstitutional after *Peel*, the Bar's petition suggested that it be redrafted as well as renumbered. As amended, new rule 4-7.6 permits a lawyer who complies with the Flor-

41. See The Florida Bar re Rules Regulating the Florida Bar, 494 So. 2d 977, 1074 (Fla. 1986).

42. See *id.* at 1075. Rule 4-7.5(b) was patterned after canon 46 of the American Bar Association's 1908 Canons of Professional Ethics as well as Ethical Consideration 2-14 of the Model Code. See generally Robert M. Jarvis, *Rethinking the Meaning of the Phrase "Surviving Widow" in the Jones Act: Has the Time Come for Admiralty Courts to Fashion A Federal Law of Domestic Relations?*, 21 CAL. W. L. REV. 463, 479 n.58 (1985).

43. FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.5 comment.

44. See *In re The Florida Bar*, 319 So. 2d 1 (Fla. 1975).

45. See The Florida Bar, 414 So. 2d 490 (Fla. 1982).

46. 110 S. Ct. 2281 (1990).

47. *Id.* at 2293.

ida Certification Plan, "or who is certified by a national group with substantially similar standards to the Florida Certification Plan," to state that he or she has been so certified.⁴⁸

In their new versions, both the rule and the comment delete all references to admiralty and the admiralty exception, and neither offers a single word of explanation for the change. This is troubling for at least three reasons. First, the Florida Certification Plan does not currently operate in the area of admiralty law (although the Designation Plan does).⁴⁹ Second, there is no national organization that presently certifies admiralty lawyers.⁵⁰ Third, although the admiralty exception was excised, the similar exception for patent lawyers was retained (although the explanatory comment was not).⁵¹ Despite these facts, by the close of the survey period admiralty lawyers in Florida had not begun any efforts to have the exception reinstated.

48. *Advertising Issues*, 571 So. 2d at 454-55.

49. The Florida Certification Plan currently certifies Florida lawyers in the following seven areas: tax, civil trial law, marital and family law, estate planning and probate, criminal law, real estate law, and workers' compensation. *See The Florida Bar re Amendment to Rules Regulating The Florida Bar Chapter 6 (Legal Specialization and Education)*, 548 So. 2d 1120 (Fla. 1989).

50. The Maritime Law Association of the United States, a national bar group founded in 1899, comes the closest of any existing organization to certifying the competence of admiralty lawyers. At one time, all lawyers who joined the MLA became "proctor" members. Since the early 1980s, however, lawyers who join the MLA have become "associate" members. After four years, they may apply to become proctor members. In order to move from associate membership to proctor membership, a candidate must demonstrate "proficiency" in admiralty. Such proficiency can be shown in a variety of ways, including attendance at approved continuing legal education seminars, delivery of speeches or publication of articles on suitable topics, or serving as counsel in maritime proceedings. There is no written or oral test, however, and once a lawyer obtains proctor membership there is no further obligation except for payment of a small annual dues charge. *See Maritime Law Ass'n, Articles of Association and By-Laws—Document No. 684* § III, at 1 (Sept. 1990).

51. *Advertising Issues*, 571 So. 2d at 470. The comment to rule 4-7.5 had stated that patent law was a specialty because of the "long-established policy of the patent and trademark office." Although The Florida Bar once tried to challenge the policy, it was rebuffed by the United States Supreme Court in a landmark case. *See Sperry v. Florida ex rel. The Florida Bar*, 373 U.S. 379 (1963). Justice Overton did not offer any explanation for why the patent law exception was being retained or for why the comment was being deleted.

II. CARRIAGE OF GOODS

There were three cases during the months under review that involved disputes arising under the Carriage of Goods by Sea Act (COGSA).⁵²

In *Insurance Company of North America v. Empresa Lineas Maritimas Argentinas, S.A.*,⁵³ a cargo of washing machine parts bound for Miami was damaged in Buenos Aires when the container in which they had been packed was dropped while under the control of the defendant, Empresa Lineas Maritimas Argentinas, S.A. (ELMA).⁵⁴ Subsequently, the Insurance Company of North America (INA), which had become subrogated to the plaintiff, filed suit to recover \$29,653.11.⁵⁵

Shortly after the case was started, INA moved for partial summary judgment.⁵⁶ In response, ELMA filed an opposing memorandum that argued that summary judgment was premature for three reasons: 1) the bill of lading had not been authenticated, 2) an essential paragraph of the bill of lading had not been translated into English, and 3) there was no proof that a higher freight rate had been charged.⁵⁷ ELMA further argued that even if summary judgment was appropriate, ELMA was entitled to the benefit of COGSA's \$500 package limitation.⁵⁸

In an exceedingly terse opinion, District Judge Moore rejected

52. 46 U.S.C. §§ 1300-1315 (1988). Under COGSA shipowners are excused from liability if goods in their possession are damaged due to certain specified causes. See THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-13, at 314-15 (1987).

53. 1991 AMC 1057 (M.D. Fla. 1990).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1059. The point of ELMA's third argument was explained by Judge Moore in the following manner: "In general, when a shipper wants the cargo to receive a higher value [than is provided under COGSA], the carrier offsets this increased liability by charging a higher freight rate." *Insurance Co. of N. Am.*, 1991 AMC at 1059. By paying a higher freight rate, the shipper avoids the COGSA package limitation. See *infra* note 58.

58. *Insurance Co. of N. Am.*, 1991 AMC at 1058. The package limitation, found at 46 U.S.C. § 1304(5) (1988), limits a defendant's liability to \$500 per package or customary freight unit unless the shipper has declared a higher value. If the defendant can invoke successfully the limitation, its liability will be drastically reduced and the plaintiff will be only partially compensated for its loss. See generally FRANE L. MARAIST, ADMIRALTY LAW IN A NUTSHELL 74-77 (2d ed. 1988).

each of ELMA's arguments and granted INA's motion.⁵⁹ Finding that the case was governed by COGSA due to the fact that the cargo had been bound for an American port and was traveling under a bill of lading,⁶⁰ Judge Moore focused his attention on the terms of the bill of lading. Although largely illegible, both parties agreed that the bill described the merchandise as 2,160 gear boxes with a per piece value of \$74.80.⁶¹ As such, the only real issue was whether ELMA could have the benefit of the package limitation.

Judge Moore found that ELMA was not entitled to the limitation for the very reasons that it had given in suggesting that the motion for partial summary judgment was premature. First, Judge Moore ruled that while the bill of lading was unauthenticated, ELMA had admitted that it accurately described the cargo.⁶² Second, although the paragraph in the bill of lading that ELMA contended might be relevant had not been translated, ELMA had neglected to offer any explanation for its failure to provide a translation in its response.⁶³ Third, while the record did not contain any proof that INA's insured had paid a higher freight rate, the lack of such proof, in Judge Moore's view, was "not determinative inasmuch as charging an increased freight rate is not a prerequisite to declaring a higher value of cargo."⁶⁴

The next cargo case of the survey period, *Z.K. Marine, Inc. v. M/V Archigetis*,⁶⁵ also involved construction of the COGSA package limitation. In September, 1987, five yachts were shipped from Taiwan to the United States aboard a vessel known as the M/V ARCHIGETIS.⁶⁶ At the time, the ARCHIGETIS was owned by Malvern Maritime, Inc. (Malvern), and was under charter to Federal Pacific Liberia, Ltd. (Fedpac).⁶⁷ The yachts had been manufactured by Offshore Marine,

59. *Insurance Co. of N. Am.*, 1991 AMC at 1059-60.

60. *Id.* at 1058. This is the threshold inquiry in any COGSA suit, of course, since the statute applies only to shipments traveling by sea to or from a United States port under a bill of lading. See 46 U.S.C. §§ 1300 and 1312 (1988).

61. *Insurance Co. of N. Am.*, 1991 AMC at 1058-59.

62. *Id.* at 1059.

63. *Id.* With more than a trace of irritation, Judge Moore wrote: "Defendant fails to indicate why an English translation of this supposedly essential paragraph, which could have been accomplished quickly and inexpensively, was not included in its response." *Id.* at 1059 n.1.

64. *Id.* at 1059.

65. 1991 AMC 1434 (S.D. Fla. 1991).

66. *Id.* at 1436.

67. *Id.* at 1435-36.

Inc. (Offshore), and were unloaded upon their arrival in the United States by Continental Stevedoring & Terminals, Inc. (Continental).⁶⁸ The five yachts were imported by four different Florida companies: Z.K. Marine, Inc., Southern Offshore Yachts, Jay Bettis and Co., and Miller Yacht Sales, Inc. (collectively, the plaintiffs).⁶⁹

Upon discovering that the yachts had arrived in a damaged condition, the plaintiffs filed suit against the ARCHIGETIS as well as Malvern, Fedpac, Offshore, and Continental.⁷⁰ In response, Malvern moved for summary judgment on the ground that the bills of lading clearly limited the carrier's liability to \$500 per package or customary freight unit or, in this case, per yacht.⁷¹ Fedpac and Continental then moved for partial summary judgment and the plaintiffs cross-moved for summary judgment.⁷²

Electing to resolve all of the motions together, District Judge Hoeveler held, in a case of first impression, that each yacht was in fact a COGSA package. As such, he granted the defendants' motions.⁷³

Judge Hoeveler began his opinion by first noting that COGSA was not directly applicable since the yachts had been carried on the ARCHIGETIS' decks, and COGSA does not apply to on-deck carriage.⁷⁴ He found, however, that since the bills of lading referred to The Hague Rules, the international version of COGSA, the parties would be deemed to have "stipulated by contract" to the application of COGSA.⁷⁵

Having disposed of the choice of law problem, Judge Hoeveler moved to the central issue: were the yachts COGSA packages? After a review of the existing caselaw on the subject, he concluded that they were because the carrier had attached each yacht to a cradle that had been manufactured by Offshore. According to Judge Hoeveler, by resting in a cradle, each yacht had become the functional equivalent of a package during the voyage. For support, he turned to a case in which Judge Spellman had found that air conditioning equipment that had been bolted to wooden skids but was not otherwise boxed was a

68. *Id.* at 1436.

69. *Id.* at 1435.

70. *Z.K. Marine*, 1991 AMC at 1436.

71. *Id.*

72. *Id.*

73. *Id.* at 1441.

74. *Id.* at 1437 (citing 46 U.S.C. § 1301(c) (1988)). For a general discussion of the law relating to deck cargo, see SCHOENBAUM, *supra* note 52, § 9-16, at 322-24.

75. *Z.K. Marine*, 1991 AMC at 1438.

COGSA package.⁷⁶ In Judge Hoeveler's view, the cradles were "analogous, for purposes of the package analysis, to skids."⁷⁷ Having so found, Judge Hoeveler summarily dismissed the remainder of the plaintiffs' arguments.⁷⁸

The final cargo case also involved the carriage of a yacht. In *Jumbo Navigation, N.V. v. Melchior*,⁷⁹ Jumbo Navigation, N.V. (Jumbo), an ocean carrier, filed an interpleader action to determine whether a yacht called the S/Y VALIA belonged to Cigisped, S.R.I. (Cigisped), an Italian freight forwarder, or to Albert Melchior, a Canadian citizen.⁸⁰ In September, 1988, Melchior had agreed to pay Cigisped \$75,000 in ocean freight, plus \$1,640 in preparation expenses, to ship his yacht from Genoa to Miami.⁸¹ Cigisped, in turn, retained Jumbo, and in October, 1988 Jumbo carried the VALIA to Miami aboard the M/V STELLA PRIMA pursuant to a bill of lading made out to Cigisped.⁸²

The STELLA PRIMA arrived in Miami on November 7, 1988, and discharged the VALIA into the water, during which the VALIA was damaged.⁸³ When Melchior demanded delivery of the yacht, Jumbo informed him that it was under orders from Cigisped to hold on to the VALIA until Melchior paid Cigisped and that as a result, the VALIA was being placed in the custody of the Merrill Stevens Dry Dock Company, Inc. (Merrill Stevens).⁸⁴ Following this exchange, Melchior filed an emergency motion for the release of the yacht, Merrill Stevens initiated its own interpleader action, and Cigisped filed cross-claims against Melchior.⁸⁵

In time, Melchior deposited \$80,000 into the registry of the court, Merrill Stevens completed extensive repairs on the yacht at Melchior's

76. See *Marante Forwarding v. C.A. Naviera de Transporte y Turismo*, 486 F. Supp. 636, 1982 AMC 2704 (S.D. Fla. 1980).

77. *Z.K. Marine*, 1991 AMC at 1440.

78. In particular, Judge Hoeveler rejected the plaintiffs' argument that they had had no opportunity to declare a higher value because they had purchased the bills of lading while the ARCHIGETIS was at sea and that Continental, as a stevedore, was not covered by the COGSA package limitation. *Id.* 1439-41.

79. 1991 AMC 1518 (S.D. Fla. 1991).

80. *Id.* at 1518.

81. *Id.*

82. *Id.*

83. *Id.* at 1519.

84. *Jumbo Navigation*, 1991 AMC at 1519.

85. *Id.*

request and was paid by Melchior's insurer, the Wausau Insurance Company (which then brought a suit against Jumbo in state court), Cigisped, which still had not been paid by Melchior, moved for summary judgment, and the case was transferred from the docket of District Judge Nesbitt to District Judge Moreno upon the latter's investiture in the fall of 1990.⁸⁶

In opposing Cigisped's motion for summary judgment, Melchior argued that there was a genuine issue of fact as to whether Cigisped had agreed that it would not be entitled to collect freight if the yacht was not delivered to Miami in perfect condition.⁸⁷ In just four brief paragraphs, however, Judge Moreno rejected Melchior's argument as "unpersuasive."

Relying on a recent decision by the Third District Court of Appeal,⁸⁸ Judge Moreno found that under both COGSA and Florida state law Melchior's sole recourse for the damages sustained by the VALIA was against Jumbo. He explained this result by writing: "Florida law is well established that a freight forwarder, such as Cigisped, does not incur liability for cargo damage while such cargo is in the possession and control of an ocean carrier."⁸⁹ As such, Judge Moreno granted Cigisped's motion and ordered the clerk of the court to release to Cigisped the money that Melchior had deposited into the court's registry.⁹⁰

III. CRIMINAL OFFENSES

As usual, the survey period produced a number of criminal cases involving ships.⁹¹ In the first, *National Marine Underwriters, Inc. v.*

86. *Id.*

87. *Id.* at 1520.

88. *See Golden Triad Carrier, Inc. v. Paco Am. Corp.*, 553 So. 2d 247 (Fla. 3d Dist. Ct. App. 1989).

89. *Jumbo Navigation*, 1991 AMC at 1520.

90. *Id.*

91. Some of these cases, however, had only a tangential connection to admiralty law. *See, e.g., United States v. Gutierrez*, 931 F.2d 1482 (11th Cir.), *cert. denied*, 112 S. Ct. 398 (1991) (defendants who had been arrested as a result of a sting operation in which federal agents portrayed Colombian drug smugglers with sailboats ready to transport cocaine into the country had been correctly adjudged guilty, but one of the defendants was entitled to be resentenced); *United States v. Mieres-Borges*, 919 F.2d 652 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1633 (1991) (record sustained the conviction of one defendant, but not the other, where both had been found guilty of attempting to smuggle cocaine into the country by means of an air drop to a waiting

Loring,⁹² a Chris Craft boat owned by Drs. Richard Krieger and Nolan Altman was stolen. After Krieger and Altman received payment from their insurer, Colonial Penn, they executed a release subrogating all of their rights to Colonial Penn.⁹³ Thereafter, Colonial Penn gave a power of attorney to National Marine Underwriters, Inc. (National Marine).⁹⁴ In turn, National Marine sued Keith S. Loring, claiming that he was responsible for the theft.⁹⁵

Loring responded to the suit by arguing that National Marine had failed to obtain a "managing general agent permit," as required under the Florida insurance code.⁹⁶ Finding that National Marine had in fact failed to obtain the permit, Circuit Judge Robinson struck National Marine's complaint as a sham pleading.⁹⁷

On appeal, however, District Judges Barkdull, Nesbitt, and Jorgenson reversed Judge Robinson and remanded the case to him for further proceedings. Although the panel agreed that there was some evidence in the record to support Loring's argument,⁹⁸ it refused to let him use it. In a short per curiam opinion, the panel wrote: "The claim brought by National Marine for Colonial Penn is as though Drs. Krieger and Altman had sued Loring. In such a subrogation claim, the third party causing injury to an insured cannot rely upon defenses that might have been raised between the insurer and the insured."⁹⁹

The next two criminal cases of the survey period arose out of Florida's continuing attempt to track down and seize vessels that are used in the drug trade. In *In re Forfeiture of One 31' Seahawk "Cigarette" Vessel*,¹⁰⁰ the City of Pompano Beach sought to forfeit a vessel that had been found without a hull identification number.¹⁰¹ Circuit Judge Dimitrouleas dismissed the complaint, however, on the ground that the

ship); *United States v. Castillo-Valencia*, 917 F.2d 494 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1321 (1991) (evidence supported conviction and sentencing of defendants who attempted to smuggle into the country 495 bales of marijuana stored in their ship's hold).

92. 568 So. 2d 1007 (Fla. 3d Dist. Ct. App. 1990).

93. *Id.* at 1007.

94. *Id.*

95. *Id.* at 1007-08.

96. *Id.* at 1007 (citing FLA. STAT. § 626.121(2) (1985)).

97. *National Marine*, 568 So. 2d at 1007.

98. *Id.* at 1007 n.1.

99. *Id.* at 1008.

100. 572 So. 2d 1038 (Fla. 4th Dist. Ct. App. 1991).

101. *Id.* at 1039.

City had failed to show that the vessel had been used in the commission of a felony.¹⁰² The City then filed an appeal.¹⁰³

In a per curiam decision that provoked a vigorous dissent, District Judges Glickstein and Oftedal affirmed the dismissal. After a review of the Florida Contraband Forfeiture Act's checkered legislative history,¹⁰⁴ they concluded that the statute required an affirmative showing of wrongdoing:

For the vessel in the instant case to be subject to forfeiture, the City was required to allege either guilty knowledge or intent. The verified amended complaint does not allege that the owners "knowingly or intentionally" concealed the vessel or misrepresented the identity of the vessel in violation of [the statute] The City was given the opportunity to amend further and chose not to do so.¹⁰⁵

In dissent, District Judge Anstead agreed with the majority that it had not been the legislature's intention to forfeit the ships of innocent owners.¹⁰⁶ But he argued that the burden was on the owner and not the government. He explained his position by writing: "[I]t appears to me that the legislature has put the burden on the innocent owner to establish his innocence. While there may be constitutional implications to this scheme, these issues have not been raised in this appeal and were not addressed below."¹⁰⁷

Several months later, another vessel forfeiture case made its way to the Fourth District. In *In re Forfeiture of One 1987 Velocity 30' Go-Fast Vessel*,¹⁰⁸ Broward County Sheriff Nick Navarro filed a complaint seeking to forfeit a boat and a boat trailer that belonged to Victor Dessberg because the boat lacked a hull identification number.¹⁰⁹ Circuit Judge Moriarty denied the petition and Navarro appealed.¹¹⁰

102. *Id.*

103. *Id.*

104. *Id.* at 1039-40. Shortly after the survey period ended, the Florida Supreme Court, in an opinion by Justice Barkett, upheld the Act while expressing grave doubts about its constitutionality. *See Department of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991).

105. *Seahawk*, 572 So. 2d at 1040.

106. *Id.*

107. *Id.*

108. 577 So. 2d 678 (Fla. 4th Dist. Ct. App. 1991).

109. *Id.* at 679.

110. *Id.*

In a brief per curiam opinion, a panel consisting of Chief Judge Hersey, District Judge Polen, and Senior District Judge Walden affirmed the denial.¹¹¹ Relying on *Seahawk*, they wrote: "In a recent opinion this court ruled that in order to support forfeiture some wrongdoing must be alleged in addition to mere possession of a vessel with altered or covered hull numbers. There must be either guilty knowledge or intent alleged."¹¹²

The final criminal case of the period also stemmed from the war on drugs. In *United States v. Thompson*,¹¹³ a United States Coast Guard boarding party had discovered 412 kilograms of cocaine during a documents and safety inspection aboard a cruiser-trawler named the MOLLY BETH while she was in the Windward Passage, approximately 500 miles from the United States.¹¹⁴ Subsequently, James M. Thompson, who had recently become the owner as well as the captain of the MOLLY BETH, was placed under arrest and charged with conspiracy to possess with intent to distribute cocaine while on an American vessel.¹¹⁵

Thompson moved to have the cocaine suppressed.¹¹⁶ When District Judge Aronovitz denied the motion, Thompson entered a conditional guilty plea and then appealed the denial of his motion.¹¹⁷ On appeal, Circuit Judge Cox, in an opinion joined in by Circuit Judge Kravitch and Senior Circuit Judge Henderson, affirmed the denial of Thompson's motion.¹¹⁸

Thompson had argued before the trial court and then again on appeal that the Coast Guard's search had violated his fourth amendment privacy rights under the United States Constitution as well as Article 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.¹¹⁹ Judge Cox, however, made short work of both of these arguments. With respect to the fourth amendment, he ruled that Thompson had no legitimate expectation of privacy during the Coast Guard's search because he had consented to the search, the search was

111. *Id.* at 680.

112. *Id.* at 679.

113. 928 F.2d 1060 (11th Cir.), *cert. denied*, 112 S. Ct. 270 (1991).

114. *Id.* at 1061.

115. *Id.*

116. *Id.* at 1063.

117. *Id.*

118. *Thompson*, 928 F.2d at 1061.

119. *Id.* at 1063. The Convention, which entered into force in the United States in 1964, appears at 15 U.S.T. 1606, T.I.A.S. No. 5639.

undertaken pursuant to statutory authorization, and the search occurred outside the territory of the United States where the strictures of the fourth amendment apply, if at all, only very slightly.¹²⁰ Having disposed of Thompson's first argument, Judge Cox devoted even less time to Thompson's other contention. Although noting that the United States is a party to the Geneva Convention, Judge Cox found that the Convention had not created any privately enforceable rights.¹²¹ As such, Judge Cox concluded that any objection based on the Convention missed the mark because "Thompson does not have standing to protest an alleged violation of the treaty."¹²²

IV. LIENS

The period under review produced two cases involving maritime liens. Although both presented rather straightforward fact patterns, they still made for interesting reading.

In *Stevens Technical Services, Inc. v. United States*,¹²³ the plaintiff, Stevens Technical Services, Inc. (Stevens) brought suit against the United States and Atlantic Sandblasting & Coatings, Inc. (Atlantic) for repairs it had performed on the U.S.S. SEALIFT ANTARCTIC. The ship, an auxiliary tanker, had been demise chartered to the United States through the Military Sealift Command (MSC) and was being operated by Marine Transport Lines, Inc. (MTL).¹²⁴ In 1985, she underwent a planned major overhaul at Atlantic's repair facility in Tampa, with half of the overhaul work being done by Atlantic and the rest carried out by Stevens.¹²⁵

The overhaul was completed as scheduled and, following various inspections by both MSC and MTL, the SEALIFT ANTARCTIC was

120. *Thompson*, 928 F.2d at 1063-66. In rejecting Thompson's Fourth Amendment argument, Judge Cox again made it clear that one's rights while on the water are not the same as those enjoyed on land: "At sea, a person's expectation of privacy may be severely restricted compared with expectations of privacy on land." *Id.* at 1064 (quoting *United States v. Lopez*, 761 F.2d 632, 635 (11th Cir. 1985)). For a further discussion, see Howard S. Marks, Comment, *The Fourth Amendment: Resting on the High Seas?*, 34 MERCER L. REV. 1537 (1983).

121. *Id.* at 1066.

122. *Id.*

123. 913 F.2d 1521, 1991 AMC 2497 (11th Cir. 1990).

124. *Id.* at 1525, 1991 AMC at 2502.

125. *Id.* The overhaul included "tank cleaning, repainting and coatings and major engine and machinery work." *Id.*

redelivered to the United States.¹²⁶ MTL then paid Atlantic in full, for which it later was reimbursed by MSC.¹²⁷ Atlantic failed to pay Stevens, however, and Stevens therefore filed suit against the United States and Atlantic.¹²⁸

The case was referred to visiting District Judge Alaimo, who conducted a bench trial.¹²⁹ Following the trial, he held that Stevens could recover against Atlantic,¹³⁰ but was barred by the Public Vessels Act (PVA)¹³¹ from recovering against the United States.¹³² Upon receiving the decision, Stevens filed an appeal.¹³³

The appeal was heard by a panel consisting of Circuit Judges Vance and Anderson and visiting Senior Circuit Judge Brown. Shortly after the oral argument, however, Judge Vance was assassinated. The opinion therefore was issued by Judges Brown and Anderson and was written by Judge Brown.¹³⁴ In it, Judge Brown reversed Judge Alaimo's conclusion that the PVA barred Stevens' suit against the government,¹³⁵ and remanded the case for a determination as to whether Stevens was entitled to assert a maritime lien against the SEALIFT ANTARCTIC.¹³⁶

Judge Brown began his decision by tracing the history of the PVA.¹³⁷ Based on this review, Judge Brown concluded that Stevens had the right to sue the government for the work it had performed and, with the exception of being barred from actually arresting the SEALIFT ANTARCTIC, was entitled to go forward in the same manner as if the vessel had been owned by a private party.¹³⁸

Having found that the PVA did not bar Stevens' suit, Judge Brown then turned to Stevens' assertion that the repairs it had performed gave rise to a maritime lien. Here Judge Brown found the rec-

126. *Id.* at 1525-26, 1991 AMC at 2502.

127. *Stevens*, 913 F.2d at 1526, 1991 AMC at 2502.

128. *Id.*, 1991 AMC at 2502-03.

129. *Id.*, 1991 AMC at 2503.

130. *Id.*

131. 46 U.S.C. §§ 781-790 (1988). The PVA and its sister statute, the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1988), are described in detail in Fritz G. Faerber, *Admiralty Claims Against the United States*, 20 FORUM 122 (1984).

132. *Stevens*, 913 F.2d 1526, 1991 AMC at 2503.

133. *Id.*

134. *Id.* at 1523.

135. *Id.* at 1537, 1991 AMC at 2521.

136. *Id.*

137. *Stevens*, 913 F.2d at 1526-34, 1991 AMC at 2503-16.

138. *Id.* at 1534, 1991 AMC at 2515-16.

ord incomplete. Although it was clear that Stevens had done the work for which it was seeking payment,¹³⁹ it was open to dispute whether Stevens had relied on the credit of the SEALIFT ANTARCTIC, as opposed to the credit of Atlantic. Noting that reliance on a vessel is a basic requirement for assertion of a maritime lien, Judge Brown held that further proceedings at the trial court were necessary.¹⁴⁰

The other lien case of the survey period was *Kaleidoscope Tours v. M/V "Tropicana."*¹⁴¹ From December 1, 1988 to May 14, 1989, the plaintiff, Kaleidoscope Tours (Kaleidoscope), had provided embarkation services to the M/V TROPICANA, a passenger cruise ship, at the Port of Miami.¹⁴² These services consisted of collecting money and tickets from passengers, checking passports, embarking temporary crew members and ship's employees, and accounting for and delivering the fares to the ship's pier supervisors.¹⁴³ Although Kaleidoscope was paid for most of its services, it was not paid for those it rendered between March 27, 1989 and May 14, 1989.¹⁴⁴ In order to recover for these services, which it valued at \$20,350, Kaleidoscope asserted a lien against the TROPICANA and had her arrested.¹⁴⁵

Kaleidoscope's case was referred to District Judge Ryskamp, who conducted a bench trial.¹⁴⁶ After reviewing the pertinent facts, he decided that there were two key questions in the case: 1) was the contract under which Kaleidoscope had acted "maritime in nature," and, 2) were the services provided "necessaries" for purposes of the Federal

139. *Id.* at 1535, 1991 AMC at 2517-18.

140. *Id.* at 1536-37, 1991 AMC at 2519-21. Because it had not been argued at the trial court, Judge Brown did not reach the government's argument that the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613 (1988), barred Stevens' suit. In dicta, however, Judge Brown stated that if the argument had been raised in a timely fashion, he would have rejected it on the ground that the CDA does not control a party's right to assert a maritime lien. *Stevens*, 913 F.2d at 1537, 1991 AMC at 2521. A short time later, in a case that had been held in abeyance pending *Stevens*, a panel consisting of Circuit Judges Fay and Edmondson and visiting Senior Circuit Judge Garza held that the CDA does not affect a party's right to claim a maritime lien. See *Marine Coatings of Alabama, Inc. v. United States*, 932 F.2d 1370, 1991 AMC 2487 (11th Cir. 1991).

141. 755 F. Supp. 382, 1991 AMC 1462 (S.D. Fla. 1990).

142. *Id.* at 383, 1991 AMC at 1463.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Kaleidoscope*, 755 F. Supp. at 383, 1991 AMC at 1463.

Maritime Lien Act (FMLA)?¹⁴⁷ In a short and well-reasoned opinion, he concluded that the answer to both questions was yes:

[T]he collection of and accounting for passengers' fares and tickets and the checking of passports for immigration services are essential to the voyage of a cruise ship. "Without these, there can be no voyage" This court therefore concludes that the embarkation services performed by Kaleidoscope are "necessaries" which give rise to a maritime lien under the FMLA. Thus, the contract pursuant to which these services were performed is a maritime contract, and the court has jurisdiction to enforce the maritime lien.¹⁴⁸

V. PERSONAL INJURY

A. Longshore and Harbor Workers

Cases about longshore and harbor workers do not often make news, but *Robinson v. Jacksonville Shipyards, Inc.*¹⁴⁹ proved to be an exception. Lois Robinson had been a ship welder at two shipyards run by the defendant, Jacksonville Shipyard, Inc. (JSI).¹⁵⁰ She had joined JSI in September, 1977 as a third-class welder and had been steadily promoted until she reached the status of first-class welder.¹⁵¹

While working at JSI, Robinson was constantly surrounded by pictures of nude women and confronted by sexually-suggestive comments and graffiti.¹⁵² Although she complained about the working environment at JSI to her superiors,¹⁵³ the problems grew worse.¹⁵⁴ Finally, in

147. *Id.*, 1991 AMC at 1464. The text of the FMLA can be found at 46 U.S.C.A. §§ 31341-31343 (West, Supp. 1990).

148. *Kaleidoscope*, 755 F. Supp. at 385, 1991 AMC at 1466.

149. 760 F. Supp. 1486 (M.D. Fla. 1991).

150. *Id.* at 1491. Robinson worked at both the Mayport Yard, situated in the Mayport Naval Station, and at the Commercial Yard, located on the riverfront in downtown Jacksonville. *Id.*

151. *Id.*

152. *Id.* at 1493-94.

153. In addition to complaining to her superiors, Robinson filed a grievance with her union and registered a complaint with the Jacksonville Equal Employment Opportunity Commission (EEOC). The union, however, refused to pursue the matter and the EEOC sent Robinson a letter informing her that it had found that "no reasonable cause existed" to believe that she had been discriminated against on account of her sex. *Robinson*, 760 F. Supp. at 1516-17.

154. *Id.* at 1500-01.

September, 1986, Robinson filed a sexual discrimination lawsuit against JSI.¹⁵⁵ In her suit Robinson sought to force JSI to implement a comprehensive sexual harassment policy, pay her money damages, and delete from her employment record warnings that she had received for excessive absenteeism.¹⁵⁶

Robinson's case was assigned to District Judge Melton and culminated in an eight day bench trial in January and February, 1989.¹⁵⁷ Two years later, in March, 1991, Judge Melton issued his final judgment. In a highly-publicized opinion¹⁵⁸ that ran sixty-one published pages, Judge Melton ruled that Robinson had been subjected to a sexually hostile work environment.¹⁵⁹ After engaging in an exhaustive review of the voluminous and often-conflicting record, including testimony from Robinson's co-workers and the opinions of expert witnesses, Judge Melton concluded:

A reasonable woman would find that the working environment at JSI was abusive. This conclusion reaches the totality of the circumstances, including the sexual remarks, the sexual jokes, the sexually-oriented pictures of women, and the nonsexual rejection of women by coworkers. The testimony by Dr. Fiske and Ms. Wagner provides a reliable basis upon which to conclude that the cumulative, corrosive effect of this work environment over time affects the psychological well-being of a reasonable woman placed in these conditions.¹⁶⁰

Having found that Robinson had been the victim of an illegal work environment, Judge Melton turned to the question of remedies. He first concluded that with respect to monetary compensation Robinson was entitled to only \$1.00 in nominal damages because she had failed to prove that JSI's conduct had caused her to sustain economic damages.¹⁶¹ He did find, however, that under federal law Robinson was

155. *Id.* at 1517. Robinson's suit was based on Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of gender. *Id.* at 1490. The Act is codified at 42 U.S.C. §§ 2000e (1988).

156. *Robinson*, 760 F. Supp. at 1519.

157. *Id.* at 1490.

158. Judge Melton's decision was reported by such diverse publications as *The Chicago Tribune*, *The New York Times*, *Newsday*, *The Seattle Times*, *The National Law Journal*, *Business Week*, *Playboy*, and *Time*.

159. *Id.* at 1491.

160. *Id.* at 1524.

161. *Id.* at 1532-34.

entitled to have JSI pay her attorneys' fees and costs since she had won nominal damages.¹⁶²

Judge Melton then moved to the subject of injunctive relief. Here he found that Robinson had met her burden of proof.¹⁶³ He therefore ordered JSI to adopt and enforce a policy for preventing sexual harassment. Because he was concerned that JSI's past history made it a poor candidate for devising an acceptable sexual harassment plan on its own, Judge Melton set forth in detail the elements that the plan would have to contain.¹⁶⁴

In justifying his hands-on approach, Judge Melton wrote:

The history of management's condonation and approval of sexually harassing conditions, together with the past failures to redress effectively those instances of sexual harassment of which management disapproved, argues forcefully for affirmative relief that provides guidance for all employees regarding acceptable and offensive conduct, provides confidence to female employees that their valid complaints of sexual harassment will be remedied, and provides male employees who transgress the boundaries of sexual harassment with notice that their conduct will be penalized commensurate with the seriousness of the offense.¹⁶⁵

162. *Id.* at 1538-39.

163. *Robinson*, 760 F. Supp. at 1534.

164. *Id.* at 1538. Recognizing that his plan might need certain modifications in order to be implemented successfully, Judge Melton gave JSI thirty days "to submit any specific objections that relate to its ability to implement and enforce the policy and procedures, as modified." *Id.* at 1537. Judge Melton cautioned JSI, however, that its objections were to be based solely on its ability to practically execute the court's mandate, and were not to "concern the substance" of the court's decision. *Id.*

165. *Id.* at 1534. Lois Robinson was not the first female plaintiff to use maritime law to strike a blow for sexual equality. For other such cases, see Robert M. Jarvis, *Sexual Equality Before the Silver Oar: Lifting the Fog on Women, Ships, and the Law of Admiralty*, 7 CARDOZO L. REV. 93 (1985). Shortly after the survey period ended, however, the Fifth Circuit affirmed the dismissal of a case very similar to *Robinson*. In *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir. 1991), Elizabeth Wilson, a motorhand, brought a Jones Act suit against her employer claiming that it had permitted a hostile work environment to develop and remain aboard its ships. Like the district court, the Fifth Circuit found that the claim was time-barred because it had been brought more than three years after the sexual harassment had occurred.

B. *Passengers*

The survey period produced three cases involving injuries to ship passengers. In the first, *Keefe v. Bahama Cruise Line, Inc.*,¹⁶⁶ the long-running saga of Rita Patricia Keefe appears to have finally come to an end. Keefe, a hairdresser, along with the other members of her bowling team, had been a passenger aboard the S/S VERA CRUZ during a two day "Cruise to Nowhere" in June, 1984.¹⁶⁷ While dancing on the ship's outdoor dance floor one night, she had slipped and injured herself.¹⁶⁸ A bench trial was held in March, 1988 before District Judge Kovachevich, who found that Keefe was entitled to recover \$10,657.60.¹⁶⁹ The owner of the VERA CRUZ, Bahama Cruise Line, Inc. (BCL), appealed Judge Kovachevich's decision to the Eleventh Circuit, and obtained an order remanding the question of liability and requiring Keefe to pay the costs of the appeal.¹⁷⁰

On remand, Judge Kovachevich readopted her earlier opinion and again entered judgment in favor of Keefe.¹⁷¹ BCL then took a second appeal. This time the Eleventh Circuit affirmed the judgment and ordered BCL to pay costs to Keefe.¹⁷² Keefe then filed a motion with Judge Kovachevich asking her to enter judgment in the amount of \$10,657.60, together with court costs, appellate costs, and interest at an annual rate of 6.71% from March 31, 1988, the date of the original judgment.¹⁷³ In response, BCL argued that interest and costs should run only from July 17, 1989, the date of Judge Kovachevich's second judgment.¹⁷⁴

Agreeing with the parties that there was a split in the law among the circuits,¹⁷⁵ Judge Kovachevich decided to side with Keefe:

166. 753 F. Supp. 349, 1991 AMC 1397 (M.D. Fla. 1990).

167. *Keefe v. Bahama Cruise Line, Inc.*, 682 F. Supp. 1191, 1192 (M.D. Fla. 1988).

168. *Id.* at 1192.

169. *Id.* at 1195. Judge Kovachevich awarded Keefe \$7,000.00 in compensatory damages and \$3,657.60 for medical costs. *Id.*

170. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1990 AMC 46 (11th Cir. 1989). This aspect of the *Keefe* litigation is discussed in Nathaniel G. W. Pieper & David W. McCreddie, *Cruise Ship Passenger Claims and Defenses*, 21 J. MAR. L. & COM. 151, 175 (1990).

171. *Keefe v. Bahama Cruise Line, Inc.*, 715 F. Supp. 1069 (M.D. Fla. 1989).

172. *Keefe v. Bahama Cruise Line, Inc.*, 902 F.2d 959 (11th Cir. 1990).

173. *Keefe*, 753 F. Supp. at 351, 1991 AMC at 1399.

174. *Id.*

175. *Id.* (citing *Chattem, Inc. v. Bailey*, 486 U.S. 1059 (1988) (White, J.,

In this case, the questions addressed in the first instance and on remand were resolved in the same manner. This Court found Defendant liable, found the claim not to be time-barred, and awarded identical damages The damages were meaningfully "ascertained" at the time of the original judgment The Court concludes that interest in this cause of action should appropriately be calculated from the date of the original judgment, March 31, 1988.¹⁷⁶

The next passenger case was *Perlman v. Valdes*.¹⁷⁷ Sherry Lynn Valdes had died from injuries sustained when the speedboat in which she was riding struck an unlighted, unused concrete pier.¹⁷⁸ Following her death her husband, Jose, and her parents, Jack and Linda Newton, brought a wrongful death suit against George D. Perlman, the trustee of the City Isles Trust (Trust), the owner of the pier, on the ground that it had been negligent in failing to light the pier in accordance with federal regulations.¹⁷⁹

The Trust moved for and received summary judgment on the Newtons' claim.¹⁸⁰ The remaining claims were then tried to a jury. The jury found that the Trust was guilty of negligence *per se* and that Jose and Sherry had been twenty-five percent negligent.¹⁸¹ Based on these findings, the jury awarded \$250,000 to Sherry's estate and \$250,000 to Jose.¹⁸² Although the Trust moved for a new trial and for remittitur of the award, Circuit Judge Gale entered final judgment in accordance with the verdict.¹⁸³ The Trust then took an appeal and the Newtons filed a cross-appeal.¹⁸⁴ In a brief opinion written by District Judge Baskin and joined in by District Judges Nesbitt and Cope, the judgment was affirmed in part and reversed in part.¹⁸⁵

Judge Baskin began her review by agreeing with the Trust that the damages won by Sherry's estate were excessive. She therefore reversed

dissenting)).

176. *Id.* at 351, 1991 AMC at 1400.

177. 575 So. 2d 216 (Fla. 3d Dist. Ct. App. 1990).

178. *Id.* at 217.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Perlman*, 575 So. 2d at 217.

183. *Id.*

184. *Id.*

185. *Id.* at 218.

the jury's award and remanded for remittitur or a new trial.¹⁸⁶ With respect to Jose's recovery, however, Judge Baskin decided that it was supported by the evidence and therefore refused to disturb it.¹⁸⁷

Having disposed of the appeal, Judge Baskin turned to the cross-appeal. Here she found that Judge Gale had been correct in dismissing the Newtons' claim because they had not relied on their daughter for financial support. Recognizing that the question was controlled by a very recent decision of the United States Supreme Court, Judge Baskin wrote: "The trial court properly granted summary judgment in the Trust's favor as the parents may not recover under general maritime law absent a showing of financial dependence on the decedent."¹⁸⁸

The final passenger case of the survey period was *Wilkinson v. Carnival Cruise Lines, Inc.*¹⁸⁹ Marjetta Wilkinson and Tracie Sanders had been travelling companions aboard the S/S TROPICALE, a cruise ship owned by Carnival Cruise Lines, Inc. (Carnival).¹⁹⁰ On the afternoon of September 30, 1983, after sunning herself for a short time by the pool on the Lido Deck, Wilkinson walked barefoot towards an electronic sliding glass door on the ship's port side.¹⁹¹ As she walked through the door, it closed, running over the toes of her right foot.¹⁹²

Wilkinson filed suit against Carnival claiming that it had failed to maintain the door properly and also had failed to warn her that the door could close suddenly.¹⁹³ The case was assigned to District Judge Zloch and the parties proceeded to discovery.¹⁹⁴ As the date for trial neared, Carnival made a motion for summary judgment.¹⁹⁵ Although the magistrate to whom the motion was referred recommended that it be granted, Judge Zloch ruled that while the plaintiff's case was weak, there was sufficient evidence to warrant a trial.¹⁹⁶

186. *Id.* at 217-18.

187. *Pertman*, 575 So. 2d at 218.

188. *Id.* (citing *Miles v. Apex Marine Corp.*, 111 S. Ct. 317, 1991 AMC 1 (1990)). The Supreme Court's decision is commented on in Ross Diamond III, *Wrongful Death Remedies After Miles v. Apex Marine Corp.*, 3 MAR. L. REP. 49 (1991), and C. Taylor Simpson, Note, *Sailing the Statutory Seas Toward Uniformity in Maritime Tort Law: Miles v. Apex Marine Corp.*, 15 TUL. MAR. L.J. 449 (1991).

189. 920 F.2d 1560 (11th Cir. 1991).

190. *Id.* at 1562.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Wilkinson*, 920 F.2d at 1562.

195. *Id.*

196. *Id.* at 1563.

Much of the trial centered around the testimony of Sanders. She had not witnessed the accident, but claimed to have had a conversation with a cabin steward named Fletcher shortly after the accident. According to Sanders, Fletcher had told her that he had been aware of the door's propensity to malfunction and had been trying to fix it.¹⁹⁷ Carnival objected to the introduction of his testimony on the ground that it was inadmissible hearsay.¹⁹⁸ Wilkinson responded by arguing that it should be let in as a party admission.¹⁹⁹ After considering the matter, Judge Zloch concluded that the statement was admissible as a statement by a party's servant concerning a matter within the scope of his employment.²⁰⁰

The trial also focused on the testimony of several other witnesses who claimed that after Wilkinson's accident the door that had injured her was locked in an open position for the remainder of the cruise.²⁰¹ Initially, Judge Zloch ruled that this testimony was inadmissible because it constituted evidence of a subsequent remedial measure.²⁰² On the next day of the trial, however, Judge Zloch held that the testimony was admissible to impeach Rafael Marcialis, the ship's second officer, who had testified that when he inspected the door he had found it to be in "normal operating condition."²⁰³

Following the trial the jury returned a verdict in favor of Wilkinson and awarded her \$260,000, less twenty percent for her negligence.²⁰⁴ After Carnival's motions for a judgment notwithstanding the verdict, remittitur, and a new trial were denied, Carnival filed an appeal.²⁰⁵ On appeal, the judgment was reversed and the case was remanded for a new trial in an opinion written by Circuit Judge Fay and joined in by Circuit Judge Edmondson and Senior Circuit Judge Tuttle.²⁰⁶

Judge Fay turned first to the question of whether Fletcher's alleged statement should have been admitted. Noting that neither party

197. *Id.* at 1562-63.

198. *Id.* at 1563.

199. *Wilkinson*, 920 F.2d at 1563.

200. *Id.*

201. *Id.*

202. *Id.* at 1563-64.

203. *Id.* at 1564.

204. *Wilkinson*, 920 F.2d at 1564.

205. *Id.*

206. *Id.* at 1562.

had attempted to depose Fletcher or call him to the stand,²⁰⁷ Judge Fay did not question Sanders' contention that Fletcher had told her that the door had been malfunctioning. Instead, Judge Fay posed the question as being whether Fletcher was in a position to speak for Carnival about the door's operation.²⁰⁸ Relying on an affidavit submitted by Jack Stein, of Carnival's Operations Department, Judge Fay found that cabin stewards such as Fletcher were strictly prohibited from being in any of the ship's "passenger areas."²⁰⁹ Since the accident had taken place in such an area,²¹⁰ Judge Fay concluded that Fletcher's statement was not a party admission: "The magistrate found, and we agree, that Stein's affidavit established 'that the statement made by a room steward to Ms. Sanders did not concern a matter within the scope of his agency or employment,' and therefore was hearsay."²¹¹

Although agreeing with Carnival that as a practical matter the plaintiff's case was over, Judge Fay noted that there still was a slight chance that Wilkinson could find a way to get Fletcher's statement into evidence.²¹² Since another trial remained a theoretical possibility, Judge Fay reviewed Wilkinson's impeachment of the ship's second officer. Once again, he found reversible error. In explaining his conclusion, Judge Fay wrote:

207. *Id.* at 1562 n.3.

208. *Id.* at 1565. Judge Fay described the inquiry by writing: "The appropriate focus is instead upon whether the cabin steward's statement concerned a 'matter within the scope of [his] agency or employment' with Carnival." *Wilkinson*, 920 F.2d at 1565.

209. *Id.* at 1566.

210. *Id.*

211. *Id.*

212. Judge Fay explained the need to remand the case, rather than simply reverse, as follows:

If 801(d)(2)(D) were the only avenue through which plaintiff had attempted to offer the Fletcher statements, then we might well simply reverse and enter judgment for Carnival on this issue. Our examination of the record, however, reveals that following the magistrate's recommendation . . . plaintiff filed a Notice of Intent to Rely on Federal Rule of Evidence 803(24)

Because the district court overruled the magistrate's report and admitted the Fletcher statements as non-hearsay admissions of a party-opponent under Rule 801(d)(2)(D), it never considered the applicability of Rule 803(24), the so-called "Catchall" exception to the hearsay rule Accordingly, we leave it to the district court to determine whether the cabin steward's hearsay statements comport sufficiently with the criteria of Rule 803(24) to justify admission under that exception.

Id. at 1567 n.13.

Marcialis made no statements concerning the functioning of the door in the days subsequent to September 30. He did not assert that the *Tropicale's* crew or the cruise line had exercised "all reasonable care" in maintaining the door. Nor did he make representations that the door in question was in the "safest" or the "best" condition.

In short, the evidence of the subsequent remedial measure in this case impeached nothing in Marcialis' testimony. Moreover, admitting various witnesses' testimony to the fact of the doors being kept open likely gave rise to the precise inference of negligence that Rule 407 was designed to avoid. Accordingly, the evidence should have remained inadmissible.²¹³

C. *Seamen*

Two very unusual personal injury cases involving seamen were decided during the time covered by the survey. In *Tanker Management, Inc. v. Brunson*,²¹⁴ Darrel Allen, a merchant seaman, suffered a back injury in September, 1983 while working aboard the M/V CAROLE G. INGRAM.²¹⁵ Allen was treated by Dr. Bruce C. Brunson, who signed a certificate in February, 1984 stating that Allen could return to work in three weeks provided that he did not have to lift anything exceeding fifty pounds.²¹⁶ In December, 1984, Brunson signed a second certificate stating that Allen could resume work in two weeks with no weight restriction.²¹⁷ In August, 1985, Allen suffered a second back injury while working aboard the CAROLE G. INGRAM.²¹⁸

Allen subsequently sued Tanker Management, Inc., the operator of the CAROLE G. INGRAM, for both injuries. In time, Tanker

213. *Wilkinson*, 920 F.2d at 1568-69. Having dealt with the evidentiary questions posed by the appeal and having found that a new trial was necessary, Judge Fay ended his opinion by disposing of the final issue in short order. Carnival had argued that Judge Zloch had erred in failing to give one of its requested jury instructions. The instruction would have informed the jury that it could find that Wilkinson was a hypersensitive victim. *Id.* at 1569. Judge Fay ruled that the refusal had not been error because the instruction was covered by another instruction that was given and because Carnival had been allowed to argue in its closing statement to the jury that Wilkinson's injuries had been aggravated by a pre-existing condition. *Id.* at 1570.

214. 918 F.2d 1524 (11th Cir. 1990).

215. *Id.* at 1525.

216. *Id.*

217. *Id.*

218. *Id.*

Management settled Allen's lawsuit for \$150,000.²¹⁹ Its counsel then wrote to Brunson and demanded indemnity for the amounts it had paid in defending and settling the lawsuit.²²⁰ When Brunson refused to pay, Tanker Management filed suit against him. According to the complaint, Brunson, who had been paid by Tanker Management to treat Allen, had intentionally misrepresented Allen's condition (at Allen's behest) despite knowing that Tanker Management was relying on Brunson to advise them on whether Allen could return to work.²²¹

The case was assigned to District Judge Sharp and a bench trial was held. At the close of Tanker Management's case-in-chief Brunson moved for a directed verdict. Finding that Tanker Management had failed to make out a prima facie case, Judge Sharp granted the motion.²²² Because Tanker Management had rejected an offer of judgment from Brunson prior to the start of the trial, Judge Sharp also granted Brunson's subsequent motion for costs and attorneys' fees.²²³ Tanker Management then filed an appeal.²²⁴

In a rather scholarly opinion, Circuit Judge Clark, joined by Circuit Judge Hatchett and Senior Circuit Judge Morgan, affirmed Judge Sharp in all respects.²²⁵ Finding that Tanker Management's case had bordered on the frivolous,²²⁶ Judge Clark approved the granting of the directed verdict,²²⁷ the imposition of costs,²²⁸ and the awarding of attorneys' fees,²²⁹ as well as Judge Sharp's decision to add The London Steam-Ship Owner's Mutual Insurance Association Limited, Tanker Management's insurer, to the judgment so as to make it clear that it could not relitigate the matter by bringing a new suit in its own name.²³⁰

The other seaman's suit was *Gleneagle Ship Management Co. v.*

219. *Tanker Management*, 918 F.2d at 1525.

220. *Id.*

221. *Id.* at 1525-26.

222. *Id.* at 1526.

223. *Id.*

224. *Tanker Management*, 918 F.2d at 1526.

225. *Id.* at 1529.

226. *Id.* at 1527. Judge Clark observed dryly: "Appellant failed to present any evidence which supports the inference that Brunson failed to accurately state his opinion as to Allen's condition." *Id.*

227. *Id.* at 1526-27.

228. *Tanker Management*, 918 F.2d at 1527.

229. *Id.* at 1527-29.

230. *Id.* at 1529.

Leondakos.²³¹ Anthony Leondakos had injured himself when he fell off a stairwell on the M/V BRIDGETON while sailing in the Persian Gulf.²³² He and his wife Carol filed a Jones Act suit²³³ in state court against Gleneagle Ship Management Company (Gleneagle) and Chesapeake Shipping, Inc.²³⁴ In response, Gleneagle moved to dismiss the complaint on the ground that the trial court lacked personal jurisdiction.²³⁵

Before the motion to dismiss could be heard, Leondakos served a discovery request aimed at determining whether the trial court did have jurisdiction. When Circuit Judge Farnell ruled that Leondakos could engage in limited discovery for the purpose of determining whether jurisdiction existed,²³⁶ Gleneagle filed a writ of certiorari.²³⁷

In a short per curiam decision, Acting Chief Judge Ryder and District Judges Danahy and Parker denied the petition.²³⁸ After reviewing both federal and state case law on the issue and noting that a conflict existed between the two, the panel concluded that the discovery was appropriate: "We believe the federal rule represents the better approach to the question, and hold that 'jurisdictional discovery' is available during the pendency of jurisdictional issues, subject of course to the supervision of the trial court."²³⁹

VI. PILOTS

The survey period produced two cases involving pilots. In both, ad-

231. 581 So. 2d 222 (Fla. 2d Dist. Ct. App. 1991).

232. *Id.* at 223.

233. 46 U.S.C. § 688 (1988). The Jones Act, passed in 1920, reversed traditional maritime law by giving seaman the right to sue their employers for negligence. See William B. Milliken et al., *Personal Injury and Wrongful Death in FLA. B., MAR. L. & PRAC.* § 2.21, at 38 (1987).

234. *Gleneagle*, 581 So. 2d at 223.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Gleneagle*, 581 So. 2d at 223. In so holding, the panel explicitly rejected the contrary holding in *F. Hoffmann LaRoche & Co. v. Felix*, 512 So. 2d 997 (Fla. 3d Dist. Ct. App. 1987), by writing: "Notably, that panel expressed a preference for the policy followed in the federal judicial system The panel apparently considered itself bound by a previous decision of the same court, *Far Out Music, Inc. v. Jordan*, 438 So. 2d 912 (Fla. 3d Dist. Ct. App. 1983), and lacked support for revisiting that decision *en banc*." *Id.*

miralty issues took a back seat to administrative law issues as the courts grappled with the Board of Pilot Commissioners (BPC).²⁴⁰

In *Rabren v. Department of Professional Regulation*,²⁴¹ the BPC, through the Department of Professional Regulation (DPR), had brought professional misconduct charges against a state-licensed pilot named David E. Rabren. According to the DPR's administrative complaint, Rabren, as President of the Tampa Tri-County Pilots Association (TRICO), had on several occasions in 1986 violated a BPC rule that required state-licensed pilots to be used in vessel shiftings.²⁴² In particular, Rabren was accused of having assigned Gary Murphy, a TRICO pilot who held only a federal license, to shift the vessels M/V OCEAN LORD, M/V VOMAR, and M/V ASPEN.²⁴³

Rabren contested the charges and requested a formal hearing, which was held in January, 1988.²⁴⁴ At the hearing, Rabren admitted that the shifts involving the OCEAN LORD and the VOMAR had taken place.²⁴⁵ He contended, however, that no penalty was warranted because: 1) it was his wife, TRICO's business manager, who had given the assignments to Murphy, and, 2) the shifts had taken place at anchorages, not ports, and therefore were not covered by the BPC's rule.²⁴⁶

The hearing officer rejected Rabren's first argument on the ground that it was not supported by any evidence.²⁴⁷ With respect to his second defense, however, the hearing officer agreed with Rabren. He found that:

Gadsden Anchorage, C.F. Industries, Rockport and Big Bend are all located in the port of Tampa. Accordingly, vessels moving between these locations are not entering and leaving port, and under the specific provisions of [Florida Statutes] Section 310.141 do not require the presence of a licensed state pilot, or a deputy pilot, on

240. For a general discussion of the powers of pilot commissioners, see A. PARKS, *THE LAW OF TUG, TOW, AND PILOTAGE* 1086-99 (2d ed. 1982).

241. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990).

242. *Id.* at 1286. This was not Rabren's first run-in with the BPC over this issue. In 1984, Rabren had challenged an earlier BPC rule concerning vessel shiftings. For a detailed account, see James I. Crowley, *In the Wake of the Exxon Valdez: Charting the Course of Pilotage Regulation*, 22 J. MAR. L. & COM. 165, 187-89 (1991).

243. *Rabren*, 568 So. 2d at 1286.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

board during maneuvers²⁴⁸

Based on his finding that Murphy's shiftings were at places that were not ports, the hearing officer recommended that the charges against Rabren be dismissed.²⁴⁹

Several months later, in May, 1988, the BPC adopted the hearing officer's recommendation in a final order.²⁵⁰ The order, however, contained one very important change. Whereas the hearing officer had found that the anchorages at which Murphy had worked were outside the statutory definition of ports, the BPC included in its order the following conclusion of law: "In addition to the above Conclusions adopted from those of the Hearing Officer, the Board concludes that Gadsden Anchorage, C.F. Industries, Rockport and Big Bend are ports within the meaning of Section 310.002(4), Florida Statutes."²⁵¹ Upon receiving the BPC's order, Rabren filed a challenge to it in court.²⁵² In a well-written opinion that demonstrated a mastery over extremely complicated facts, District Judge Miner, joined by District Judges Nimmons and Barfield, agreed with Rabren and struck down the conclusion that the four facilities were ports.²⁵³

Judge Miner began his opinion by first finding that Rabren had standing to challenge the BPC's ruling even though the ruling had adopted the hearing officer's recommendation that the charges against Rabren should be dropped. Finding that new charges already had been brought against Rabren based on the order's redesignation of the anchorages as ports, Judge Miner concluded that Rabren ought to be allowed to challenge the order:

In terms of standing, we acknowledge that this is close to the boundary which separates injury in fact from mere illusory speculation However, the fact that there are pending charges against appellant based upon the legal conclusion contained in the final order serves to distinguish this case While standing here is not overwhelmingly clear, we hold that appellant has standing.²⁵⁴

248. *Rabren*, 568 So. 2d at 1287.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 1287-88.

253. *Rabren*, 568 So. 2d at 1290.

254. *Id.* at 1288.

Having resolved the standing issue, Judge Miner turned to the real question: had the BPC overstepped its boundaries by deciding that the anchorages should be considered ports? In doing so, he confronted the always hazy distinction between agency rulemaking and agency adjudication. The difference between the two in Florida has been described by one noted commentator as follows:

Generally, agencies can create legally binding policy by either using their rule making authority or by properly developing policy positions in adjudicatory proceedings. The latter have been labeled incipient rules by the courts, because they are developed in the case by case adjudicative process through a series of orders. There are several critical distinctions between the two processes. One such distinction is the type of record required to support agency policy developed in an adjudicatory proceeding [In order to withstand judicial challenge, the agency] must support in the record with competent substantial evidence *every* factual conclusion that is necessary to justify the agency's policy choice and detail the legal rationale for such policy choices.²⁵⁵

Although faced with a difficult question, Judge Miner found the answer rather easy. After considering the proceedings undertaken by the BPC and the DPR, he concluded that the record did not contain nearly enough evidence to support the BPC's redesignations. He explained his conclusion by writing:

In the instant case, there is no record foundation for the BPC's conclusion that CFI, Gadsden Anchorage, Rockport and Big Bend are ports. The transcript of the DOAH proceeding was not available, and the factual findings adopted in the BPC's final order tend to support a contrary conclusion. Neither does the order offer an explanation or justification for the policy. The BPC simply states in conclusory fashion that the facilities are ports. We find this conclusion to be unsupported by the record.²⁵⁶

255. Johnny C. Burris, *Administrative Law*, 14 NOVA L. REV. 583, 613-14 (1990) (emphasis in original).

256. *Rabren*, 568 So. 2d at 1289. Although it had no bearing on the case, by the time Judge Miner's decision was published the statute under which the BPC had proceeded had been amended. See FLA. STAT. § 310.141 (1990). The amendment, which will expire on October 1, 1996 unless reenacted, exempts vessel dockings, undockings, and shiftings from the rule requiring the use of a state-licensed pilot.

The other pilotage case of the survey period was *McDonald v. Department of Professional Regulation*.²⁵⁷ George H. McDonald, a licensed harbor pilot, was fined \$500 by the BPC and DPR for allowing the stern of the M/V KALLIOPE II, a vessel he was piloting with the assistance of the tugboats TAMPA and ORANGE out to Tampa Bay, to be towed into the west bank of the Cut D channel.²⁵⁸ Following the imposition of the fine, McDonald appealed the order.²⁵⁹

On appeal, a divided panel consisting of District Judges Ervin and Zehmer and Senior District Judge Wentworth produced three separate opinions. Judge Ervin wrote the majority opinion, in which Judge Zehmer joined by penning a special concurrence. Judge Wentworth objected to both the majority opinion and the concurrence in a short dissent.

Each member of the panel agreed that the issue before the court was whether the BPC had met its burden of proving that McDonald had been negligent. In finding negligence, the hearing officer had relied on an evidentiary presumption borrowed from a federal admiralty case: in the absence of severe weather conditions or mechanical difficulties, evidence that a vessel has been navigated outside the channel is prima facie evidence of negligence.²⁶⁰ The BPC accepted the hearing officer's recommendation that McDonald be found negligent, but modified the presumption to include, in addition to weather conditions and mechanical difficulties, "the absence of any exigent circumstances."²⁶¹

In reviewing the BPC's decision, Judge Ervin believed that both the BPC and the hearing officer had been wrong to rely on the presumption. He therefore reversed the decision and remanded the case for further proceedings in which the presumption could not be used.²⁶² In setting out the rationale behind his ruling, Judge Ervin wrote:

Under the principle of strict construction applicable to disciplinary statutes and the principles set forth in the cases cited above, it follows that without any provision for a legal presumption in the disciplinary statutes, the agency lacks authority to adopt a legal pre-

257. 582 So. 2d 660 (Fla. 1st Dist. Ct. App. 1991).

258. *Id.* at 661-62.

259. *Id.* at 662.

260. *Id.* The case from which the hearing officer and the BPC had borrowed the presumption was *Woods v. United States Department of Transportation*, 681 F.2d 988, 1985 AMC 2112 (5th Cir. 1982).

261. *McDonald*, 582 So. 2d at 662.

262. *Id.* at 664.

sumption that effectively relieves it from having to prove specific acts of misconduct and shifts the burden of proving innocence to the licensee. We have found no such statutory provision authorizing DPR or the Board to adopt or apply any presumption like that applied in this case. Thus, DPR, in urging the Board to adopt the presumption, and the Board, in applying the presumption to support the finding of guilt, greatly exceeded their statutorily delegated authority under Florida law.²⁶³

Although he agreed with Judge Ervin that reliance on the presumption had been error, Judge Zehmer in his concurrence explained that he believed that the case against McDonald was so weak that the order should have been reversed with directions to dismiss the charges.²⁶⁴

The panel's final opinion, by Judge Wentworth, came to an entirely opposite conclusion. Judge Wentworth concluded that the BPC had been correct to use the presumption and also had been correct in finding that McDonald had been negligent.²⁶⁵ Since the presumption was not a "conclusive" presumption, Judge Wentworth saw no reason that would bar its use and chastised Judge Ervin for making the BPC's job more difficult by prohibiting "the use of rebuttable evidentiary devices which are well rooted in the law of the subject matter regulated."²⁶⁶

VII. PRODUCTS LIABILITY

In recent years, the number of marine products liability suits has been rapidly increasing. The period under study produced two such cases, both of which turned out to be victories for the manufacturers and distributors of products that fail.

In *Ruano v. Water Sports of America, Inc.*,²⁶⁷ Nelson Atan, a fourteen year old, and his brother rented a jet ski known as a "wave jammer" from the defendant, Water Sports of America (WSA).²⁶⁸

263. *Id.*

264. *See id.* at 1593.

265. *Id.* at 676.

266. *McDonald*, 582 So. 2d at 676.

267. 578 So. 2d 385 (Fla. 3d Dist. Ct. App. 1991).

268. *Id.* at 385. Unlike other types of jet skis, a wave jammer is driven with the operator standing. *Id.* The Eleventh Circuit has found that jet skis are vessels for federal admiralty purposes. *See Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1990 AMC 609 (11th Cir. 1990). For a discussion of *Keys*, see Jeffrey S. Winder, Note, *On the*

Before being allowed to take out the jet ski, the boys were given operating instructions, provided with rudimentary safety precautions, and told to stay away from the swimming area.²⁶⁹

David Ruano, a swimmer, was sitting in Biscayne Bay near the Rickenbacker Causeway approximately five to eight feet from the shore.²⁷⁰ The area in which he was sitting was part of the established swimming area.²⁷¹ In an instant, he was hit in the head by the wave jammer, knocked unconscious for a few seconds, and sustained injuries to his ear and to other parts of his body.²⁷²

Following the June, 1988 mishap, Ruano brought suit against WSA for having negligently entrusted the wave jammer to a minor. Circuit Judge Turner granted a motion for summary judgment by WSA and Ruano appealed.²⁷³ In a short opinion, District Judge Barkdull, joined by District Judges Nesbitt and Jorgenson, affirmed the decision.²⁷⁴

WSA had moved for summary judgment on the ground that under Florida law liveries cannot be held liable for negligent entrustment. Judge Turner had agreed with WSA, and so did Judge Barkdull. Finding that WSA has complied fully with the law, he wrote:

The trial court properly entered summary judgment because section 327.54, Florida Statutes (1987), provides a complete defense, thus relieving the defendant from liability. The statute provides that the liability of a commercial lessor ceases upon compliance with the statutory safety requirements. The statute supplants the common law theories of vicarious liability and negligent entrustment. Moreover, even if the statute does not constitute a defense for negligent entrustment, there is no view of the facts which supports such a claim.²⁷⁵

A more traditional products liability claim was made in *American Universal Insurance Group v. General Motors Corporation*.²⁷⁶ In 1985,

Duty to Follow Precedent in Applying the Limitation of Liability Act: Keys Jet Ski, Inc. v. Kays, 15 TUL. MAR. L.J. 465 (1991).

269. *Ruano*, 578 So. 2d at 385.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 386.

274. *Ruano*, 578 So. 2d at 386.

275. *Id.*

276. 578 So. 2d 451 (Fla. 1st Dist. Ct. App. 1991).

Robert Cook purchased from Diesel Parts, Sales & Service, Inc. (Diesel Parts) a replacement oil pump that had been manufactured and distributed by the defendant, General Motors Corporation (GMC).²⁷⁷ Diesel Parts subsequently installed the pump aboard Cook's fishing boat, the F/V CAPTAIN SLEEPY.²⁷⁸ Two years later, on January 20, 1987, the pump's drive gear failed and burned up the CAPTAIN SLEEPY's engine while she was being operated off the coast of New Smyrna Beach.²⁷⁹

Pursuant to its insurance policy, the plaintiff, American Universal Insurance Group (American), paid Cook and his wife \$7,392.91.²⁸⁰ Meanwhile, Cook returned the engine to Diesel Parts, and they repaired it. When Cook failed to pay for the repairs, Diesel Parts sued him. In response, Cook claimed a set-off based upon Diesel Parts' alleged breach of its implied warranty of merchantability arising out of the original sale.²⁸¹ Cook also brought a third-party complaint against Diesel Parts and GMC.²⁸² American, having become subrogated to Cook on account of its payment to him, then filed an intervening complaint against both Diesel Parts and GMC.²⁸³

The case was assigned to Circuit Judge Beverly. She eventually dismissed American's complaint against GMC and also dismissed the negligence count in American's complaint against Diesel Parts.²⁸⁴ In response, American filed an appeal with respect to the dismissal of GMC.²⁸⁵ In a well-crafted opinion, District Judge Smith, joined by District Judge Booth, affirmed the dismissal.²⁸⁶ Although District Judge Zehmer dissented, he did not write an opinion.²⁸⁷

After a careful review of the case law, Judge Smith stated what has become the accepted rule in this state: "Florida law does not permit a buyer under a contract for goods to recover economic losses in tort without a claim for personal injury or property damage to property

277. *Id.* at 451.

278. *Id.*

279. *Id.* at 451-52.

280. *Id.* at 452.

281. *American Universal*, 578 So. 2d at 452.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *American Universal*, 578 So. 2d at 455.

287. *Id.*

other than the allegedly defective goods.”²⁸⁸ Having set out the rule, Judge Smith turned to American’s argument for why the rule did not apply.

According to American, the oil pump had been the product that Cook had purchased and the engine was the “other property” that the product had damaged when it malfunctioned.²⁸⁹ Although the distinction drawn by American sounded reasonable enough, Judge Smith found that it did not comport with the facts of the case:

Here the object of the bargain was a repaired engine, not just a replacement oil pump. The oil pump furnished essential lubrication and heat protection to the engine—this is the part of the “bargain” purchased, not just the metal and parts making up the oil pump. The pump became an integral part of the repaired engine and when it damaged itself, and the engine parts, this was not damage to “other property.”²⁹⁰

VIII. SALVAGE

There was only one salvage case during the survey period, but it proved to be a dandy. In *Flagship Marine Services, Inc. v. Belcher Towing Co.*,²⁹¹ the tugboat E.N. BELCHER, JR., and her two barges became stranded on the morning of July 17, 1989, after striking an unidentified submerged object near Big Shell Island off the Southwest Florida coast. Realizing that he was in trouble, William Diamond, the BELCHER’s captain, notified the Coast Guard and then began trying to save his ship.²⁹² The Coast Guard relayed Diamond’s message to the Ft. Myers Fire Department, the Cape Coral Fire and Police Departments, and Flagship Marine Services, Inc., a private salvage company operating under the name Sea Tow Services of Lee County (Sea Tow).²⁹³ Within the hour, help began arriving.²⁹⁴

288. *Id.* at 453 (citing *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987)). As Judge Smith noted, this is the same standard as the one used in federal admiralty proceedings. *Id.* (citing *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986)); see also Symposium, *Products Liability in Admiralty*, 62 TUL. L. REV. 313 (1988).

289. *American Universal*, 578 So. 2d at 455.

290. *Id.* at 454.

291. 761 F. Supp. 792 (S.D. Fla. 1991).

292. *Id.* at 793.

293. *Id.*

When the first of three Sea Tow ships appeared on the scene, Diamond asked the Sea Tow representative how much his company would charge. Although a discussion ensued, no price was agreed on and Sea Tow eventually went to work with the issue left open.²⁹⁵ After four difficult hours, during which a diver was deployed to patch a hole in the BELCHER's hull, Sea Tow managed to save both the BELCHER and the barges.²⁹⁶

After the rescue, one of Sea Tow's fleet captains, a Captain Robinson, prepared but then did not send an invoice for \$24,281.²⁹⁷ Instead, Sea Tow filed a suit for salvage against Belcher Towing Company, Belcher Oil Co., the BELCHER, and the two barges. Following a four day bench trial in March and April, 1991, Judge Aronovitz found that Sea Tow was entitled to a salvage award. Although Captain Robinson's invoice had been found by Belcher in discovery and had been introduced, Judge Aronovitz decided that it was not important: "The invoice represents a calculation of what the salvage job would have cost had it been on a straight time and materials basis. It does not account for all of the elements of a salvage award."²⁹⁸ Judge Aronovitz also found that the conversation between Diamond and the Sea Tow representative did not bar Sea Tow's ability to claim salvage: "Furthermore, the conversations that took place between Sea Tow and Captain Diamond did not rise to the level of either a contract between the parties, or a special oral agreement."²⁹⁹

Having concluded that Sea Tow was entitled to claim salvage, Judge Aronovitz then considered the size of the award. Noting that the BELCHER and her barges were worth \$670,000 and that the equipment that had been used by Sea Tow (and therefore put at risk) was valued at \$250,000, Judge Aronovitz decided that an award of \$125,000 would be "fair recompense."³⁰⁰

294. *Id.* at 794.

295. *Id.*

296. *Flagship*, 761 F. Supp. at 794-95.

297. *Id.* at 796.

298. *Id.*

299. *Id.* (citing *Brown v. Johnson*, 881 F.2d 107 (4th Cir. 1989)).

300. *Id.* at 796-97. In so holding, Judge Aronovitz did not explain how he had reached the figure of \$125,000.00 or why such an amount was fair. This is not surprising, however, for rarely is there any logical explanation for the size of a salvage award. As has been noted elsewhere: "Eventually the trial judge will pull an arbitrary figure out of the air." GRANT GILMORE & CHARLES L. BLACK, *THE LAW OF ADMIRALTY* § 8-10, at 56 (2d ed. 1975). For a very interesting article that decries the current system

IX. CONCLUSION

As noted in the Introduction, this survey period contained an eclectic mix of the traditional as well as the unusual. Each of the cases are great reading, and all serve to illustrate the period's single most important lesson: to be successful in the highly specialized practice of admiralty law, it helps to be an accomplished generalist.³⁰¹

and attempts to provide a mathematical formula for computing salvage awards, see Note, *Calculating and Allocating Salvage Liability*, 99 HARV. L. REV. 1896 (1986).

301. The credit for this observation belongs to Mary C. Hubbard, Esq., a maritime lawyer with the New Orleans law firm of Phelps Dunbar, who related it to the author during the Southeastern Admiralty Law Institute's 1991 Annual Continuing Legal Education Seminar in Savannah, Georgia.

Florida Constitutional Law: 1991 Survey of the State Bill of Rights*

David C. Hawkins**

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I. INTRODUCTION

This work comprehensively surveys the cases of the Supreme Court of Florida that considered the bill of rights contained in article I of the state constitution during 1991.¹ It supplements the previous state constitutional surveys published by the Review,² and adheres to the same case selection criteria.³

1. Specifically, the survey summarizes all cases that the court released in slip form during the period January 1 through August 15, 1991.

2. See David C. Hawkins, *Florida Constitutional Law: A Ten-year Retrospective on the State Bill of Rights*, 14 NOVA L. REV. 693 (1990) [hereinafter *Decade Survey*] (concluding that the court's decisions create a hierarchical order of rights in article I, with the order dependent solely upon the particular standard chosen to measure the justification for the state's encroachment; that article I rights are not absolute, despite rhetoric to the contrary; that article I rights eclipsed protections afforded by the federal analogues on five occasions during the decade; that litigants should exploit the textual differences between the state and federal constitutions, thereby advancing constitutional imperatives that are unique to Florida; and that the court has promoted the independence of the state constitution on several occasions when it eschewed relevant federal precedent); David C. Hawkins, *Florida Constitutional Law: 1990 Survey of the State Bill of Rights*, 15 NOVA L. REV. 1049 (1991) [hereinafter *1990 Survey*] (identifying a variety of doctrinal positions and principles of construction that drive the court's constitutional logic; concluding that the court has accepted major responsibility for protecting personal rights from governmental excess; and noting that article I rights on two occasions surpassed the protections of their federal counterparts).

3. This survey accepts the premise that each opinion citing to the state bill of rights, whether by principled analysis or passing reference, uniquely contributes to the development of the Florida Constitution. In profile, the opinion must confirm that the state constitution was relied upon by one or more members of the court, addressed by a lower court, or advanced by a litigant in support of a claim. Conversely, an opinion that generically refers to equal protection, double jeopardy, and the like, makes a less certain contribution to this body of law. Those cases are selectively included.

These case selection criteria allow one exception. Occasionally, the court simply cites to another case to dispose of a constitutional issue and fails to mention that its holding in the case under review has constitutional significance. See, e.g., *Blizzard v. W. H. Roof Co.*, 573 So. 2d 334 (Fla. 1991) (adopting opinion of district court that construed three sections of the Florida Constitution, yet failing to indicate that its hold-

No case more profoundly symbolizes the strength of article I than *Department of Law Enforcement v. Real Property*.⁴ This featured opinion establishes an analytical model for state due process, which shields several article I rights from state encroachment by utilization of a heightened level of judicial scrutiny, and illustrates that Florida property rights are entitled to a level of protection that eclipses the protection afforded by federal analogues. Treatment of the decision appears throughout the following material.⁵ Like *Real Property*, several other cases during this survey period granted relief for violations of personal rights entirely on the strength of state constitutional law. One message is clear—litigants should be encouraged to rely on article I with the same confidence that they place on other principled bases of relief.

II. DECLARATION OF RIGHTS

A. Basic Rights

Article I, section 2 makes three separate declarations of personal rights. The first declaration expresses the central constitutional concept that the state must deal with similar persons in a similar manner. The second provides that all natural persons have inalienable rights, and specifically enumerates several of those rights. The third expressly prohibits the deprivation of any right on account of race, religion,⁶ or physical handicap.⁷ During this survey period, the court construed

ing has constitutional stature); *Broward County v. LaRosa*, 505 So. 2d 422 (Fla. 1987) (approving opinion of district court that construed article I, section 18, yet omitting reference to the prohibition of administrative penalties in its opinion); *State v. Castillo*, 486 So. 2d 565 (Fla. 1986) (clarifying *State v. Neil*, 457 So. 2d 481 (Fla. 1984), without signifying that it is necessarily deciding a constitutional question). Fortunately this practice is the exception, not the norm, for subtlety has no place when the court expounds the state's organic law. Cases of that ilk are included in this survey to the extent that research successfully identified them.

In all, the court released 49 cases that considered the state constitution during the seven-and-one-half-month survey period, and addressed 74 state constitutional issues. Of those, 38 cases and 53 issues directly pertain to article I.

4. 16 Fla. L. Weekly S497, (Aug. 15, 1991) (unanimous) (Barkett, J., author) (mandate issued Dec. 2, 1991).

5. See *infra* notes 20-24, 71-122, 282-88, 316-20 and accompanying text.

6. FLA. CONST. art. I, § 3 ("There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof . . .").

7. There is no express textual basis in the federal equal protection clause for treating race, religion, and physical handicap different from other classifications. Yet federal constitutional analysis regards race as a suspect classification, and subjects

rights guaranteed under each of these three clauses.

1. Equal Protection Clause

All natural persons are equal before the law . . . FLA. CONST.
art. I, § 2.

Two opinions by Justice McDonald this survey period relied on the test of reasonableness to uphold various statutes that limited the exposure to liability of certain classes of defendants from negligence suits by injured plaintiffs. The plaintiffs in *Abdala v. World Omni Leasing, Inc.*⁸ were injured in separate automobile accidents and sued the finance companies that leased the automobiles to the other drivers. The plaintiffs proceeded principally on the theory that the lessors were liable for damages under Florida's dangerous instrumentality doctrine, which holds that the owners of motor vehicles are liable for injury caused by the negligent operation of those vehicles by their agents.⁹ The lessors argued that they were not accountable for the plaintiffs' injuries because they fell within an exception carved out by the legislature for long-term lessors of vehicles who maintained certain liability insurance limits.¹⁰

The court rejected the plaintiffs' common law argument. It explained that the legislature simply redefined the term "owner" of a motor vehicle, and excluded long-term lessors of automobiles. Moreover, the court wrote that the legislative history of the statutory exception showed that long-term leases were actually alternative methods of financing vehicle purchases, which offered tax advantages to the lessors.¹¹ It is unclear from the opinion why tax benefits of a long-term

race-based restrictions to "the most rigid scrutiny." *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Other classifications accorded special scrutiny under federal analysis are: gender, *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); citizenship, *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); and legitimacy, *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968). By expressly recognizing race, religion, and physical handicap, the adopters of the state constitution have conferred a unique constitutional status on those groups and have created an opportunity for Florida courts to extend protections beyond the federal counterpart. Reason argues that those classifications, unlike classifications not enumerated, are entitled to a heightened level of scrutiny.

8. 583 So. 2d 330 (Fla. 1991) (unanimous) (McDonald, J., author).

9. *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920).

10. FLA. STAT. § 324.021(9)(b) (1989).

11. *Abdala*, 583 So. 2d at 334.

lease should render the financing company less culpable under the dangerous instrumentality doctrine than had it executed a short-term lease. A reasonable explanation for the holding is that long-term leases do not retain for the financing company the traditional indicia of ownership that would warrant holding it accountable under the doctrine for the negligence of lessees or third parties.¹²

Plaintiffs also advanced an equal protection challenge.¹³ The court ruled that the statutory exception does not irrationally distinguish between the class of plaintiffs injured by vehicles leased for longer than one year, and the class of plaintiffs injured by vehicles leased for less than one year.¹⁴ Nor does the statute discriminate against the most severely injured plaintiffs by eliminating long-term lessors as a source of recovery, for plaintiffs retained the "unlimited ability to recover from the lessee."¹⁵

The other case, *Blizzard v. W. H. Roof Co., Inc.*,¹⁶ dealt with statutes of limitation that shortened the period for bringing negligence suits against an insured tortfeasor whose insurance carrier became insolvent, and against the association established by law to cover claims brought against insolvent carriers.¹⁷ The statutes reduced the period for bringing suit from four years to one year, commencing at the deadline established in the order of liquidation. *Blizzard* argued that the statutes impermissibly created a subclass of insureds that was treated differently from members of the class as a whole.

A unanimous court adopted the opinion of the district court under review, which ruled that the legislative choice to treat an insured tortfeasor whose carrier became insolvent different from an insured whose carrier remained solvent, was reasonably related to the stated purpose of avoiding financial loss to claimants and policyholders alike.¹⁸ The statutory scheme assures injured claimants a mechanism for prose-

12. For instance, finance companies and long-term lessors may assume less control of the leased automobile than do short-term lessors. Moreover, finance companies may never see the automobile, or exercise a possessory interest over it during the term of the lease.

13. In addition, plaintiffs claimed that the statute violated due process and access to courts. See *infra* notes 136, 296 and accompanying text.

14. *Abdala*, 583 So. 2d at 333-34.

15. *Id.* at 334.

16. 573 So. 2d 334 (Fla. 1991) (unanimous) (McDonald, J., author).

17. FLA. STAT. §§ 95.11(5)(d), 631.68 (1987).

18. *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 1990).

cutting damage claims that would otherwise go unsatisfied due to the insolvency of the carrier. Moreover, it safeguards persons who sought to protect themselves from liability by purchasing insurance policies.¹⁹

2. Inalienable Rights and Deprivation Clauses

All natural persons . . . have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap. FLA. CONST. art. I, § 2.

Property, race, life and liberty were all considered this survey period. We begin with property. Article I accords high stature to substantive property rights. *Department of Law Enforcement v. Real Property*²⁰ declared that the rights "to acquire, possess and protect property" are among the most basic substantive rights protected by article I, section 2. A unanimous court found the procedures employed by the state to execute a property seizure and forfeiture under the Florida Contraband Forfeiture Act²¹ were woefully inadequate to protect fundamental property rights safeguarded by this and other article I sections. Those rights are valued so highly that the initial restraint on property must be accomplished by the least intrusive means under the circumstances that are necessary to preserve potentially forfeitable assets.²² Moreover, the state is entitled to forfeiture only when it shows by no less than clear and convincing evidence that the property was used in violation of the act.²³ The court imposed these and other "minimal" due process standards on the state without regard to the particular type of personal property or real property that the state sought to restrain. Because state due process is central to the protection of property rights in this context, *Real Property* is treated fully under article

19. *Blizzard*, 573 So. 2d at 334.

20. 16 Fla. L. Weekly S497 (Aug. 15, 1991) (unanimous) (Barkett, J., author).

21. FLA. STAT. §§ 932.701-.704 (1989).

22. *Real Property*, 16 Fla. L. Weekly at S500.

23. *Id.* at S501.

I, section 9.²⁴

The rights "to acquire, possess and protect property" are not entitled to such stalwart protection when subject to state regulation in contexts less onerous than forfeiture. In 1990, the court in *Shriners Hospitals v. Zrillic*²⁵ stated that the legislature is prohibited from restricting property rights unless the restriction is "reasonably necessary to secure the health, safety, good order, [and] general welfare."²⁶ This year, the court returned to that principle in *Harris v. Martin Regency, Ltd.*,²⁷ a case that asked whether the legislature could permissibly deny the owner of a mobile home park the right to evict the tenant mobile home owners where that owner had decided to allow the land comprising the park to become vacant. The mobile home park owner relied on section 723.061(1)(d), Florida Statutes (1985), which specifies limited circumstances when a park owner can evict tenant mobile home owners, including change in use of the park land.

Martin Regency, the park owner, notified the tenant mobile home owners of its intent to vacate its mobile home park. It provided the requisite notice, but omitted any explanation for the anticipated change. After the mobile home owners failed to timely vacate the park, Martin Regency initiated proceedings to evict them. The trial court granted summary judgment in favor of Martin Regency, finding that it complied with the notice requirements of section 723.061, and that it was not required to state its intended use of the park, provided that it did not continue to use the land as a mobile home park.²⁸ The district court affirmed.²⁹

In a split decision, a bare majority of four justices agreed to quash the decision of the district court. The majority noted that mobile home

24. See *infra* notes 71-122 and accompanying text.

25. 563 So. 2d 64 (Fla. 1990).

26. *Id.* at 68 (citing, in part, *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881 (Fla. 1974)). The court wrote in *Palm Beach Mobile Homes* that the extent of the personal right to use property must be determined in light of the prevailing social and economic conditions, rather than as the framers and adopters intended, for the legislature would otherwise become helpless to regulate and to extend that right to new conditions. 300 So. 2d at 884 (citation omitted).

27. 576 So. 2d 1294 (Fla. 1991) (Barkett, J., author; McDonald and Kogan, JJ., and Ehrlich, Senior Justice, concurring; Overton, J., dissented with an opinion; Grimes, J., dissented with an opinion in which Shaw, C.J., and Overton, J., concurred).

28. *Id.* at 1296.

29. *Harris v. Martin Regency, Ltd.*, 550 So. 2d 1160 (Fla. 4th Dist. Ct. App. 1989).

owners and mobile home park owners alike derive substantial property rights from article I, section 2 of the state constitution.³⁰ For instance, mobile home park owners enjoy a protected right to use the land comprising the park. Also, they need not accept tenancy of a mobile home owner indeterminately. However, the court held that mobile home park owners may offer the park for sale only if the sale is “‘consistent with the *total circumstances*’” and does not advance an evil sought to be remedied by state regulation of the sale.³¹ The state regulates park sales by imposing on the park owner the obligation of good faith and fair dealing³² and requires the park owner to give the home owner the right of first refusal.³³ Those regulations, the majority agreed, served a legitimate function by advancing the legislature’s aim of protecting mobile home owners from economic servitude and abuse by mobile home park owners.³⁴ The majority regarded the regulations as permissible only if “‘reasonably necessary’” to secure the public welfare.³⁵

The court acknowledged that nothing in the legislative scheme required a mobile home park owner to specify the nature of the proposed change. It inferred from the statute a requirement that the change of use must be valid. Because the record was unclear whether Martin Regency intended to sell its land as vacant land (a permissible motive), or to avoid extending to the home owners the right of first refusal (an improper motive), the court determined that a genuine issue of material fact remained, and therefore the trial court’s grant of summary judgment for Harris Regency was inappropriate.

Three justices charged that the majority impermissibly created a restriction on the sale of a mobile home park out of “whole cloth.”³⁶ Justice Grimes wrote that section 723.061(d) does not forbid the owner from closing the park and selling the vacant land, and only guarantees the mobile home owner ample time to relocate should the park owner decide to change the use of the property. He claimed that the majority’s construction effectively provides that the owner may sell his or her

30. *Harris*, 576 So. 2d at 1296 (citing *Stewart v. Green*, 300 So. 2d 889 (Fla. 1974)).

31. *Id.* at 1297-98 (emphasis in original) (quoting *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 888 (Fla. 1974)).

32. FLA. STAT. § 723.021 (1985).

33. FLA. STAT. § 723.071 (1985).

34. *Harris*, 576 So. 2d at 1296.

35. *Id.* at 1297 (quoting *Shriners Hosps. v. Zrillic*, 563 So. 2d 64, 68 (Fla. 1990)).

36. *Id.* at 1300 (Grimes, J., dissenting; Shaw, C.J., and Overton, J., concurring.).

land *only* when it is a mobile home park. He argued that such a construction is itself an unconstitutional deprivation on the use of property.³⁷

Other cases addressed the prohibition against deprivation on account of race. The deprivation issue in *Craig v. State*³⁸ concerned Palm Beach County's jury selection procedures, which provided that petit jurors were to be drawn from one of two districts that comprised discrete geographic areas of the county at large. In a 1989 decision, *Spencer v. State*,³⁹ the court struck the districting scheme on two grounds. First, it ruled that the administrative order creating the scheme "results in an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool" of the district from which Spencer's venire was selected.⁴⁰ Second, it held that the procedure violates the equal protection clause of article I, section 2 of the Florida Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution because a black defendant charged with a crime in the predominately white eastern district must be tried there, whereas a white defendant charged with a crime in the predominately black western district may choose to be tried in the eastern district.⁴¹ At the time of Craig's trial, *Spencer* was pending appeal, and Craig filed a pre-trial motion to draw the jury from the entire county, rather than from the eastern district, the situs of his trial. The trial court denied the motion as untimely, proceeded with the trial, and the jury ultimately convicted Craig of numerous crimes, including first degree murder.

On direct appeal, the state argued that Craig could not rely on *Spencer*, for he failed to reassert the claim after the trial court denied his initial motion. The court rejected the state's procedural argument, ruled that *Spencer* was dispositive, and remanded for a new trial.

Craig reaffirmed the principle of standing expressed in *Kibler v. State*⁴² that a white defendant may challenge a jury selection process

37. *Id.* Justice Overton added that the majority risks that a federal court would overturn section 723.061(1)(d), Florida Statutes (1985), on Fifth and Fourteenth Amendment grounds, *id.* at 1299 (Overton, J., dissenting), although it is doubtful that a federal court would review *Harris* itself, for the decision is grounded exclusively on the Florida Constitution.

38. 583 So. 2d 1018 (Fla. 1991) (*per curiam*) (unanimous).

39. 545 So. 2d 1352 (Fla. 1989).

40. *Id.* at 1355.

41. *Id.*

42. 546 So. 2d 710 (Fla. 1989).

that discriminates against racial minorities.⁴³ Reliance on *Kibler* for this purpose is interesting, for the court there construed article I, section 16's guarantee of an impartial jury to persons accused of crimes. Thus, the constitutional right at stake was personal to Kibler. In *Craig*, however, the constitutional right at stake was the right of prospective jurors to be free of race-based discriminatory selection practices,⁴⁴ a right that they lacked standing to assert, and that only Craig could effectively vindicate on their behalf. The equal protection clause and impartial jury guarantee of article I protect congruent rights in this context so that Craig had as much at stake in assuring jury impartiality as the wrongfully-struck jurors. *Craig* reaffirms Florida's avowed commitment to rid the courtroom of racially discriminatory jury selection practices through application of the doctrine of vicarious standing.⁴⁵

Palm Beach County's jury districting scheme was also assailed in *Moreland v. State*.⁴⁶ The opinion relies entirely on federal constitutional principles, however, it is included in this survey because its holding is equally germane to future state constitutional litigation. Moreland, like Craig, was tried and convicted by a Palm Beach County jury while *Spencer* was pending in the supreme court. Moreland argued at trial that the jury plan violated the sixth and fourteenth amendments to the federal constitution. The trial court rejected his claim, convicted him of first-degree murder, and imposed a life sentence of imprisonment.⁴⁷ The district court affirmed his conviction and sentence on direct appeal.⁴⁸

Subsequently, the court released *Spencer* and Moreland relied on that decision to collaterally attack his conviction and sentence in a post-conviction relief motion. The trial court granted his motion, citing *Spencer*. The district court disagreed and reversed. Citing *Witt v.*

43. *Craig*, 583 So. 2d at 1020; see also *Powers v. Ohio*, 59 U.S.L.W. 4268, 4272 (U.S. Apr. 2, 1991).

44. *State v. Slappy*, 522 So. 2d 18, 22 (Fla. 1988).

45. *Id.*

46. 582 So. 2d 618 (Fla. 1991) (unanimous) (McDonald, J., author).

47. *Id.* at 619. Moreland also personally attacked the composition of the petit jury in a pretrial motion by asserting that the county's racially discriminatory bias against prospective black jurors violated the *state* constitution, *State v. Moreland*, No. 86-41-CF-A02 (15th Jud. Cir.) (Motion Relating to Composition of Petit Jury Panel and Memorandum of Law in Support), however, abandoned the state claim in his motion for post-conviction relief.

48. *Moreland v. State*, 525 So. 2d 896 (Fla. 4th Dist. Ct. App. 1988).

State,⁴⁹ which held that only major constitutional law changes warrant retroactive application in post-conviction proceedings,⁵⁰ the district court ruled that *Spencer* did not establish a new and different standard of procedural fairness that would entitle Moreland to raise it collaterally.⁵¹

A unanimous supreme court quashed the opinion of the district court and approved the trial judge's order granting Moreland a new trial. *Spencer* was neither new law nor a major constitutional change in the law, it said, but represented the first opportunity to apply existing sixth amendment law to a new situation.⁵² Although *Witt* declared that the interests in decisional finality generally prohibit the retroactive application of decisions of this order, the justices stated that the district court erred by failing to acknowledge an exception to that principle. *Witt* also declared that "a more compelling objective . . . , such as ensuring fairness and uniformity in individual adjudications," would warrant abridging the doctrine of finality.⁵³ The court applied *Witt*'s "fundamental fairness" exception in *Moreland* because it had twice before granted relief to claimants who raised *Spencer* claims. Thus, the "fundamental fairness" exception enables the court to assure decisional consistency, and to avoid the patent miscarriage of justice that would result when one post-conviction litigant is entitled to rely on a favorable constitutional decision issued after the conclusion of direct appellate proceedings, while another court bars a claim by a similarly situated litigant.⁵⁴

Reference to the Florida Constitution is conspicuously absent from *Moreland*. There is no doubt that Moreland enjoyed state constitutional rights that awaited vindication—*Craig* was issued only eight days earlier on state equal protection grounds, and *Spencer*, the dispositive case, was principally grounded on state equal protection. However, the court in *Moreland* cannot be faulted for failing to peg its decision on the state constitution. The explanation lies with Moreland's post-conviction motion, which sought relief assertedly because trial counsel was ineffective and because the jury violated the federal cross-section

49. 387 So. 2d 922 (Fla. 1980).

50. *Id.* at 929-30 (footnote omitted).

51. *State v. Moreland*, 564 So. 2d 1164, 1166 (Fla. 4th Dist. Ct. App. 1990).

52. *Moreland*, 582 So. 2d at 619 (footnote omitted).

53. *Id.* at 620 (quoting *Witt*, 387 So. 2d at 925).

54. *Id.*

requirement.⁵⁵

*Perkins v. State*⁵⁶ considered whether a state statute that made unavailable the defense of self defense by a person who attempts to commit a forcible felony violated due process and separation of powers.⁵⁷ The court held that the statute did not bar the defense under circumstances when the defendant and the decedent were engaged in attempted cocaine trafficking, and the decedent initiated the use of deadly force against the defendant. Justice Kogan added in his special concurring opinion that the right to fend off an unprovoked attack was equally grounded in article I, section 2, which assures the inalienable right to defend life and liberty. He wrote that “[t]he right to fend off an unprovoked and deadly attack is nothing less than the right to life itself,” which enables a person to mount a reasonable defense or to meet an unjustified use of force with force.⁵⁸

B. Freedom of Speech and Press

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated. FLA. CONST. art. I, § 4.

Two opinions this period bear on the speech and press provision. In *CBS, Inc. v. Jackson*⁵⁹ the court considered a subpoena issued by the defendant in a criminal proceeding that sought from CBS untelevised videotapes, or “outtakes,” of a law enforcement drug operation, which depicted physical evidence of the defendant’s arrest. CBS argued that the “outtakes” were protected under the qualified reporter’s privilege. The court held that there existed no impediment under the first amend-

55. *State v. Moreland*, No. 86-41-CF-A02 (Fla. 15th Cir. Ct. June 22, 1989) (Motion for Post-Conviction Relief, filed Feb. 2, 1989; Amendment to Motion for Post-Conviction Relief and Memorandum of Law in Support).

56. 576 So. 2d 1310 (Fla. 1991) (per curiam). *Perkins* is addressed more fully under article I, section 9 (due process), *infra* notes 138-42 and accompanying text.

57. FLA. STAT. § 776.041(1) (1987).

58. *Perkins*, 576 So. 2d at 1314 (Kogan, J., specially concurring; Barkett, J., concurring).

59. 578 So. 2d 698 (Fla. 1991) (per curiam).

ment or the state constitution to the compelled discovery of those tapes.⁶⁰ It reasoned that the tapes do not risk drying up sources of information, and that certain information might eventually become unavailable to the public. Moreover, the disclosure of information contained in the "outtakes" would not otherwise threaten the newsgathering process.⁶¹ The court's holding applies with equal force to unpublished film footage of an interview with a prison inmate and to photographs of an automobile accident.⁶² The opinion demonstrates that Florida's speech and press guarantees are closely bound to first amendment precedent under the circumstances presented.

Without passing on the merits, the court in *In re Standard Jury Instructions (Civil Cases 89-1)*⁶³ approved standard jury instructions for use in defamation cases. The Supreme Court Committee on Standard Jury Instructions (Civil) recommended three alternative jury charges on liability issues in defamation cases. The court acknowledged that briefs submitted by media representatives perceived constitutional and common law deficiencies in the proposals.⁶⁴

C. *Rights to Assemble, Instruct, and Petition*

The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances. FLA. CONST. art. I, § 5.

The defendant in *Larson v. State*⁶⁵ entered a nolo plea to felony witness tampering, and the trial court imposed probation, a condition of which prohibited the defendant from entering Tallahassee for five years. He argued on appeal that the condition violated his right to petition government under article I, section 5. Although the justices said that the claim was procedurally barred for Larson's failure to raise it

60. *Id.* at 699.

61. *Id.* at 700.

62. *Id.* at 700 n.2 (disapproving *CBS, Inc. v. Cobb*, 536 So. 2d 1067 (Fla. 2d Dist. Ct. App. 1988), and *Johnson v. Bentley*, 457 So. 2d 507 (Fla. 2d Dist. Ct. App. 1984)).

63. 575 So. 2d 194 (Fla. 1991) (per curiam).

64. *Id.* at 195; *see also id.* at 202 (Barkett, J., dissenting) (cautioning that the standards do not have the force of law).

65. 572 So. 2d 1368 (Fla. 1991) (Kogan, J., author; Shaw, C.J., and Overton, McDonald, Barkett, and Grimes, JJ., concurring; Ehrlich, J., concurred in result only with an opinion).

initially in the trial court, they reached the merits and concluded that the condition of probation did not violate his constitutional right of petition, which assured him the opportunity to petition state government by telephone or mail, or by contacting state officers outside Tallahassee.⁶⁶ Moreover, Larson remained free to ask the trial court to modify the condition of probation should he need to personally appear before state officials in Tallahassee, and the trial court would be obliged to grant his request.⁶⁷

The right to petition for redress of grievances assures electoral accountability—that persons will have the opportunity to make public officers and employees accountable for their acts. Writing for a unanimous court in *Reynolds v. State*,⁶⁸ Justice Kogan said in dictum that accountability of public officials forms the bedrock of our democracy, and partly explains the rationale for requiring the state to justify any impermissible exercise of peremptory challenges to strike racial minorities from petit jury venires.⁶⁹ This personal right turns on the right of the public, whether members of a minority or not, “to assurances that our courts are acting to eliminate past abuses.”⁷⁰

D. *Due Process*

Florida’s due process section combines three categories of rights. The first category creates the substantive rights of life, liberty, and property that are safeguarded by procedural due process. The section also includes two other fundamental guarantees that protect defendants who are prosecuted criminally by the state. These categories are regarded generally as independent of due process—the protection against double jeopardy, and the protection against self-incrimination.

66. *Id.* at 1371-72.

67. *Id.*

68. 576 So. 2d 1300 (Fla. 1991) (Kogan, J., author; Shaw, C.J., and Overton, McDonald, Barkett, and Grimes, JJ., concurring).

69. *Id.* at 1302; *see also* *Tillman v. State*, 522 So. 2d 14 (Fla. 1988) (holding that *Neil* has an equal protection component that derives from article I, section 2); *State v. Neil*, 457 So. 2d 481 (Fla. 1984) (holding that impermissible race-based strikes of prospective jurors violates a defendant’s right to an impartial jury guaranteed under article I, section 16).

70. *Reynolds*, 576 So. 2d at 1302.

1. Life, Liberty or Property

No person shall be deprived of life, liberty or property without due process of law FLA. CONST. art. I, § 9.

Four of the decisions that construed article I, section 9 this survey period were unanimous, and notably, each rested explicitly, and exclusively on Florida law. The first of those cases, *Department of Law Enforcement v. Real Property*,⁷¹ is a case of singular importance for its contribution to state constitutional doctrine. Mindful of its role as a coordinate branch of state government,⁷² the court, without dissent, upheld the Florida Contraband Forfeiture Act⁷³ against multiple constitutional challenges, but resorted to a canon of constitutional interpretation to impose "minimal" due process requirements on the exercise of the state's powers of seizure and forfeiture. Without this textual interpolation, the Act suffered from defects that were potentially fatal to its continued existence. The opinion, written for the court by Justice Barkett, deserves careful review.

The Act permits the state to seize property that is used in violation of offenses enumerated in the Act, "or in, upon, or by means of which any violation . . . has taken or is taking place."⁷⁴ After arresting the defendant on drug trafficking charges, the state initiated forfeiture proceedings against certain properties.⁷⁵ The trial judge issued warrants to seize the properties, based solely on an affidavit executed by a special agent. As required by the Act, the state petitioned for a rule to show cause why the properties should not be forfeited,⁷⁶ and also filed a notice of lis pendens, which was not required.

The defendant, joined by amicus, moved to dismiss the petition on constitutional grounds. The trial judge granted the motions, noting that the defendant had not yet been convicted of any offenses that were factual predicates for forfeiture, and holding that the Act facially vio-

71. 16 Fla. L. Weekly S497 (Aug. 15, 1991) (unanimous) (Barkett, J., author) (mandate issued Dec. 2, 1991).

72. FLA. CONST. art. II, § 3 (separation of powers).

73. FLA. STAT. §§ 932.701-.704 (1989).

74. FLA. STAT. § 932.703(1) (1989).

75. *Real Property*, 16 Fla. L. Weekly at S497. Defendant's properties included a 60-acre tract of land with an airstrip extension, a 40-acre R/V mobile home subdivision with numerous full recreational vehicle hookups, entire 280 and 100-acre subdivisions platted into separate lots or parcels, and a personal residence and property. *Id.*

76. *Id.* at S502 n.2 (citing FLA. STAT. § 932.704(1) (1989)).

lated state and federal constitutions.⁷⁷ Deciding that the trial judge's order required immediate attention, a divided panel of the First District Court of Appeal certified the matter to the supreme court.⁷⁸ The justices reversed the trial judge, and upheld the Act as facially constitutional, provided, however, that it is applied in keeping with "minimal" due process principles articulated in the opinion.

The court began by describing the process that is due under article I, section 9. State due process includes a substantive and a procedural component. Substantive due process protects "the full panoply of individual rights from unwarranted encroachment by the government."⁷⁹ Procedural due process is a vehicle that protects substantive rights. It does so by ensuring fair treatment through an orderly procedure that includes notice, coupled with a real opportunity to be heard and to defend before any judgment is rendered.⁸⁰ The process that is due varies with the character of the rights implicated and the nature of the process challenged, and admits to no single, inflexible test.⁸¹

Turning to the act itself, the court noted several provisions that potentially affront due process. For instance, the act "can be read to mean" that a seizure immediately ousts owners and lienholders of their interest in seized property.⁸² It requires the state to "'promptly proceed'" against the property, once seized, by a rule to show cause, and empowers the state to have the property forfeited "'upon producing due proof'" that the property was used in violation of the act, although it leaves those critical terms undefined.⁸³ The act bars suits to recover seized property for ninety days after seizure unless the state fails to initiate proceedings within that period.⁸⁴ It restrains owners and lienholders from defending until after seizure, and imposes on them the

77. *Id.* The trial judge struck down the act on grounds of substantive and procedural due process, and because it failed to adequately define the scope of the state's powers, thus rendering it void for vagueness and overbreadth. *In re Real Property Forfeiture Proceedings*, No. 90-250-CF (Fla. 8th Cir. Ct. Dec. 21, 1990) (order and opinion granting claimant's amended motion to dismiss petitions for forfeiture).

78. FLA. R. APP. P. 9.125.

79. *Real Property*, 16 Fla. L. Weekly at S497.

80. *Id.* at S498 (relying on *State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (1936)).

81. *Id.*

82. *Id.* at S501 n.7 (citing FLA. STAT. § 932.703(1) (1989)).

83. *Id.* at S498 (citing FLA. STAT. § 932.704(1) (1989)).

84. *Real Property*, 16 Fla. L. Weekly at S498 (citing FLA. STAT. § 932.703(1) (1989)).

burden of proving in a forfeiture proceeding that they lacked scienter.⁸⁵ In addition, the act fails to distinguish between real and personal property, to require preseizure notice and opportunity for the property owner or lienholder to be heard, and to prescribe procedures for the seizure itself.⁸⁶

Several guiding principles direct the course of judicial analysis of forfeiture statutes. Forfeiture is a harsh exaction that courts generally disfavor.⁸⁷ Forfeiture statutes are strictly construed, but doubts are resolved in favor of upholding them against constitutional attack.⁸⁸ Attentive to its obligations to both establish rules that safeguard constitutional rights and to respect the province of a coordinate branch of state government,⁸⁹ the court sought to determine whether the forfeiture act "can reasonably be construed" to comport with "minimal" due process.⁹⁰ Unanimously, the court found that it could.

Real Property presented an issue untried in Florida. For guidance, the court turned to federal cases, said to be highly persuasive and expressing principles embodied in the Florida Constitution. Among them are the federal due process requirements of notice to the interested party and an opportunity to be heard at an adversarial proceeding *before* the government may seize property containing a residence, unless extraordinary circumstances justify postponing notice and hearing until after seizure.⁹¹ Moreover, the "special significance" of residential property necessitates "special constitutional protection."⁹² In that

85. *Id.* (citing FLA. STAT. §§ 932.703(2), (3) (1989)).

86. *Id.*

87. *Id.* (citations omitted).

88. *Id.* (citation omitted).

89. FLA. CONST. art. II, § 3.

90. This mode of statutory interpretation is not clearly dictated by precedent. For instance, the court is disinclined to rehabilitate laws that suffer from vital omissions or impermissible vagueness. *See Perkins v. State*, 576 So. 2d 1310, 1312-13 (Fla. 1991) (discussed *infra* note 138); *State ex rel Williams v. Coleman*, 180 So. 357, 360 (Fla. 1938) ("We are powerless to read into a statute . . . that which the Legislature in its wisdom omitted . . ."). Yet, the court believes that it should consider rehabilitative constructions of vague laws. *See State v. Wershow*, 343 So. 2d 605, 607 (Fla. 1977) (unwilling to abandon its position of judicial restraint to rewrite a statute proscribing "malpractice in office," when the statute is so vague and overbroad that it is *not amenable to a construction* that would permit the court to resolve all doubts in favor of its validity) (citing FLA. CONST. art. II, § 3).

91. *Real Property*, 16 Fla. W. Weekly at S499 (citing *United States v. Premises & Real Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989)).

92. *Id.* (quoting *Livonia Rd.*, 889 F.2d at 1264).

vein, due process requires preseizure notice and hearing to minimize the risk of erroneous deprivation. This respects the character of real property, which unlike personal property, makes it unlikely to produce exigencies that require means as restrictive as seizure.⁹³

The state has at its disposal less restrictive means than seizure to preserve potentially forfeitable assets. They include notices of lis pendens, bonds, restraining orders, or some combination. The issuance of an ex parte restraining order before notice to the owner or lienholder, as example, is appropriate when a grand jury indictment has already established probable cause to believe that property is subject to forfeiture. The restraining order merely removes assets from control of the defendant temporarily, pending final judgment, and provides an opportunity for the state to establish a higher right to those assets.⁹⁴ However, seizure after indictment is no less serious an encroachment than seizure before indictment. Therefore, federal due process requires that the trial court reexamine probable cause at an adversarial hearing to determine de novo whether continued restraint on the property is necessary.⁹⁵

Florida due process plays a central role in protecting property rights that are infringed when the state wields its powers of seizure and forfeiture. Traditionally, courts and legislatures have measured the degree of property protection from unjustified forfeiture based on the label attached to the forfeiture action itself. *Real Property* dispenses with this practice as too "simplistic," and rejects the notion that due process provides qualitatively different protection that depends on whether the forfeiture is classified as civil (remedial), criminal (punitive), or quasi-criminal. Instead, the court wrote, disputes over constitutional rights must be decided by evaluating those rights, and when necessary, by balancing the competing interests.⁹⁶

Floridians have taken great care to make property rights secure under the state constitution. Property rights are expressly protected by article I, section 2, and they are numbered among the most basic sub-

93. *Id.* (citing *Livonia Rd.*, 889 F.2d at 1265).

94. *Id.* (citing *United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (en banc)).

95. *Id.*; *Monsanto*, 924 F.2d at 1195.

96. *Real Property*, 16 Fla. L. Weekly at S502 n.15; see also *United States v. Halper*, 490 U.S. 435, 447-48 (1989) ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.").

stantive rights. For this reason, persons whose property the state restrains clearly have a compelling interest to be heard at the outset of forfeiture proceedings to assure that the state has probable cause to justify any restraint.⁹⁷ Moreover, property rights are “particularly sensitive” when the state seeks to forfeit residential property. This is directly attributed to several specific article I provisions that form a barrier between the state on the one hand, and the home and personal autonomy on the other.⁹⁸

Next, due process requires a court to evaluate the justification for the state activity. The court said that the state advances “substantial” state interests when it seizes and forfeits property that is used to facilitate trafficking in illicit drugs. Those state interests include punishing criminal wrongdoers, seeking retribution for society, deterring the continued use of property to further criminal activity, remedying societal wrongs, and recovering the costs of law enforcement.⁹⁹ By characterizing the state’s interests as “substantial,” the court implies that the state has satisfied an intermediate level of justification for its activity, one less demanding than “compelling,”¹⁰⁰ but more demanding than merely “legitimate.”¹⁰¹ As it turns out, however, the characterization is not particularly crucial in the forfeiture context. The defendant did not dispute the strength or importance of the state’s asserted aims, and the thirty-eight page slip opinion lays the matter to rest in a single sentence without citation.

More crucial to the outcome than the label attached to the state’s interests is the choice of standards by which the court measures the level of protection due individual rights when the state wields its power. Generally, when basic rights are at stake, article I, section 9 requires the state to narrowly tailor the means chosen to accomplish its goals by

97. *Id.* at S499.

98. *Id.* (citing FLA. CONST. art. I, §§ 2 (inalienable rights), 12 (security in the home), and 23 (express right of privacy)). The seizure and forfeiture of property also implicate other provisions designed to limit the exercise of state power. *Id.* (citing FLA. CONST. art. I, §§ 17 (prohibition against excessive punishments), 21 (meaningful access to the courts)).

99. *Id.* at S499.

100. *See, e.g., In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (requiring the state to show a “compelling” state interest before it intrudes into a person’s right to self-determine his or her medical course).

101. *See, e.g., Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) (upholding anti-obscenity law, in part, because the state has a “legitimate interest ‘in stemming the tide of commercialized obscenity’”) (citation omitted).

using the least restrictive alternative. Because means less restrictive than seizure were available, the state failed to satisfy this burden. *Real Property* holds that Florida due process compels the state to employ means less restrictive than seizure, where feasible, if it intends to prevent the disposition of potentially forfeitable property before trial on the forfeiture.¹⁰² The holding underscores the high regard Floridians have for the rights at stake, for very few article I rights receive greater protection from state encroachment.¹⁰³

Because the act failed to adequately shield basic rights from unjustified ouster by the state, the court issued several rehabilitative procedural directives.¹⁰⁴ Before initially restraining real property (by means other than *lis pendens*), the state must provide notice and schedule an adversarial hearing on the issue of probable cause. The state must initiate proceedings by filing a petition for rule to show cause, and simultaneously recording a copy of the petition in the official records of

102. *Real Property*, 16 Fla. L. Weekly at S499. Due process also requires the state to provide notice to those with an interest in the property, and an opportunity to be heard throughout the forfeiture proceedings. *Id.*

103. The most stringent standard announced for protection of article I rights requires the state to show "overpowering public necessity" and "no alternative method" of meeting the necessity. *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) (standard applied when the state abolishes a right of access to courts protected under article I, section 21, and fails to provide a reasonable alternative). A standard less rigorous, but one seldom satisfied, requires the state to show a compelling state interest that it advanced through the least intrusive means. *See, e.g., Hillsborough County Governmental Employees Ass'n, v. Hillsborough County Aviation Auth.*, 522 So. 2d 358, 362 (Fla. 1988) (article I, section 6, right to bargain collectively); *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 251 (Fla. 1987) (article I, section 2, inalienable rights (classification based on alienage)); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985) (article I, section 23, express right of privacy). *See generally Decade Survey supra* note 2 at 856 (maintaining that the court has created a hierarchical order of article I rights that depends entirely on the standard used to measure the justification for the state's encroachment).

104. *Real Property*, 16 Fla. L. Weekly at S499-500. In other instances, the court has resorted to its rule making authority to craft procedural protection for substantive constitutional rights newly recognized in an opinion. *See, e.g., In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990) (prescribing procedures under article I, section 23 to safeguard the right of an incompetent patient to self-determine his or her medical course without prior judicial approval); *State v. Stanjeski*, 562 So. 2d 673 (Fla. 1990) (finding that statute, which authorized clerk to enter a final judgment by operation of law when obligor defaulted on support payments, "should be interpreted" to allow the obligor a hearing and the opportunity to present equitable defenses *before* entry of judgment).

the clerk. The recordation amounts to a seizure of real property.¹⁰⁵ The state must immediately schedule an adversarial preliminary hearing and notice all interested persons. In the event the state shows that it has probable cause to believe that the seized property is subject to forfeiture, the trial judge may protect the respective interests by order. The adversarial hearing should take place within ten days of filing of the petition for rule to show cause, and a decision on probable cause should be "expeditiously completed."¹⁰⁶

Due process does not require preseizure notice or hearing when the state initially restrains personal property,¹⁰⁷ however, it does require the state to send notice to interested persons after making an ex parte seizure, and to afford them an opportunity to be heard at a postseizure adversarial hearing. If requested, the adversarial hearing shall be held "as soon as possible after seizure."¹⁰⁸ The trial judge must expeditiously determine de novo whether the state had probable cause to proceed with the forfeiture, and whether continued restraint of the seized property is warranted.¹⁰⁹

The opinion makes several points regarding litigation of property claims under the act. Claimants are constitutionally entitled to a jury trial on the ultimate issue of forfeiture,¹¹⁰ a right that is subsumed within state due process.¹¹¹ The state argued that it should be held to no more than a preponderance standard of proof at trial on the forfeiture claim. However, Florida law expects more. Construing the "due proof" requirement of the act, the court said that the state must show by "no less than clear and convincing evidence" that the seized prop-

105. The act makes no provision for seizure of real property, such as by warrant or writ, although seizure warrants were issued by the trial judge in this case.

106. *Real Property*, 16 Fla. L. Weekly at S500-501.

107. *Accord Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Justice Brennan wrote that "seizure [of personal property] for the purposes of forfeiture is one of those 'extraordinary situations' that justify postponing notice and opportunity for a hearing." *Id.* at 677 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972)).

108. *Real Property*, 16 Fla. L. Weekly at S500. The opinion is not entirely clear on this point. *See id.* (anticipating that the hearing would occur within ten days after seizure and "as soon as is reasonably possible"). The court also reaffirmed *Lamar v. Universal Supply Co.*, 479 So. 2d 109 (Fla. 1985), which held that due process requires "reasonably prompt" proceedings in forfeiture actions involving personal property. *Real Property*, 16 Fla. L. Weekly at S502 n.16. To the extent that there is disagreement between *Lamar* and *Real Property*, the latter prevails. *Id.*

109. *Id.* at S500.

110. *Id.* at S501 (citing FLA. CONST. art. I, § 21 (access to courts)).

111. *Id.*

erty was used in violation of the act before it is entitled to forfeiture.¹¹² The higher standard is justified, the court said, because forfeiture impinges on basic constitutional rights, often those of persons who are innocent of wrongdoing.¹¹³

This is a marked departure from the prevailing practice in Florida forfeiture cases. Formerly, the state was required to initially proceed by a mere showing of probable cause that the property was subject to forfeiture. Once established, the burden shifted to the claimant to rebut the showing of probable cause. Alternatively, the claimant was required to show by a preponderance of the evidence that no violation occurred, or that an affirmative defense entitles the claimant to repossess the seized property.¹¹⁴

In summary, there is no doubt that the court would have acted within its prerogatives had it performed last rites on the forfeiture act, affirming the trial judge and striking the act as sorely wanting protection for substantive rights.¹¹⁵ While it may be argued that some justices would have voted to overturn the act in its entirety, it is doubtful that all would have concurred in the result. Thus seen, *Real Property* was likely the product of compromise, realized through strenuous effort.¹¹⁶

112. *Id.* Rather than imposing a fixed standard, the court allowed leeway for the legislature to establish a higher evidentiary burden, such as the standard that governs criminal prosecutions.

113. *Id. Contra Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) (noting that innocence of the property owner has almost uniformly been rejected as a defense to a forfeiture).

114. *In re Forfeiture of Approximately Forty-Eight Thousand Dollars (\$48,900.00) in U.S. Currency*, 432 So. 2d 1382, 1385 (Fla. 4th Dist. Ct. App. 1983). Under *Real Property*, the claimant is still held to a preponderance burden to establish a defense that defeats a forfeiture action. *Real Property*, 16 Fla. L. Weekly at S501.

115. The district courts often complained about the procedural shortcomings in the predecessor versions of the 1989 act under review. *See id.* at S500 and cases cited therein.

116. Given an earlier opportunity to consider the act in light of federal double jeopardy, the court divided four to three. *See State v. Crenshaw*, 548 So. 2d 223, 227 (Fla. 1989). The majority never reached the constitutional issue. However, three justices advocated a minority position that the vehicle forfeiture authorized by the act violated the federal double jeopardy prohibition against multiple punishments, as applied, because the forfeiture penalty exceeded the compensation required to make the state whole. *Id.* at 229 (Kogan, J., dissenting, with whom Shaw and Barkett, JJ., concurred) (citing *Halper*, 109 S. Ct. at 1897). The rationale behind the double jeopardy concern strongly parallels the court's proportionality analysis in *Real Property*, which limits the state to the property or portion thereof that was used in connection with the crime. *Real Property*, 16 Fla. L. Weekly at S501. For a discussion of this aspect of the

On the one hand, allowing the act to stand served those justices who might have believed that it satisfied federal constitutional standards, and that Florida provided no greater protection. On the other hand, application of a judicial tourniquet of “minimal” due process requirements cured some of the potentially fatal defects that concerned those justices who would have struck the act, partially or entirely.

This remarkable unity has several virtues. The choice permitted the court to speak with clarity through one voice. Unanimity enhances the precedential value of a decision, for it reflects the joint wisdom of the court’s membership. This is particularly important because the opinion addresses constitutional rights of some magnitude. The decision respects Florida’s strong separation of powers doctrine by leaving intact a forfeiture law, said to advance several “substantial” state aims. Finally, the result is politically savvy and practically appropriate. The decision avoided piecemeal litigation that surely would have occurred had the court overturned the act, leaving to the legislature the task of enacting “minimal” protections of individual constitutional rights in the aftermath.¹¹⁷

Real Property establishes the analytical paradigm for article I, section 9 due process. The opinion distinguishes substantive and procedural due process as two discrete, functional components. The substantive due process component forms the core of the state bill of rights, shielding “the full panoply of individual rights” from unjustified interference by the state’s political branches. This is a statement of great amplitude.

It is beyond dispute that substantive due process protects expressly declared constitutional rights, such as the rights “to acquire, possess and protect property” under article I, section 2. Thus seen, personal rights declared throughout the constitution give substantive content to

case, *see infra* notes 282-88 and accompanying text.

Another case decided this survey period suggests that the unanimity reached in *Real Property* is an example of collegial accommodation. The justices were irreconcilably split in *Smith v. Department of Health & Rehabilitative Servs.*, 573 So. 2d 320 (Fla. 1991), over a fundamental principle of due process—whether due process entitled indigents to a free transcript of an administrative hearing to perfect their appeal. *Smith* is discussed *infra* notes 304-10 and accompanying text.

117. The constant pressure from groups of constituents makes it unlikely that legislators, and the voters, will care enough about preserving “‘the balance of the Constitution’ to offset the votes of those whose interests will be disappointed.” Learned Hand, *The Bill of Rights 12 in THE OLIVER WENDELL HOLMES LECTURES* (1958) (citation omitted).

article 1, section 9 due process. More interesting is the implication that due process protects unspecified, unenumerated rights.¹¹⁸ That the Florida Constitution should respect essential values that have no specific textual foundation is not surprising, for article I does not limit the scope of its protections to rights expressly declared.¹¹⁹ In addition, courts have acknowledged that protected rights derive from non-constitutional sources. Among them are rights of individuals conferred by state grant or entitlement, such as statute, regulation, ordinance, and agreement.¹²⁰ Less clear is whether individual rights that derive from relationships, contracts, custom, course of conduct, and the like are similarly entitled to due process. The statement has the potential for far-reaching impact and its full import must await the perspective of later case development.

While a statement of general policy reserves important details for adjudication in later cases, precedent cautions against ascribing a meaning to the statement that exceeds the parameters of the decision. The court has recently refused to be bound by archetypical statements of constitutional principle outside the factual contexts in which they were announced.¹²¹ With that caution *Real Property's* holding must be

118. See also *Real Property*, 16 Fla. L. Weekly at S499 (implying that privacy protections derive from the inalienable rights clause of article I, section 2).

119. Compare FLA. CONST. art. 1, § 1 with U.S. CONST. amend. IX.

120. See *Hewitt v. Helms*, 459 U.S. 460, 486, n.12 (1983) (Stevens, J., dissenting, joined by Brennan, Marshall, and Blackmun, JJ.) (specific rights attach "whether the State uses a particular form of words in its laws or regulations, or indeed whether it has adopted written rules at all"); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (declaring that property interests "are created and their dimensions are defined by existing rules or understandings or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits").

121. Compare *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990) (describing privacy as a "physical and psychological zone within which an individual has the right to be free from intrusion or coercion," and deciding that Florida's express right of privacy protects a person's right to self-determine his or her medical course, even if it means that death is certain to follow as a result of the choice) (citation omitted) and *In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) (stating that "'the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men,'" and declaring that it prohibits the state from requiring a minor female to obtain parental consent before electing to terminate her pregnancy in the first trimester) (citation omitted) with *State v. Stall*, 570 So. 2d 257 (Fla. 1990), *cert. denied*, 111 S. Ct. 2888 (1991) (relying on precedent predating the adoption of Florida's express right of privacy to declare that no privacy rights arise in the context of commercial sale or viewing of obscene material).

seen as grounded on textually enumerated rights in article I, not on peripheral rights or entitlements.

The procedural due process component requires fair treatment, which includes notice and a real opportunity to defend before judgment is rendered, whenever substantive rights are implicated. The application of due process is dependent on the character of the interests at stake, and the nature of the process involved. When fundamental property rights are implicated, the state must justify its action to divest those rights by showing that its action advances a substantial state interest. And the state must employ the least restrictive means to exercise an initial restraint on property, and show by no less than clear and convincing evidence that the property is subject to forfeiture.

Real Property is a fountainhead of state constitutional decision making. The decision illustrates the court's willingness to dispose of far-reaching constitutional questions entirely on the strength of the Florida Constitution. This is no phenomenon, but a result made more likely by the deliberate litigation of state constitutional claims at trial and on appeal, by the high regard that Floridians have shown for property rights in article I, and by an evolving line of precedent that urged state law development.¹²² If the significance of an opinion is measured by the care that a state court takes to ground its holding firmly on state law logic, then *Real Property* has few equals in the opinions of the Supreme Court of Florida. The exclusive, explicit, and principled reliance on articulated state law values of property, fairness, notice, and meaningful hearing renders federal review improbable, and preserves for Floridians a measure of property security and due process that surpasses federal constitution standards.

122. Although the opinion does not make the point, the court's case law suggests that the time was ripe when *Real Property* reached the court to confront the state constitutional claims attacking the forfeiture act. The historical progression begins with *Griffis v. State*, 356 So. 2d 297, 299 (Fla. 1978), where the court abided by express legislative intent, and wrote that the 1975 version of Florida's contraband forfeiture statute was to be construed "in uniformity" with its federal counterpart. Then, *Duckham v. State*, 478 So. 2d 347, 349 (Fla. 1985), suggested the onset of a new era. *Duckham* receded from *Griffis*, indicating that the extensive amendments to the act in 1980 required courts to look to state legislative intent, rather than federal precedent. Finally, three justices dissented in *State v. Crenshaw*, 548 So. 2d 223, 226 (Fla. 1989) (Kogan, J., dissenting, Shaw and Barkett, JJ., concurring), exposing the vulnerability of the act to constitutional attack. They argued that the forfeiture of the defendant's car under the act violated the double jeopardy prohibition against multiple punishment, because the forfeiture exceeded the compensation needed to make the state whole.

The second unanimous case this period, *State v. Rodriguez*,¹²³ like *Real Property*, dealt with the notice aspect of due process. The state charged Rodriguez by information with felony driving under the influence (DUI),¹²⁴ a crime that is punishable as a felony of the third degree provided the defendant has three or more prior DUI convictions. The information omitted any reference to Rodriguez's prior convictions. The court determined that proof of prior convictions is an essential element of the substantive offense of felony DUI.¹²⁵ Relying exclusively on the Florida Constitution, the court held that the fair notice aspect requires the state to specifically enumerate in the accusatory instrument the defendant's three specific prior convictions for driving under the influence.¹²⁶ The court overturned the felony DUI conviction because the state failed to provide Rodriguez with any notice of his prior convictions that it intended to rely on to establish felony DUI.¹²⁷

The opinion adds that the record contained insufficient evidence to establish Rodriguez's prior DUI convictions,¹²⁸ and leaves for another day the question of whether a tender of proof alone might satisfy the constitution's fair notice requirement.

The justices further agreed that another due process aspect, the presumption of innocence, requires the trial court to withhold from the jury any allegations or facts about the defendant's prior DUI convictions.¹²⁹ Once the state proves the elements of the instant DUI offense, the trial court is then required conduct a separate, non-jury proceeding to determine the historical fact of the defendant's prior convictions.¹³⁰

123. 575 So. 2d 1262 (Fla. 1991) (unanimous) (Barkett, J., author).

124. FLA. STAT. § 316.193(2)(b) (Supp. 1988).

125. *Rodriguez*, 575 So. 2d at 1266.

126. *Id.* (citing art. I, §§ 9 (due process) and 16 (right of accused in criminal prosecution to be informed of "the nature and cause of the accusation against him")); *see also* *M.F. v. State*, 583 So. 2d 1383 (Fla. 1991) (due process requires the state to provide the accused with notice of the allegations in juvenile as well as adult criminal proceedings, and does not prohibit the state from amending a petition of delinquency to correct a good faith typographical error before the adjudicatory hearing).

127. *Rodriguez*, 575 So. 2d at 1266-67.

128. *Id.* at 1266.

129. *Id.* at 1265-66.

130. *Id.* at 1266 (applying *State v. Harris*, 356 So. 2d 315 (Fla. 1978)). *Harris* explained the due process implications of failing to determine out of earshot of the jury the historical fact of convictions of similar crimes: "If the presumption of innocence is destroyed by proof of an unrelated offense, it is more easily destroyed by proof of a similar, related offense." 356 So. 2d at 317.

The third unanimous due process decision, *Burr v. State*,¹³¹ vacated a death sentence and remanded for a new sentencing hearing because the defendant had been acquitted of collateral crimes that the trial court earlier relied on to establish three aggravating circumstances in overriding the jury's recommendation of a life sentence. Finding that two of the three aggravating circumstances rested "predominantly, if not entirely," on some of the collateral crimes evidence, the court was "forced to conclude" that the two circumstances are "reasonably suspect," and inadmissible under article I, section 9 at a resentencing hearing.¹³² The court rejected a conclusion that the error could be considered harmless in the penalty phase of a capital trial.¹³³

Burr's harmless error analysis warrants brief comment. The court wrote that the error was harmless in the guilt phase of *Burr's* trial, "in light of the overwhelming evidence of guilt discernible in our review of the entire record."¹³⁴ Without clarification, the statement risks its misapplication. *DiGuilio* posed the precise harmless error inquiry as whether there is a reasonable possibility that the error affected the verdict, and it expressly rejected the overwhelming evidence test as a basis for determining harmless error.¹³⁵ Despite appearances, *Burr* does not depart from *DiGuilio*, and its statement should not be read to imply that the court will find error to be harmless merely because the record contained overwhelming evidence of guilt.

In the fourth case, *Abdala v. World Omni Leasing, Inc.*,¹³⁶ the court rejected a due process attack against a statute that exempted long-term lessors of vehicles who maintained certain liability insurance

131. 576 So. 2d 278 (Fla. 1991) (per curiam).

132. *Id.* at 280; see also *Johnson v. Mississippi*, 486 U.S. 578 (1988) (vacating death sentence when the sole prior conviction relied on by the sentencer to establish an aggravating circumstance was later overturned).

133. *Burr*, 576 So. 2d at 280.

134. *Id.* (citation omitted). Compare *Bruno v. State*, 574 So. 2d 76, 80 (Fla. 1991) (finding error to be harmless, and stating that the record showed "overwhelming evidence of guilt"), cert. denied, No. 90-812 (U.S. Oct. 7, 1991) with *Dailey v. State*, No. 71,164, slip op. at 8 (Fla. Nov. 14, 1991) (finding error harmless in light of "other substantial evidence of guilt") and *Craig v. State*, 585 So. 2d 278, 280 (Fla. 1991) (same).

135. *DiGuilio*, 491 So. 2d at 1139; see also *Chapman v. California*, 386 U.S. 18, 23 (1967) (admonishing courts against overemphasizing a finding of overwhelming evidence of guilt as a basis for concluding that error could not have affected the outcome).

136. 583 So. 2d 330 (Fla. 1991) (unanimous) (McDonald, J., author). The case is treated more fully under equal protection, see *supra* notes 13-15 and accompanying text, and access to courts, see *infra* notes 296-99 and accompanying text.

limits. The court said that the exemption bore a reasonable relationship to a permissive legislative objective.¹³⁷

In the following three cases, no opinion won majority approval, although the justices reached unanimous positions. In *Perkins v. State*,¹³⁸ the court overturned Perkins' conviction of murder in the first degree and attempted cocaine trafficking. Perkins and Guy agreed to buy cocaine through Lazier, their codefendant. Perkins and Lazier approached Kimble, the prospective seller. Instead of selling them cocaine, Kimble tried to rob Perkins and Lazier of their purchase money at gun point. In the ensuing struggle, Kimble shot Perkins, but Perkins succeeded in seizing Kimble's gun and shot him dead.¹³⁹

The state conceded at trial that Perkins shot Kimble in self-defense, but argued that Perkins was barred from raising the legal claim of self-defense under the statute, which made the defense unavailable to a person who attempts to commit a forcible felony. The statute defines "forcible felony" under the catchall clause to be "any other felony which involves the use or threat of physical force or violence against any individual."¹⁴⁰ The trial judge granted Perkins's motion to dismiss the murder charges. However, the third district reversed, finding that the crime, trafficking in cocaine, qualifies as a "forcible felony" because it inherently involves a propensity to do violence.¹⁴¹

The state supreme court quashed the opinion of the district court. The court began with a fundamental principle of statutory construction, due process requires a court to strictly construe penal statutes according to their literal text, and in a manner most favorable to the accused. The court ruled that the term "involves" was vague and ambiguous, and failed to place narcotics trafficking within the conduct proscribed in the statute.¹⁴²

Another case, *Anderson v. State*,¹⁴³ borrowed from established

137. *Id.* at 333-34.

138. 576 So. 2d 1310 (Fla. 1991) (per curiam). *Perkins* is also addressed under article I, section 2 (inalienable rights), *supra* notes 56-58 and accompanying text.

139. *Id.* at 1311.

140. FLA. STAT. § 776.041(1) (1987) (emphasis added).

141. *State v. Perkins*, 558 So. 2d 537, 538-39 (Fla. 3d Dist. Ct. App. 1990).

142. *Perkins*, 576 So. 2d at 1313-14. The court added that the rule of strict construction was a necessary rule of self-restraint, equally required by the doctrine of separation of powers embodied in article II, section 3 of the state constitution. Without the rule, courts could use "some minor vagueness" to extend the meaning of a statute beyond the text enacted by the legislature. *Id.* at 1312-13.

143. 574 So. 2d 87 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDon-

federal doctrine to declare that the state violates Florida's due process guarantee when it prosecutes a person on charges known to be based on perjured material evidence. However, the court rejected Anderson's claim that his indictment for first-degree murder was based on the perjured testimony before the grand jury of his accomplice woman-friend, turned accuser. The court wrote that her testimony was not materially false, and thus would not have affected the grand jury's decision to indict or the petit jury's truth-seeking function.¹⁴⁴

At least three justices believed that state due process provided the dispositive principles in the following two plurality decisions. However, the fractured opinions make a less certain contribution to article I. The court in *Smith v. Department of Health and Rehabilitative Services*¹⁴⁵ accepted review of a claim by various petitioners, all of whom were indigent, that they had a statutory and a constitutional right to receive without charge transcripts of administrative hearings in order to perfect their judicial appeal from unfavorable administrative rulings. Six justices agreed that indigents were entitled under section 57.081(1), Florida Statutes (1985),¹⁴⁶ to receive transcripts of administrative proceedings at no cost.¹⁴⁷

The petitioners also advanced a claim that they were entitled to receive transcripts under principles of state due process.¹⁴⁸ Justices, Overton, Grimes, and McDonald joined in the per curiam opinion and rejected the constitutional claim, while Chief Justice Shaw concurred in result. They relied on the United States Supreme Court's decision in

ald, and Grimes, JJ., concurring; Ehrlich, J., concurred with an opinion in which Shaw, C.J., and Kogan, J., joined; Barkett, J., concurred in part and dissented in part with an opinion; Kogan, J., concurred in result only).

144. *Id.* at 91-92.

145. 573 So. 2d 320 (Fla. 1991) (per curiam) (Overton and Grimes, JJ., concurred; Shaw, C.J., concurred in result; McDonald, J., concurred in part and dissented in part with an opinion; Ehrlich, J., concurred in part and dissented in part with an opinion in which Barkett and Kogan, JJ., joined).

146. The section provides that indigent parties to an administrative proceeding shall receive "the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge."

147. *Smith*, 573 So. 2d at 323 (Overton and Grimes, JJ., concurring); *id.* at 325 (Shaw, C.J., concurring in result); *id.* (Ehrlich, J., concurring in part; Barkett and Kogan, JJ., concurring); *see also* *Gretz v. Florida Unemployment Appeals Comm'n*, 572 So. 2d 1384 (Fla. 1991) (holding that agency rule requiring payment for a copy of hearing transcript and record violated statute prohibiting the charging of fees).

148. The petitioners advanced a second constitutional argument under the access to courts provision. *See infra* notes 304-10 and accompanying text.

Ortwein v. Schwab, which had considered a related issue.¹⁴⁹ *Ortwein* affirmed an Oregon court, construing Oregon law, which ruled that welfare recipients were not entitled to a waiver of an appellate court filing fee to seek judicial appeal of an administrative ruling, following an evidentiary hearing, that had affirmed an agency decision reducing their welfare benefits. Federal due process did not require the state of Oregon to waive costs that would permit an indigent to file an appeal, and that the existence of the alternative evidentiary hearing, which was not conditioned on the prepayment of a filing fee, sufficed under the circumstances.¹⁵⁰ It was “‘inconceivable,’” the per curiam opinion reads, that Florida’s statute requiring prepayment of transcript costs is any less rational.¹⁵¹ “We see no compelling reason to construe Florida’s due process clause differently than its federal counterpart with respect to this issue. Since petitioners received an evidentiary hearing on their claims without cost, we do not believe that they would be constitutionally entitled to be furnished with a free transcript to assist in the prosecution of their appeals.”¹⁵²

The per curiam position provoked a strong dissent, and exposed a deep-rooted division over the meaning of due process. Writing for three members of the court in dissent, Justice Ehrlich argued that a party could not be bound personally by an administrative decision until he or she had meaningful access to a judicial tribunal, which necessarily included a transcript of the administrative proceeding.¹⁵³ Moreover, the court had earlier declared in an equally applicable equal protection context that indigents were entitled to challenge their involuntary hospitalization in a manner commensurate with the appellate review available to nonindigents.¹⁵⁴

149. 410 U.S. 656 (1973).

150. *Id.* at 658-59 (relying on *United States v. Kras*, 409 U.S. 434, 445-46 (1973) (upholding statutorily imposed bankruptcy filing fees, in part, because Kras’ resort to the bankruptcy court was not his sole path of relief); *see also* *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (striking state statute requiring prepayment of filing fee by indigent seeking divorce because Connecticut courts provided the “exclusive precondition” for obtaining a divorce).

151. *Smith*, 573 So. 2d at 324 (quoting *Harrell v. Department of Health & Rehabilitative Servs.*, 361 So. 2d 715, 717 (Fla. 4th Dist. Ct. App. 1978)).

152. *Id.*

153. *Id.* at 325 (Ehrlich, J., concurring in part and dissenting in part; Barkett and Kogan, JJ., concurring) (relying on *Scholastic Sys. v. LeLoup*, 307 So. 2d 166 (Fla. 1974)).

154. *Id.* (relying on *Shuman v. State*, 358 So. 2d 1333 (Fla. 1978)).

Smith departs from the well-settled providential rule which states that the court should avoid deciding a constitutional question when it can dispose of the issue on nonconstitutional grounds.¹⁵⁵ Because six justices clearly agreed that indigents are statutorily entitled to a transcript free of charge, the court had no need to reach the constitutional claim.¹⁵⁶ Despite its dubious precedential importance as a constitutional decision, *Smith* adds a gratuitous measure of understanding to the field, and displays a willingness by the justices to share their views, however disparate. Both results are welcomed by those who follow carefully the court's labors.

*Walls v. State*¹⁵⁷ also produced a plurality decision and three opinions. The state prosecuted Walls for a double homicide. Suspecting that he was involved in other murders, the state asked a correctional officer to conduct a surveillance of Walls while he awaited trial in detention. The officer assured Walls that his comments to her would remain confidential, and discouraged Walls from telling his attorney. The officer took detailed notes of Walls' statements, which the state gave to its examining psychiatrists. Following evaluation, two of the state's psychi-

155. See *Griffis v. State*, 356 So. 2d 297, 298 (Fla. 1978), *receded from on other grounds*, *Duckham v. State*, 478 So. 2d 347 (Fla. 1985); *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 883 (Fla. 1974); *In re Estate of Sale*, 227 So. 2d 199, 201 (Fla. 1969).

156. It is not entirely clear why the court issued *Smith* in violation of the providential rule. The per curiam opinion, concurred in by Justices Overton and Grimes, indicates that the constitutional issue was reached because the matter had been "extensively argued." *Smith*, 573 So. 2d 323. Other recent cases suggest more appropriate rationale that guide the court to addressing a constitutional claim when other dispositional bases exist. See, e.g., *Davis v. State*, No. 76,640, slip op. at 3 n.* (Fla. Oct. 31, 1991) (declining to impose procedural bar and reaching merits to emphasize that no error occurred); *Mac Ray Wright v. State*, 586 So. 2d 1024, 1029 (Fla. 1991) (reversing convictions on dispositive claim, and addressing other constitutional errors to instruct the trial court in the event of retrial); *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991) (reaching the merits of the constitutional challenges on its own, "given the importance of th[e] case," and even though petitioners failed to show entitlement to relief, *id.* at 1171; addressing petitioners' separation of powers claim "for future guidance only." *Id.* at 1173). *But see id.* at 1176 (Kogan, J., specially concurring; Barkett, J., concurring); *id.* (Barkett, J., concurring in part and dissenting in part; Shaw, C.J., and Kogan, J., concurring) (arguing that the challenged act violated the single subject rule, thus disposing of the case, and that the majority inappropriately addressed additional constitutional claims).

157. 580 So. 2d 131 (Fla. 1991) (Kogan, J., author. Shaw, C.J., and Barkett, J., concurred. Grimes, J., concurred in result; McDonald, J., dissented with an opinion with which Overton, J., concurred).

atrists opined that Walls was competent to stand trial. The trial court accepted the opinions of the psychiatrists and proceeded to trial. The jury convicted Walls of murder, and recommended the death sentence, which the trial court imposed.¹⁵⁸

On direct appeal, Walls argued that the correctional officer's activities violated his constitutional rights. A majority of the justices agreed, although two of the opinions chose different rationale. Justice Kogan wrote that the state engaged in illegal subterfuge, which required the court to conduct an "intensive scrutiny" of the particular method used by police to extract the statements from Walls.¹⁵⁹

The state conceded at trial that the police conduct violated *Massiah v. United States*,¹⁶⁰ and further agreed that Walls' statements were properly excluded from the guilt phase and penalty phase of his trial. Relying exclusively on Florida due process, Justice Kogan wrote that the gross deception practiced by the state required the trial court to exclude the statements from *all* aspects of Walls' trial, thereby prohibiting the state from gaining advantage from the subterfuge on matters relating to Walls' competence to stand trial.¹⁶¹ The practice violated the due process tenants of fairness and good faith, and degenerated from permissible accusation to impermissible inquisition.¹⁶² The court ordered the case remanded for a new trial on all issues, and barred the use of psychiatric evaluations conducted by the original psychiatrists who received information derived from the Walls' detention statements.

Justice Grimes concurred in result only, and simply wrote that *Massiah* precluded the use of testimony by the mental health experts.¹⁶³ In dissent, Justice McDonald characterized the police activity as "inappropriate gathering of facts surrounding one's competency," which did not equate to a due process violation. Had the state's action led to a confession or been introduced as substantive evidence, he wrote, reversal would more likely be warranted.¹⁶⁴

State due process arguments appeared in dictum and a minority

158. *Id.* at 132.

159. *Id.* at 133.

160. 377 U.S. 201 (1964).

161. *Walls*, 580 So. 2d at 134.

162. *Id.* at 133. The police conduct here also interfered with the attorney-client relationship, protected by article I, section 9. *Id.* at 134 (citing *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987)).

163. *Id.* at 135 (Grimes, J., concurring in result only).

164. *Id.* (McDonald, J., dissenting; Overton, J., concurring).

opinion in the two remaining cases. The court in *Clark v. State*¹⁶⁵ declined to consider a claim that separate sentences imposed on the same day and in the same court, but by different judges, resulted in sentences that combined to violate the recommended guidelines sentence. The court ruled that Clark was procedurally barred from raising the claim on appeal because he failed to ask the trial court to consolidate his sentencing proceedings. Recognizing that the underlying problem would persist in future cases, the court established a general rule that one sentencing score sheet must be used for each pending case. It further recognized an exception to that rule that allowed defendants to move to delay sentencing of pending cases to permit the use of a single score sheet.¹⁶⁶ In dictum, the court wrote that due process protects defendants against extreme delay occasioned by a rule that would postpone sentencing until all pending cases are ready for sentencing, such as where the delay results in an unreasonably long period of incarceration in anticipation of sentencing.¹⁶⁷

A four-justice majority in *Espinosa v. State*¹⁶⁸ rejected Espinosa's claim that he was entitled to be tried separate from his co-defendant on multiple charges, including murder. The majority reasoned that Espinosa was not entitled to severance simply because he testified and was cross-examined by his co-defendant's counsel. Moreover, no evidence was introduced at his trial that could not have been introduced against either defendant, if each had been tried separately. Although Espinosa was unable to cross-examine his co-defendant during the guilt-innocence phase of his trial, because his co-defendant did not testify, Espinosa was able to cross-examine him during the penalty phase.¹⁶⁹

Two justices in dissent relied on Florida's due process clause to argue that severance should generally be allowed in the guilt phase of a capital trial. Moreover, the requirement for an individualized punishment in death cases dictates that severance always be allowed in the penalty phase. This is particularly so when the co-defendants exhibit extreme animosity, and an elevated antagonism.¹⁷⁰ The inherent unfair-

165. 572 So. 2d 1387 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, Ehrlich, Grimes, and Kogan, JJ., concurring; Barkett, J., specially concurring with opinion).

166. *Id.* at 1392.

167. *Id.* at 1390.

168. 16 Fla. L. Weekly S753 (Nov. 27, 1991) (per curiam).

169. *Id.* at S754; *see also* Beltran-Lopez v. State, 583 So. 2d 1030 (Fla. 1991) (per curiam).

170. *Espinosa*, 16 Fla. L. Weekly at S756 (Barkett, J., dissenting, Kogan, J.,

ness of jointly trying co-defendants under those circumstances is that “‘a substantial possibility exists []that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.’”¹⁷¹

2. Double Jeopardy

No person shall . . . be twice put in jeopardy for the same offense
 FLA. CONST. art. I, § 9.

Federal case law provides a frequent source of precedent for resolving state double jeopardy claims. *Robinson v. State*¹⁷² relied on *Oregon v. Kennedy*¹⁷³ and rejected a claim that double jeopardy barred retrial due to asserted prosecutorial overreaching where the record did not establish that the prosecutor deliberately intended to provoke Robinson into moving for a mistrial.¹⁷⁴ Robinson, a black man, was charged with first-degree murder of a white woman whom he kidnapped, robbed, and sexually battered. Robinson maintained that the prosecutor, during cross examination of a defense witness, insinuated that he habitually preyed on white women.

Unable to agree on which federal precedent suggested the better reasoned outcome, the justices in *Goene v. State*¹⁷⁵ predictably split their decision. Goene misrepresented his identity at sentencing and received a guideline sentence of four and one-half years' imprisonment following his conviction of various crimes. Afterward the state learned of Goene's true identity and that he had an extensive criminal history, which would have resulted in a guideline sentence of twelve-to-seventeen years' imprisonment had that fact been taken into account. The state moved to vacate Goene's sentence. After Goene began serving his sentence, the trial court granted the state's motion and resentenced Goene to seventeen years' imprisonment. He argued that a resentence

concurring).

171. *Id.* (quoting *United States v. Berkowitz*, 662 F.2d 1127 (5th Cir. 1981)).

172. 574 So. 2d 108 (Fla. 1991) (Barkett, J., author. Shaw, C.J., and Overton, Grimes, and Kogan, JJ., and Ehrlich, Senior Justice, concurred. McDonald, J., concurred in result only), *cert. denied* No. 40-8277 (U.S. Oct. 7, 1991).

173. 456 U.S. 667 (1982).

174. *Robinson*, 574 So. 2d at 112-13 (relying on *Oregon v. Kennedy*, 456 U.S. 667 (1982)).

175. 577 So. 2d 1306 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurred; Barkett, J., dissented with an opinion, in which Kogan, J., concurred).

to a greater term after he began serving the original sentence violated the state and federal double jeopardy clauses.¹⁷⁶

Four of the six justices participating in the decision rejected Goene's claim of error. The majority acknowledged that the double jeopardy clause was intended, in part, to avoid subjecting a criminal defendant to repeated insecurity, which would occur were he or she not entitled to rely on the finality of the court's action.¹⁷⁷ The general rule, followed in Florida, prohibits a court from resentencing a defendant to an increased term of imprisonment once he or she has begun serving a sentence.¹⁷⁸ However, a defendant's fraudulent behavior in securing a sentence produces no "'legitimate expectations'" of constitutional finality.¹⁷⁹ Unlike a jury verdict of acquittal, a sentence imposed through the defendant's fraud may be assailed on appeal. This conclusion derives equally from the trial court's inherent power to assure the orderly function of the judicial process by rectifying "'at any time'" its orders and judgments that are the product of fraud.¹⁸⁰

Two justices argued in dissent that the exception carved out by the majority ran afoul of the very purpose of the double jeopardy clause. Constitutional finality requires the state "to marshal all the evidence and present it at one time, not in a piecemeal fashion."¹⁸¹ Here, the state failed to supply evidence of Goene's identity at the original sentencing hearing, or to seek a continuance and await a forthcoming fingerprint identification that would have established Goene's true identity.¹⁸²

*Carawan v. State*¹⁸³ continues to have precedential importance in resolving claims that prosecution or sentencing of multiple charges arising out of a single act violates Florida law, even though the decision

176. *Id.* at 1306-07.

177. *Id.* at 1307 (relying on *Green v. United States*, 355 U.S. 184 (1957)).

178. *Id.* at 1308 (citations omitted).

179. *Id.* at 1307-08 (emphasis in original) (quoting *United States v. DiFrancesco*, 449 U.S. 117, 137 (1980)); *see also* *United States v. Jones*, 722 F.2d 632 (11th Cir. 1983).

180. *Goene*, 577 So. 2d at 1309 (emphasis in original) (quoting *State v. Burton*, 314 So. 2d 136, 138 (Fla. 1975)).

181. *Id.* at 1310 (Barkett, J., dissenting; Kogan, J., concurring).

182. *Id.* at 1311 (citing *Grady v. Corbin*, 110 S. Ct. 2084 (1990) (reasoning that double jeopardy barred a subsequent prosecution where the state was capable of prosecuting all charges in a single proceeding)).

183. 515 So. 2d 161 (Fla. 1987).

was overruled by the legislature effective July 1, 1988.¹⁸⁴ *Carawan* controls pipeline cases, that is, cases with direct appeals pending at the time the decision became final,¹⁸⁵ and cases alleging the occurrence of criminal activity before July 1, 1988.

The Second District Court of Appeal certified a question in a series of cases that asked whether double jeopardy barred prosecution and sentence for sale and possession (or possession with intent to sell) of the same quantum of cocaine. The lead decision, *State v. McCloud*,¹⁸⁶ dealt with prosecutions for those crimes allegedly occurring on June 9, 1988, and on August 1, 1988. Relying on the dictates of *Carawan*, the court said that the trial judge properly dismissed the June 9th possession charge.¹⁸⁷ However, section 775.021(4)(b), Florida Statutes (Supp. 1988), called for the opposite result concerning the August 1st offenses. That section authorized multiple convictions and sentences for offenses based on a single act, unless, for instance, it was a lesser-included offense. *McCloud* argued that the offense of possession was subsumed by the offense of sale, and fell within the exception. Rejecting that claim, the court ruled that an offense is a lesser-included offense under that section "only if the greater offense necessarily includes the lesser offense,"¹⁸⁸ and sale is not a lesser-included offense of possession because it can occur independent of possession. The court also ruled that the legislature prohibited it from examining either the pleading or proof to determine whether the defendant possessed and sold the same quantum of cocaine.¹⁸⁹

The court ruled in *State v. Hollinger*¹⁹⁰ that *Carawan* did not prohibit the state from seeking to convict a defendant for the multiple offenses of first-degree premeditated murder and use of a firearm dur-

184. *State v. Smith*, 547 So. 2d 613, 617 (Fla. 1989) (construing FLA. STAT. § 775.021(4) (1987)).

185. Rehearing was denied in *Carawan* on December 10, 1987.

186. 577 So. 2d 939 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurred; Barkett, J., dissented with an opinion in which Kogan, J., concurred); see also *State v. James*, 581 So. 2d 1305 (Fla. 1991); *State v. Oliver*, 581 So. 2d 1304 (Fla. 1991); *Davis v. State*, 581 So. 2d 893 (Fla. 1991); *State v. Robinson*, 581 So. 2d 158 (Fla. 1991) (per curiam); *State v. Robinson*, 581 So. 2d 157 (Fla. 1991) (per curiam); *State v. Gillette*, 580 So. 2d 614 (Fla. 1991) (per curiam); *State v. Dukes*, 579 So. 2d 736 (Fla. 1991) (per curiam); *State v. V.A.A.*, 577 So. 2d 941 (Fla. 1991) (per curiam); *State v. White*, 577 So. 2d 943 (Fla. 1991).

187. *McCloud*, 577 So. 2d at 940.

188. *Id.* at 941 (emphasis in original).

189. *Id.* (citing FLA. STAT. § 775.021(4)(a) (Supp. 1988)).

190. 581 So. 2d 153 (Fla. 1991) (unanimous) (Grimes, J., author).

ing the commission of a felony, allegedly occurring on October 1, 1987. *Carawan* specifically stated that those crimes did not violate double jeopardy, a conclusion which it attributed to "the legislature's manifest concern over the proliferation of violent crimes involving the use of firearms."¹⁹¹ The court added that the intervening changes to section 775.021(4) since *Carawan* did not mandate a different result.¹⁹²

Finally, Justice Grimes in *State v. Zanger*¹⁹³ reiterated that *Carawan* was limited to single act analysis, and rejected the defendant's claim that the decision prohibited multiple convictions of robbery and dealing in stolen property. He explained that Zanger robbed his victims and then sold their jewelry the following day, thus committing crimes based on separate acts.¹⁹⁴

E. *Prohibited Laws*

No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed. FLA. CONST. I, § 10.

Florida courts adhere to the standard announced in *Weaver v. Graham*¹⁹⁵ when deciding whether the application of a statute violates the prohibition against ex post facto laws under the state constitution. *Weaver* established that a statute impermissibly violates the federal ex post facto prohibition if it applies to events that occurred before its enactment, and operates to disadvantage the offender against whom it is applied.¹⁹⁶ For that reason, the court in *Hernandez v. State*¹⁹⁷ concluded that a law that requires the affirmance of a departure sentence comprised of a single valid reason for departure, even though other in-

191. *Id.* at 154 (quoting *Carawan*, 515 So. 2d at 169). More likely, it meant to say that those crimes proscribed different conduct, which would permit the state to prosecute them both without violating double jeopardy.

192. *Id.*

193. 572 So. 2d 1379 (Fla. 1991) (Shaw, C.J., author; Overton, McDonald, Ehrlich, and Grimes, JJ., concurred; Barkett and Kogan, JJ., dissented).

194. *Id.* at 1380; *see also* *Henderson v. State*, 583 So. 2d 1030 (Fla. 1991) (unanimous, Barkett, J., author) (adopting rationale of *Henderson v. State*, 572 So. 2d 972 (Fla. 3d Dist. Ct. App. 1990), and holding that state could separately convict and sentence under *Carawan* for theft and uttering a forged instrument when both offenses arose from a single transaction and the defendant actually receives another's property).

195. 450 U.S. 24 (1981). *See* *State v. McGriff*, 537 So. 2d 107, 108 (Fla. 1989).

196. *Weaver*, 450 U.S. at 29.

197. 575 So. 2d 640 (Fla. 1991) (unanimous) (Kogan, J., author).

valid reasons are also relied on, could not be applied against a defendant whose crimes occurred before the enactment of the law.¹⁹⁸ The court vacated the sentence after finding one of two reasons given in support of a departure sentence was invalid. It left open the question whether a law that makes the burden of proof for departure reasons less burdensome similarly violates the ex post facto clause.¹⁹⁹

F. Searches and Seizures

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 or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. 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. FLA. CONST. art. I, § 12.

Only a single decision, *Department of Law Enforcement v. Real Property*,²⁰⁰ relied on article I, section 12 this year. Together with several other state constitutional rights, this section prohibits the state from intruding into the sanctity of the home and the maintenance of one's personal life when it seeks to execute its seizure and forfeiture powers, unless it first complies with minimal due process requirements.²⁰¹ The court's authoritative reliance on the state search and seizure provision illustrates that the provision enjoys a vitality that has not been completely eviscerated by the conformity requirement.

The clearest opportunity to consider article I, section 12 as a source of protection, independent of the Fourth Amendment, presents

198. *Id.* at 641 n.1 (relying on *McGriff*, 537 So. 2d at 109).

199. *Id.*

200. 16 Fla. L. Weekly at S497.

201. *Id.* at S499 (also citing FLA. CONST. art. I, §§ 2 (inalienable rights), and 23 (privacy)).

itself when the facts are outside Fourth Amendment precedent of the United States Supreme Court. Yet, even then, the section may prove to be unreliable. Until *Florida v. Bostick*,²⁰² the United States Supreme Court had not considered the specific Fourth Amendment implications when the government searches boarded passengers on commercial carriers. There, the Court reversed a decision of the Supreme Court of Florida that struck down a law enforcement drug interdiction practice, which consisted of plain-clothed narcotics officers, without a whisper of suspicion of wrongdoing, boarding scheduled busses, confronting passengers, and requesting consent to search their carry-on luggage for contraband.²⁰³ In light of circumstances that the trial judge characterized as “very intimidating,”²⁰⁴ a majority of the state court determined that Bostick was seized under article I, section 12 and the Fourth Amendment. Applying the standard announced in *United States v. Mendenhall*,²⁰⁵ the majority concluded that Bostick was neither free to leave, nor to “disregard the [officers’] questions and walk away.”²⁰⁶

A six-member majority of the United States Supreme Court charged that the Florida court had misread *Mendenhall* by “focusing on whether Bostick was ‘free to leave’ rather than on the principle that those words were intended to capture.”²⁰⁷ The correct formulation under the Fourth Amendment, Justice O’Connor wrote for the majority, “is whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”²⁰⁸ Relying on *Immigration and Naturalization Service v. Delgado*,²⁰⁹ where INS agents conducted a factory sweep in search of illegal aliens who might be found inside, she wrote that there is no seizure where persons have “no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer.”²¹⁰ The opinion chastises the state court for focusing on a “sin-

202. 111 S. Ct. 2382 (1991).

203. *Bostick v. State*, 554 So. 2d 1153 (Fla. 1989), *rev'd*, 111 S. Ct. 2382 (1991).

204. *Id.* at 1157.

205. 446 U.S. 544 (1980).

206. *Bostick*, 554 So. 2d at 1157 (quoting *Mendenhall*, 446 U.S. at 554).

207. *Bostick*, 111 S. Ct. at 2387.

208. *Id.* The dissent agreed that this formulation correctly expressed the *Mendenhall* standard, although it would have answered the question differently. *Id.* at 2389 (Marshall, J., dissenting; Blackmun and Stevens, JJ., concurring).

209. 466 U.S. 210 (1984).

210. *Bostick*, 111 S. Ct. at 2387 (quoting *Delgado*, 466 U.S. at 218).

gle fact—that the encounter took place on a bus,” to adopt a per se rule.²¹¹ Declining to answer for the moment whether a seizure occurred when narcotics deputies confronted Bostick in the rearmost seat of his bus, the Court remanded for a decision on this issue by the Florida courts.

G. Pretrial Release and Detention

Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained. FLA. CONST. art. I, § 14.

No decision construed this section during the survey period, although a rules amendment has potential constitutional importance. Without ruling on the constitutional aspects of its decision, a divided court amended the rule establishing time standards for the state to charge pretrial detainees. Five justices in *In re Amendment to Florida Rules of Criminal Procedure—Rule 3.133(b)(6) (Pretrial Release)*²¹² agreed to amend the Florida Rules of Criminal Procedure to require the state to file formal charges against defendants in custody within thirty days from the date of their arrest or service of *capias*. If the defendants remain uncharged on the thirtieth day, the rule requires the court to order the defendants automatically released on their own recognizance on the thirty-third day, unless the state files formal charges by that day; or if the state shows good cause, to order the defendants automatically released on their own recognizance on the fortieth day, unless the state files formal charges by that day.²¹³ The rule provides a benchmark for establishing a constitutional minimum when the stan-

211. *Id.* at 2388. *But see id.* at 2392 (Marshall, J., dissenting, joined by Blackmun and Stevens, JJ.). Justice Marshall wrote that the state supreme court considered “all of the details of the encounter,” suggesting that the majority was unfaithful to the record. *Id.* (emphasis in original).

212. 573 So. 2d 826 (Fla. 1991) (per curiam).

213. FLA. R. CRIM. P. 3.134 (renumbering FLA. R. CRIM. P. 3.133(b)(6)).

dards are tested under the light of the adversarial process.

Of note, the majority rejected a rules committee proposal that would have authorized the state, with good cause, to detain a defendant beyond forty days without filing formal charges.²¹⁴ Proving that some court conferences must be uproarious, Justice Overton objected to the majority's forty day rule, charging that it was borne in the court's "bosom," rather than in the rules committee. He characterized the rule as "mandatory [and] inflexible,"²¹⁵ and added that the rule will now result in "games being played with the process" that thwart the desired effect of the mandatory cut-off period. For instance, he predicted that "most state attorneys will be filing informations based on hearsay evidence from investigating officers," rather than on sworn testimony of material witnesses, to avert the release of uncharged defendants.²¹⁶

H. *Rights of Accused and of Victims*

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be

214. The proposed rule provided, in part:

Unless the state can show good cause why the charging instrument has not been filed, the defendant shall be released from custody on his or her own recognizance. Any defendant who remains in custody after the 30th day [without formal charges] shall be brought before a magistrate at least every ten days thereafter, until the charging document is filed or defendant is released from custody.

In re Amendment, 573 So. 2d at 826 n.*.

215. *Id.* at 828 (Overton, J., dissenting; McDonald, J., concurring.).

216. *Id.* at 829.

informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused. FLA. CONST. art. I, § 16.

Article I, section 16(a) creates a cluster of rights designed to serve persons who are subject to criminal prosecution. Second to article I, section 9 (due process), rights in this cluster are the most actively litigated article I rights. Half of those cases addressed the right to trial by an impartial jury.

1. Notice of Charges

The requirement that the state inform a defendant of “the nature and cause of the accusation against him” embodies the due process concept of fair notice. In *State v. Rodriguez*,²¹⁷ a unanimous court relied on the two companion provisions to overturn Rodriguez’s conviction for felony driving under the influence (DUI) because the state neglected to give him any notice of the particular prior DUI convictions it intended to rely in proving the enhanced felony DUI offense. Because the state ultimately was required to prove that Rodriguez had three or more DUI convictions, as an essential element of felony DUI, it was required to specifically allege the prior convictions in the charging instrument.²¹⁸

2. Fair Trial

A juror’s use of unauthorized materials may implicate the right of a fair trial, in particular the rights of confrontation, cross examination, and assistance of counsel, guaranteed to the accused under article I, section 16 and the Sixth Amendment of the federal Constitution. In *State v. Hamilton*,²¹⁹ the state appealed a trial court ruling that ordered a new trial as to the penalty phase in the capital trial because one juror brought two unauthorized magazines into the jury room. Noting that no Florida case had yet formulated a test for measuring the error caused by a juror’s use of unauthorized documents, and stating that there could be no bright-line test, the court adopted a federal

217. 575 So. 2d 1262 (Fla. 1991). This case was introduced above. *See supra* notes 123-30 and accompanying text.

218. *Id.* at 1266.

219. 574 So. 2d 124 (Fla. 1991) (unanimous) (Kogan, J., author).

test that attempts to balance the accused's constitutional right to a fair trial and the juror's privacy right to be shielded from needless prying and harassment.²²⁰

Under *Hamilton*, the moving party bears the initial burden of establishing the breach by stating a legally sufficient reason for conducting an interview of the jury. Defense counsel alleged that the unauthorized magazines distracted the jury because one included a single advertisement that depicted a blonde woman wearing a bathing suit.²²¹ The court said that the trial judge could have summarily denied defense counsel's motion for a new trial based on counsel's allegations, for the allegations expressed counsel's reaction to the advertisement and not the juror's reaction. The trial judge conducted a hearing, even though he harbored "serious doubt" about the existence of misconduct.²²² The court commended the trial judge, but hastened to add that a judge need not conduct an interview if the allegation of misconduct is "unreasonable."²²³

When the movant provides a legally sufficient reason for interviewing the juror, the misconduct raises a rebuttable presumption of prejudice. The burden then shifts to the state to show that the breach was harmless:²²⁴ "[D]efendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the [unauthorized materials] affected the verdict."²²⁵ The inquiry must be "limited to objective demonstration of extrinsic factual matter disclosed in the jury room,"²²⁶ and may not extend into matters relating to the juror's subjective thoughts, impressions, or mental processes.²²⁷ In *Hamilton*, the justices agreed that the error was harmless, particularly because the unauthorized materials were irrelevant to the factual and

220. *Id.* at 128, 130; *see also* FLA. STAT. § 90.607(2)(b) (1987). The test may also be viewed as preserving the station of the jury itself by impermissibly delving into matters that inhere in the verdict, *Baptist Hosp. of Miami, Inc. v. Maler*, 579 So. 2d 97, 99 (Fla. 1991) (citation omitted), and averting improper second-guessing of verdicts. *Id.* at 102 (Kogan, J., concurring in part, dissenting in part).

221. *Hamilton*, 574 So. 2d at 130.

222. *Id.* at 130.

223. *Id.* (emphasis in original).

224. *Id.* (citing *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975)).

225. *Id.* at 129 (quoting *Paz v. United States*, 462 F.2d 740, 745 (5th Cir. 1972)).

226. *Id.* (quoting *Howard*, 506 F.2d at 869); *see, e.g.*, *Trotter v. State*, 576 So. 2d 691 (Fla. 1991) (upholding trial court's finding that evidence failed to support allegations that law books and a telephone in jury room improperly influenced the jury).

227. *Hamilton*, 574 So. 2d at 129.

legal issues of the case.²²⁸

Because *Hamilton* may be read to authorize an inquiry, even though the trial judge harbored serious doubt about the merits of any alleged juror misconduct, a realigned court “clarified” its decision in a civil case, *Baptist Hospital of Miami, Inc. v. Maler*.²²⁹ A four-justice majority held that “an inquiry is *never* permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in *Hamilton*.”²³⁰ Thus, an inquiry is permissible if it will elicit information about overt prejudicial acts, and is impermissible if it will elicit information about a juror’s subjective thoughts.²³¹ In *Baptist Hospital*, attorneys for the defendant hospital sought to interview jurors following the verdict for the brain-damaged infant plaintiff and against the hospital. They presented affidavits, alleging essentially that the verdict was an agreement borne out of sympathy for the plaintiff, and that the jury relied on nonrecord evidence of the hospital’s insurability. The court ruled that the affidavits were legally insufficient, because they alleged facts that merely purported to be opinions of two jurors about the reason for the verdict, sought to delve into the jurors’ subjective impressions, or were otherwise refuted by the record.²³²

Justice Kogan, who authored *Hamilton*, concurred in the court’s continued adherence to the decision, but dissented for what he saw as an effective overruling of *Hamilton*’s threshold inquiry. He would authorize a “*very limited*” interview of jurors, to permit inquiry into objective acts that would establish whether jurors agreed to disregard their oaths and instructions, and whether nonrecord evidence was received.²³³

3. Right to Counsel

A majority of the court in *McKinney v. State*²³⁴ affirmed the de-

228. *Id.* at 131.

229. 579 So. 2d 97 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, Barkett, and Grimes, JJ., concurring. Kogan, J., concurred in part and dissented in part with an opinion in which Harding, J., concurred).

230. *Id.* at 100 (footnote omitted) (emphasis added).

231. *Id.* at 99.

232. *Id.* at 99-100.

233. *Id.* at 101 (Kogan, J., concurring in part, and dissenting in part; Harding, J., concurring) (emphasis in original).

234. 579 So. 2d 80 (Fla. 1991) (Barkett, J., author; Shaw, C.J., and Grimes and

defendant's convictions, but declined to hear a claim of ineffective assistance of trial counsel. *McKinney* reaffirms the court's practice of requiring defendants who claim that they received ineffective assistance, including those that assertedly impinge article I, section 16, to prosecute their claims in a motion for post conviction relief. Generally, direct appeal is an inappropriate time to initiate a claim of ineffective assistance of trial counsel because the trial judge has had no opportunity to consider and rule on the evidentiary basis of the claim.²³⁵

Unable to garner additional votes, Justice Overton dissented alone on this point, arguing that the holding sets bad precedent by encouraging multiple litigation. He would have declined for the moment to reach the merits of *McKinney's* other claims, preferring instead to remand for an evidentiary hearing and await the outcome on the ineffective assistance claim.²³⁶

The right to present mitigating evidence in capital cases is constitutionally guaranteed. The question posed in *Anderson v. State*²³⁷ asked whether a defendant's waiver of that right amounts to a waiver of effective assistance of counsel, thereby implicating enhanced procedural protections. For reasons not clear from the record or opinion, *Anderson* instructed his attorney not to present evidence at the penalty phase of his capital trial. He argued on direct appeal that his decision effectively amounted to a waiver of effective assistance of counsel for which the trial court was required to ascertain that the waiver was knowing, intelligent, and voluntary. The trial colloquy reflected that defense counsel advised the court that his investigation identified numerous persons who could provide mitigating evidence, but that *Anderson* commanded him not to call any. *Anderson* declared on the record that he preferred not to have any witnesses testify on his behalf. The trial court's inquiry was limited to a solitary question—whether *Anderson* was on drugs or medication that would affect his understanding of the proceedings. *Anderson* replied that he was not.²³⁸ Ultimately, the trial court accepted the jury's recommendation and imposed the death penalty.

Kogan, JJ., concurring; McDonald, J., concurred in part, and dissented in part, without an opinion; Overton, J., dissented with an opinion).

235. *Id.* at 82.

236. *Id.* at 85 (Overton, J., dissenting) (citing unreported order in *Francis v. State*, No. 50,127 (Fla. June 20, 1978)).

237. 574 So. 2d 87 (Fla. 1991) (per curiam), *cert. denied*, 60 U.S.L.W. 3259 (U.S. Oct. 10, 1991).

238. *Id.* at 89-90, 94-95.

A majority affirmed the conviction and death sentence, holding that the trial court was not obliged to conduct further inquiry.²³⁹ It specifically rejected Anderson's claim that the trial court was required to ascertain whether the waiver of his right to present mitigating evidence, which amounted to a waiver of his right to effective assistance of counsel, satisfied *Faretta v. California*.²⁴⁰ The majority reasoned that *Faretta's* standard for protecting a defendant who seeks to exercise the right of self-representation did not apply because Anderson was represented by counsel.²⁴¹

The decision to forego presenting mitigating evidence, Justice Barkett argued in dissent, raises the specter of "the most dire consequences possible under the law."²⁴² The right to present mitigating evidence is constitutionally guaranteed, and is no less important than the right to plead guilty to a capital crime. The latter requires an affirmative showing on the record that the defendant tendered his or her plea intelligently and voluntarily.²⁴³ She wrote that Anderson was entitled to an equivalent degree of procedural protection, which should not be suspended " 'simply because the accused invites the possibility of a death sentence.' "²⁴⁴ Moreover, a full inquiry into the effectiveness of a defendant's waiver, on the record, promotes finality of the judicial process, which is otherwise lost on collateral proceedings " 'that seek to probe murky memories.' "²⁴⁵

4. Right to Appeal

Article I of the state constitution does not expressly create a right of appeal. And *State v. Gurican*²⁴⁶ casts doubt on whether other consti-

239. *Id.* at 95 (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurred).

240. 422 U.S. 806 (1975).

241. *Anderson*, 574 So. 2d at 95. Justice Ehrlich concurred separately, stating that he would dissent on this point had the colloquy between the trial judge, defense counsel, and Anderson not occurred. He added that the colloquy was "sufficient to meet any constitutional requirement." *Id.* (Ehrlich, J., concurring; Shaw, C.J., and Kogan, J., concurred.).

242. *Id.* at 96 (Barkett, J., concurring in part, dissenting in part).

243. *Id.* (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)).

244. *Id.* at 97 (quoting *Hamblen v. State*, 527 So. 2d 800, 804 (Fla. 1988)).

245. *Id.* (citation omitted).

246. 576 So. 2d 709 (Fla. 1991) (McDonald, J., author; Shaw, C.J., and Overton, Ehrlich, Barkett, and Grimes, JJ., concurring; Kogan, J., dissented without opinion.).

tutional sources may provide such a right.²⁴⁷ There the court addressed for the first time whether a defendant who fled the jurisdiction of the trial court before sentencing and filing her notice of appeal is entitled to appeal her conviction if she returns to the jurisdiction before the state files a motion to dismiss the appeal. Justice McDonald, writing for a majority of six members, noted that but for Gurican's voluntary absence from the jurisdiction, the trial judge would have rendered a judgment sentencing her. Justice McDonald explained that Gurican forfeited whatever right to an appeal she possessed by fleeing the jurisdiction of the trial court, and showing overt disrespect for the judicial system, which she could no longer rely on for protection.²⁴⁸

Although *Gurican* does not foreclose the matter, it seems unlikely that future claimants will successfully argue that the state constitution provides a right of appeal to persons who comply with procedural rules. The majority distinguished its earlier decisions that found that a defendant had a constitutional right of appeal, explaining that those decisions construed jurisdictional provisions of former constitutions.²⁴⁹ Moreover, the majority disagreed with a district court decision, which found a state constitutional right to appeal, and characterized its reasoning as "debatable."²⁵⁰

5. Impartial Jury

Florida adheres to a determined policy to rid its trial courts of race-based jury selection, and the appearance of impropriety that such a practice fosters. The focus of this effort has been on the entitlement of defendants in criminal cases to trial by an impartial jury guaranteed

247. See *id.* at 711-12 n.2 (citing FLA. CONST. art. V, § 4(b)(1) ("[d]istrict courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right . . .")). The matter would seem to be foreclosed by *State v. Creighton*, 469 So. 2d 735, 740 (Fla. 1985), which construed the section as merely allocating jurisdiction, rather than conferring a right to appeal. See *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130 (Fla. 1990); see also *Abney v. United States*, 431 U.S. 651, 656 (1977) (noting that there is no federal constitutional right to an appeal, and that the right of appeal in criminal cases is purely a creature of statute); *Estelle v. Dorough*, 420 U.S. 534, 536 (1975) (noting that there is no federal constitutional right to state appellate review of state criminal convictions).

248. *Gurican*, 576 So. 2d at 711.

249. *Id.* at 712 (citations omitted).

250. *Id.* (citing *Marshall v. State*, 344 So. 2d 646, 648 (Fla. 2d Dist. Ct. App.) (Grimes, J., author) ("Our Florida Constitution guarantees convicted persons of the right of appeal . . ."), *cert. denied*, 353 So. 2d 679 (Fla. 1977)).

in article I section 16. It is noteworthy that other article I sections provide coordinate protection against racially discriminatory use of peremptory challenges,²⁵¹ and that the protection extends to litigants and jurors in civil proceedings.²⁵² Also, the court has declared in dicta that the state itself is entitled to a fair trial, free of discriminatory impediments.²⁵³

Florida's current standard for reviewing claims of racial bias in the jury selection process was announced in the 1984 decision *State v. Neil*.²⁵⁴ The standard essentially provides that the moving party must first make a timely objection that the other party improperly exercised a peremptory challenge to strike a prospective juror on account of race. Then the movant must demonstrate a prima facie case on the record that the juror belongs to a distinct racial group, and that there is a "strong likelihood" that the peremptory was entirely racially motivated. Once the movant demonstrates the existence of a prima facie case, the burden shifts to the other party to show that it struck the prospective juror for a valid, non-racial reason.²⁵⁵ The court considered six cases in the *Neil* case line this period, proving that its standard continues to demand the court's attention as the single-most litigated right in the cluster of article I, section 16 rights.

Defense counsel in *Williams v. State*²⁵⁶ established a prima facie case of discrimination by objecting to the state's removal of two blacks

251. See *Reynolds v. State*, 576 So. 2d 1300 (Fla. 1991) (noting in dictum that article I, section 5's right to petition officials for redress of grievances assures accountability of public officials of the sort advanced by requiring the prosecutor to explain a race-based exercise of a peremptory challenge); *Tillman v. State*, 522 So. 2d 14 (Fla. 1988) (relying on state and federal equal protection clauses).

252. *Mazaheritehrani v. Brooks*, 573 So. 2d 925 (Fla. 4th Dist. Ct. App. 1990), *rev. granted*, No. 77,692 (Fla. July 11, 1991); see also *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (equal protection component of the Fifth Amendment's Due Process Clause prohibits discrimination on account of race in selecting a jury in a civil proceeding).

253. *State v. Neil*, 457 So. 2d 481, 487 (Fla. 1984). The *Neil* case line to date focused entirely on the rights of defendants and jurors in criminal trials to be free of race-based discriminatory practices in the selection of jurors. No case has yet reached the court asking it to apply *Neil* to remedy impermissible defense selection practices, although at least one district court considered the point. See *Cure v. State*, 564 So. 2d 1251, 1252 (Fla. 4th Dist. Ct. App. 1990).

254. *Neil*, 457 So. 2d at 481 (Fla. 1984), *clarified*, *State v. Slappy*, 522 So. 2d 18 (Fla.), *cert. denied*, 487 U.S. 1219 (1988); *State v. Castillo*, 486 So. 2d 565 (Fla. 1986).

255. *Neil*, 457 So. 2d at 486-87.

256. 574 So. 2d 136 (Fla. 1991) (*per curiam*) (unanimous).

from the jury. However, after the prosecutor explained the decision to remove the first black juror, the trial judge prevented the prosecutor from explaining the decision to excuse the second black juror. This was error, the court ruled, because the trial judge should have resolved all doubts in favor of the defense and conducted an inquiry. Relying on *State v. Slappy*²⁵⁷ the court declared that “[i]f we are to err at all, it must be in the way least likely to allow discrimination.”²⁵⁸ Therefore, “[w]hensoever a sufficient doubt has been raised as to the exclusion of any person on the venire because of race, the trial court must require the state to explain each one of the allegedly discriminatory challenges.”²⁵⁹ That error here required remand for a new trial.

Williams is instructive for several reasons. The opinion illustrates circumstances when the defense may satisfy the “strong likelihood” requirement of establishing a prima facie case under *Neil* simply by creating “sufficient doubt” on the record that the state improperly struck even a single juror. It also shows the court’s intolerance of and the severe consequences to the state for its unjustified, race-based juror selection.²⁶⁰

Defense counsel failed to show a “strong likelihood” of improper discrimination in *Taylor v. State*,²⁶¹ where the prosecutor removed one of four black members of the venire. The trial judge rejected counsel’s assertion that the prosecutor was “systematically excluding” blacks, and refused to require the prosecutor to explain his peremptory.²⁶² The record failed to show a *Neil* violation, and the court held that the mere fact that the prosecutor challenged one of four black members does not show “substantial likelihood” of an improper peremptory, particularly when the prosecutor knew, under the procedure followed for jury selection, that another black juror would succeed the excused juror to the

257. 522 So. 2d 18 (Fla.), cert. denied, 487 U.S. 1219 (1988).

258. *Williams*, 574 So. 2d at 137 (quoting *Slappy*, 522 So. 2d at 22).

259. *Id.* at 137 (emphasis in original); see *Reynolds v. State*, 576 So. 2d 1300, 1301 (Fla. 1991) (unanimous) (Kogan, J., author) (“strong likelihood” of discrimination exists when the prosecutor removes the only black member of the venire); see also *Taylor v. State*, 583 So. 2d 323, 327-28 (Fla. 1991) (per curiam) (trial court need not look back to the prosecutor’s reasons for strike of second black venire member when defense accepts prosecutor’s withdrawal of the peremptory challenge).

260. The court expressly stated in another case that it has the highest regard for the integrity and skill of the state’s prosecutors, and does not ascribe to them a racist sentiment. *Reynolds*, 576 So. 2d at 1302 (Fla. 1991).

261. 583 So. 2d 323, 327 (Fla. 1991) (per curiam).

262. *Id.*

panel.²⁶³

Not infrequently the court addresses the standard of reviewing the trial judge's *Neil* rulings. *Neil* established a deferential standard of review, where it emphasized that "the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion."²⁶⁴ Later the court said that the trial judge "necessarily is vested with broad discretion in determining whether peremptory challenges are racially intended . . . [and] we must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process."²⁶⁵

With those principles in mind, four of six members of the court participating in *Green v. State*²⁶⁶ sustained the decision of the trial judge to deny defense counsel's *Neil* claim, which was prompted when the prosecutor excused two black jurors. The majority wrote that the trial judge "sees and hears the prospective jurors, . . . has the ability to assess the candor and the credibility of the answers given to the questions presented. Clearly, the trial judge is in the best position to determine if peremptory challenges have been properly exercised."²⁶⁷ Having reviewed the record, the justices declared: "we cannot say that the trial judge abused his discretion"²⁶⁸

The factual basis of the majority's decision in *Green* was seriously called into doubt in Justice Barkett's dissenting opinion.²⁶⁹ Engaging in a careful review of the voir dire proceedings, she identified several instances where the majority had passed over voir dire testimony of caucasian jurors, who went unchallenged by the prosecutor, and yet possessed qualities that resulted in the dismissal of blacks.

The majority made no attempt to reconcile the dispute raised by Justice Barkett. The unexplained impasse allows room for speculation

263. *Id.* at 326 n.3, 327.

264. *Neil*, 457 So. 2d at 487 n.10; *see also Slappy*, 522 So. 2d at 24.

265. *Reed v. State*, 560 So. 2d 203, 206 (Fla. 1990).

266. 583 So. 2d 647 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, and Grimes, JJ., concurring; Barkett, J., dissented with an opinion, with which Kogan, J., concurred.).

267. *Id.* at 652 (citation omitted).

268. *Id.* *But see* Files v. State, 586 So. 2d 352 (Fla. 1st Dist. Ct. App. 1991) (on motion for rehearing) (panel split on whether *Neil* rulings by trial judge should be resolved by abuse of discretion standard, or whether state's reasons must be supported by competent, substantial evidence).

269. *Green*, 583 So. 2d at 653 (Barkett, J., dissenting; Kogan, J., concurring.).

that the majority is unlikely to hold the state to exacting certainty.²⁷⁰ *Green* also suggests that the majority tends to defer to the trial judge's factual findings in *Neil* rulings, even though a perusal of the record contains facts that suggest the findings were erroneous.²⁷¹ Moreover, the existence of record inconsistency will not necessarily convince the justices to find error after a *Neil* inquiry.

Deference to the station of the trial judge on the issue of discriminatory intent is clearly not warranted in all circumstances. For instance, the court refused to defer to the trial judge in *Reynolds v. State*²⁷² because she failed to conduct any sort of *Neil* inquiry. There, the state peremptorily struck the sole black juror on the venire. The trial judge agreed with the prosecutor that there was no "systematic exclusion," and summarily denied defense counsel's *Neil* objection.²⁷³ Because the excusal of the entire black membership on a venire raises a "strong likelihood" of impropriety, the trial judge should have conducted a *Neil* inquiry to ascertain the prosecutor's motives, but erroneously never did.

Generally, the court will not reach the merits of a *Neil* claim that is procedurally barred. This period, the court declined to consider claims in two cases because trial counsel failed to preserve the issue for appeal. The first case, *Valle v. State*,²⁷⁴ illustrates the importance to the movant of understanding the mechanics for asserting a *Neil* claim. At trial, defense counsel charged that the prosecutor's exercise of peremptory challenges to remove six blacks and two Hispanics from the jury created "an impropriety in the record."²⁷⁵ The trial judge stated that he would allow the prosecutor to respond, but noted that "I've

270. See *Slappy*, 522 So. 2d at 22 (misuse of a preemptory is indicated by "a challenge based on reasons equally applicable to juror[s] who were not challenged"); see, e.g., *Gadson v. State*, 561 So. 2d 1316, 1318 (Fla. 4th Dist. Ct. App. 1990).

271. See *Bryant v. State*, 565 So. 2d 1298, 1303 (Fla. 1990) (McDonald, J., concurring in part, dissenting in part) (dissenting on decision to grant new trial for *Neil* violation, and arguing that "it is manifest from the record that the peremptory challenges were not racially motivated"); *Kibler v. State*, 546 So. 2d 710, 716 (Fla. 1989) (McDonald, J., dissenting, Ehrlich, C.J., concurring) (independently reviewing the record and concluding that there was no possibility of racial overtones that would warrant overturning the trial court ruling rejecting *Neil* claim); *Slappy*, 522 So. 2d at 24 (Fla. 1988) (McDonald, C.J., dissenting) (no showing that the trial judge abused his discretion).

272. 576 So. 2d 1300 (Fla. 1991) (unanimous) (Kogan, J., author).

273. *Id.* at 1300-01.

274. 581 So. 2d 40 (Fla. 1991) (per curiam) (unanimous).

275. *Id.* at 43.

been asked to make no findings and I am making no findings' " that the state acted improperly.²⁷⁶ After the prosecutor volunteered reasons for striking the eight jurors, the defense objected only that the challenges were used to create a death-prone jury.

The record suffered from three defects, each of which could have been independently fatal. First, the record makes clear that defense counsel unartfully pled a *Neil* claim. Second, counsel should have asked the trial judge to expressly find that the defense had carried its initial burden of establishing a prima facie case of racial bias.²⁷⁷ Finally, counsel failed to show that the reasons advanced by the prosecutor were racially motivated.²⁷⁸

The court also declined to consider a *Neil* claim raised collaterally in *Francis v. Barton*.²⁷⁹ Although *Neil* was issued in 1984, after Francis appealed his conviction and sentence, Francis's failure to assert a *Neil* violation in his first collateral attack procedurally barred him from seeking to litigate the claim in his second collateral attack.²⁸⁰ The majority denied all relief. Two justices specially concurred, but wrote to argue that the case should have been remanded for a review of the claim on its merits. They advanced a minority position that every constitutional claim in a death case should be reviewed on its merits. Moreover, they would have excused the procedural bar because Francis's direct appeal was in the *Neil* pipeline and the court issued its opinion on the direct appeal after it released *Neil*.²⁸¹

I. *Excessive Punishments*

Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. FLA. CONST. art. I, § 17.

Article I, section 17 prohibits, in part, "[e]xcessive fines, cruel or unusual punishment, . . . [and] forfeiture of estate." Seldom have

276. *Id.*

277. *Id.* at 44.

278. *Id.*

279. 581 So. 2d 583 (Fla. 1991) (per curiam) (Shaw, C.J., and Overton, McDonald, Grimes, and Harding, JJ., concurring. Barkett, J., concurred specially with an opinion with which Kogan, J., concurred.).

280. *Id.* at 584-85.

281. *Id.* at 585 (Barkett, J., specially concurring, Kogan, J., concurring).

courts construed this section. The two references to article I, section 17 in *Department of Law Enforcement v. Real Property*²⁸² are therefore exceptional, and for their brevity might go unnoticed. The court declared that Floridians have, under this section, a substantive right to be free from “excessive punishments.”²⁸³ The phrase seems to borrow directly from the caption above the section, for it has no literal, textual derivation. This suggests that the phrase is only of general importance because the text of a constitutional section, and not its title, determines its construction.²⁸⁴ In light of the facts and following discussion, however, the phrase “excessive punishments” effectively captures the spirit of the section, and establishes a principle akin to Eighth Amendment proportionality analysis.²⁸⁵

The court also declared that article I, section 17 limits the state to forfeiting property of a defendant that was used in the predicate crime, or alternatively, prohibits the state from forfeiting property that was not an instrument of criminal activity.²⁸⁶ The state had alleged at trial that the defendant used portions of the properties, or improvements, to facilitate drug trafficking activity. It did not allege that the defendant used the entirety of the seized properties in that activity.²⁸⁷ Under the ruling, the state may not forfeit property that was not related to further the predicate drug offense without violating the defendant’s right to be free from “excessive punishments.” This is a marked departure from federal Eighth Amendment case law, which permits forfeiture of the whole, even though the criminal activity pertained to a part.²⁸⁸ The

282. 16 Fla. L. Weekly at S497. For an extended discussion of this case, see *supra* notes 71-122 and accompanying text, and *infra* notes 282-88, 316-20 and accompanying text.

283. *Id.* at S499. This right is protected by the notice and hearing requirements of article I, section 9. *Id.*

284. FLA. CONST. art. X, § 12(h).

285. See *Solem v. Helm*, 463 U.S. 277, 284 (1983) (Eighth Amendment proscribes punishment that is disproportionate to the crime committed).

286. *Real Property*, 16 Fla. L. Weekly at S501 (citing FLA. CONST. art. I, §§ 9 and 17).

287. *In re Real Property Forfeiture Proceedings*, No. 90-250 (Fla. 8th Cir. Ct. Dec. 21, 1990) (order and opinion granting claimant’s amended motion to dismiss petitions for forfeiture).

288. See *United States v. 141st St. Corp.*, 911 F.2d 870, 880-81 (2d Cir. 1990) (as applied, statute subjecting the whole of any tract of land used to facilitate narcotics distribution permits forfeiture of apartment building as a whole, rather than specific apartments, and does not violate eighth amendment proscription against disproportionate punishment), *cert. denied*, 111 S. Ct. 1017 (1991); *United States v. One 107.9*

decision illustrates an important principle of federalism—that the state may extend greater protection to persons from governmental excess than they are entitled to under the federal counterpart.

J. Access to Courts

The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.
FLA. CONST. art. I, § 21.

In its 1973 decision, *Kluger v. White*,²⁸⁹ the court declared that article I, section 21 prohibits the legislature from abolishing a statutory right of access to the courts that predated the adoption of the Florida Constitution, or that became part of the state's common law. Despite its commitment to preserving an avenue of redress through Florida's courts, *Kluger* recognized that the demands of society and the "ever-changing character of the law" may on occasion justify the abolition of an enduring right of action. The court announced that the legislature is free to abolish a personal right of access if it provides a "reasonable alternative" to protect the right, or otherwise shows an "overpowering public necessity" for abolishing the right and that no alternative method exists to satisfy that necessity.²⁹⁰ As the following two cases illustrate, *Kluger's* "exacting standard" continues to serve as the cornerstone of the court's article I, section 21 case law.

Various taxpayers, employers, employees, and others opposed recent comprehensive changes to Florida's workers' compensation law. They claimed in *Martinez v. Scanlan*,²⁹¹ in part, that the 1990²⁹²

Acre Parcel of Land, 898 F.2d 396, 400 (3d Cir. 1990) (statute making all real property, or part, subject to forfeiture does not violate Eighth Amendment's protections against cruel, unusual, and disproportionate punishments). The identical conclusion would not necessarily withstand scrutiny under the double jeopardy clause. *See, e.g., United States v. Halper*, 109 S. Ct. 1892, 1902 (1989) (holding that the Double Jeopardy Clause may not subject a defendant who has already been punished in a criminal prosecution to an additional civil sanction to the extent that the second sanction does more than make the government whole); *State v. Crenshaw*, 548 So. 2d 223, 229 (Fla. 1989) (Kogan, J., dissenting; Shaw and Barkett, JJ., concurring) (arguing that the state's failure to establish a nexus between the forfeited property and the criminal conduct renders the forfeiture an impermissible second punishment).

289. 281 So. 2d 1 (1973).

290. *Id.* at 4.

291. 582 So. 2d 1167 (Fla. 1991) (McDonald, J., author; Overton, Grimes, and

amendments substantially reduced preexisting benefits to eligible workers, without providing countervailing advantages, and assertedly violated article I, section 21. A four-member majority found that the workers' compensation law remains a reasonable alternative to tort litigation. The majority explained that the law continued to provide injured workers with full medical care and wage-loss payments, regardless of fault and without the delay and uncertainty associated with common law tort remedies.²⁹³ Three justices would not have addressed this claim, believing instead that the statute violated the single subject requirement²⁹⁴ and made inappropriate the court's consideration of this and other constitutional claims.²⁹⁵

Petitioners in *Abdala v. World Omni Leasing, Inc.*²⁹⁶ argued unsuccessfully that the legislature failed to provide a reasonable alternative or demonstrate overpowering necessity when it limited the liability of long-term lessors of automobiles from negligence of their lessees. The right to sue the lessors of motor vehicles was the product of recent common law,²⁹⁷ not a long-established statute. Thus, the legislature was free to limit the vicarious liability of long-term lessors, without complying with the rigors of *Kluger*.²⁹⁸ Justice McDonald wrote that such a limitation does not equate to denial of access to courts, and he added in passing, "particularly when the law is unsettled at the time of the enactment."²⁹⁹

Litigants frequently, yet unsuccessfully challenge statutes of limitations and repose on grounds that they deny access to courts. The

Harding, JJ., concurring; Kogan, J., concurred specially with an opinion, with which Barkett, J., concurred; Barkett, J., concurred in part and dissented in part with an opinion, with which Shaw, C.J., and Kogan, J., concurred).

292. Ch. 90-201, 1990 Fla. Laws 894.

293. *Scanlan*, 582 So. 2d at 1171-72.

294. FLA. CONST. art. III, § 6.

295. *Scanlan*, 582 So. 2d at 1176 (Kogan, J., specially concurring, joined by Barkett, J.); *id.* (Barkett, J., concurring in part, dissenting in part, joined by Shaw, C.J., and Kogan, J.).

296. 583 So. 2d 330 (Fla. 1991). The case was introduced above. *See supra* notes 8-15 and accompanying text.

297. *Id.* at 333 (citing *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959)).

298. *Id.*; *see also* *Wright v. General Motors Acceptance Corp.*, 583 So. 2d 1033 (Fla. 1991) (per curiam) (unanimous); *Raynor v. De La Nuez*, 574 So. 2d 1091 (Fla. 1991) (Ehrlich, J., author; Shaw, C.J., and Overton, Barkett, Grimes, and Kogan, JJ., concurred; McDonald, J., concurred in part and dissented in part in an opinion.).

299. *Abdala*, 583 So. 2d at 333.

court in *Blizzard v. W. H. Roof Co., Inc.*³⁰⁰ upheld the constitutionality of two statutes that shortened the period from four years to one year for bringing a negligence claim against insured tortfeasors whose insurance carrier became insolvent after the cause of action accrued. The justices adopted the opinion of the district court under review, which expressed the familiar principle that a statute of limitation does not deny constitutionally protected access to courts by merely shortening the period for bringing an action.³⁰¹ Without elaborating, the court declared that the legislative action was a “reasonable” restriction on the right of access assured under article I, section 21,³⁰² which was “necessary” to protect the rights of claimant and insured tortfeasor alike.³⁰³

Finally, the most divisive debate over article I, section 21 protections occurred in *Smith v. Department of Health and Rehabilitative Services*,³⁰⁴ where three justices concurred in a plurality decision that article I, section 21 was “inapplicable” to cases brought by indigents who sought to receive free transcripts of administrative hearings.³⁰⁵ They reasoned that the right of appeal to a judicial tribunal provided in the Administrative Procedure Act³⁰⁶ afforded sufficient protection of

300. 573 So. 2d 334 (Fla. 1991). This case was introduced in article I, section 2 (equal protection). See *supra* notes 16-19 and accompanying text.

301. *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1238 (Fla. 5th Dist. Ct. App. 1990); see also *University of Miami v. Bogorff*, 583 So. 2d 1000, 1004 (Fla. 1991) (statute of repose limiting period for medical malpractice claims does not violate article I, section 21, even when applied to claims accruing after the period had expired) (citation omitted) (McDonald, J., author; Overton and Grimes, JJ., and Ehrlich, Senior Justice, concurring; Shaw, C.J., and Barkett and Kogan, JJ., dissented without opinion.).

302. *Blizzard*, 556 So. 2d at 1238. The district court panel explained the reasonableness of the linkage between the statute of limitation and the purpose to be served in light of *Blizzard*'s equal protection argument, which we may assume applies equally to the access to courts argument.

303. *Blizzard*, 573 So. 2d at 334. This statement is potentially misleading. A showing of necessity itself is insufficient to sustain a legislative infringement of a right of access protected under article I, section 21. See *Kluger*, 281 So. 2d at 4. Moreover, statutory time bars on initiating claims need only be reasonable. See, e.g., *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657, 659 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

304. 573 So. 2d 320 (Fla. 1991) (per curiam). This case was introduced in article I, section 9 (due process). See *supra* notes 145-56 and accompanying text.

305. *Id.* at 323 (Overton and Grimes, JJ., concurring); *id.* at 325 (McDonald, J., concurring on point).

306. FLA. STAT. § 120.68 (1985).

their right of redress.³⁰⁷ Chief Justice Shaw concurred in result only, which leaves in doubt his position regarding the outcome of the constitutional issues, for he may not have disputed the decision of Justices Overton, McDonald, and Grimes, to grant petitioners relief on the statutory claim.³⁰⁸ Justice Ehrlich, with whom Justices Barkett and Kogan agreed, dissented on the constitutional issue, charging that the majority's "parsimonious" reading of the Act "facilely avoids the question of whether the right has any substance in the absence of a transcript."³⁰⁹ Justice Ehrlich concluded that "[t]he plain language of article I, section 21 guarantees access to courts . . . [and that] meaningful judicial review by an article V court" of an administrative proceeding is essential to the fulfillment of that guarantee.³¹⁰

K. *Trial by Jury*

The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law. FLA. CONST. art. I, § 22.

This section preserves the right to a jury trial in cases that were triable before a jury when Florida adopted its first constitution in 1838.³¹¹ Without elaboration, the court relied on this section as authority in *State v. Rodriguez*³¹² for its conclusion that a defendant who the state has charged with the crime of felony driving under the influence has a right to be tried by a jury.³¹³ In addition, *Department of Law Enforcement v. Real Property*³¹⁴ reaffirmed the well-known principle that forfeiture proceedings are triable by a jury unless waived, and

307. *Smith*, 573 So. 2d at 323.

308. *Id.* at 325 (Shaw, C.J., concurring in result only).

309. *Id.* at 326 (Ehrlich, J., concurring in part and dissenting in part; Barkett and Kogan, JJ., concurring).

310. *Id.* (emphasis in original). The notion that access to courts must be meaningful was echoed in the more recent and unanimous opinion of *Real Property*, 16 Fla. L. Weekly at S497, which declared that the right is entitled to all the safeguards of procedural due process. *Id.* at S499

311. *State v. Webb*, 335 So. 2d 826, 828 (Fla. 1976).

312. 575 So. 2d 1262 (Fla. 1991). This case is discussed more fully under the due process section above. *See supra* notes 123-130 and accompanying text.

313. *Id.* at 1266 n.6.

314. 16 Fla. L. Weekly at S497.

noted that state due process provides coordinate protection.³¹⁵

L. *Right of Privacy*

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. FLA. CONST. art. I, § 23.

This survey period, only *Department of Law Enforcement v. Real Property*³¹⁶ relied on Florida's express right of privacy. Residential property rights derive special protection from article I that is directly attributed to several coordinate provisions, including the express right of privacy.³¹⁷ Because property rights subject to divestment under the Florida Contraband Forfeiture Act³¹⁸ are "particularly sensitive"³¹⁹ when residential property is at stake, the state is compelled to meet *at a minimum* a clear and convincing burden of proof, rather than the lesser preponderance standard, before it is entitled to forfeit property under the act.³²⁰

Last year, *In re Guardianship of Estelle M. Browning*³²¹ held that Florida's privacy amendment protects the right of a person to self-determine purely personal matters of medical health care, and rejected the interests traditionally relied on by the state to justify its regulation of a patient's choice to forego or withdraw life-saving procedures. Several laws enacted by the regular session of the 1991 Florida Legislature rode the crest of *Browning* and are worth noting. Those laws create statutory rights of privacy on behalf of patients who are subject to the state's health care system.

Chapter 91-98 creates rights for residents of continuing care facilities by providing, in part, that: "No resident of any facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed

315. *Id.* at S501.

316. *Id.* at S497

317. *Id.* at S499 (also relying on FLA. CONST. art. I, §§ 2 (inalienable rights), and 12 (search and seizure)).

318. FLA. STAT. §§ 932.701-.704 (1989).

319. *Real Property*, 16 Fla. L. Weekly at S499.

320. *Id.* at S500.

321. 568 So. 2d 4 (Fla. 1990).

by law, by the State Constitution, or by the United States Constitution solely by reason of status as a resident of a facility"³²² Among the enumerated rights is the "[f]reedom from governmental intrusion into the private life of the resident, as provided in s. 23, Art. I of the State Constitution."³²³

Another law, Chapter 91-127, creates the "Florida Patient's Bill of Rights and Responsibilities,"³²⁴ which directs each health care facility or provider to observe specific standards. One standard requires respect for the patient's individual dignity, and acknowledges that patients retain certain "rights to privacy," which it declares to exist without regard to the patient's economic status.³²⁵

As patients and health care providers test the limits of these statutorily created rights in the future, they are certain to present the opportunity for courts to consider the constitutional dimension of their claims under article I, section 23.

III. CONCLUSION

No case fosters the principles of article I of the state constitution more than *Department of Law Enforcement v. Real Property*. A unanimous Supreme Court of Florida let stand the Florida Contraband Forfeiture Act, despite the act's widespread disregard of substantive rights, and interpolated into the text "minimal" due process requirements on the state when it wields its powers to seize and forfeit private property.

The opinion by Justice Barkett is a fountainhead of state constitutional jurisprudence, and establishes an analytical paradigm of state due process. *Real Property* relies explicitly, and exclusively on article I, in which Floridians have declared for themselves a cluster of basic, fundamental property rights, deserving heightened protection from state encroachment. The opinion describes state due process as a broad concept that is central to the protection of all substantive rights. The decision provides a valuable precedent to guide courts in rehabilitating, rather than overturning constitutionally defective laws. The result respects the province of a coordinate branch of state government by leaving the law intact and promoting the implementation of legislative

322. Ch. 91-98, 1991 FLA. LAWS 705.

323. Ch. 91-98, § 9, 1991 FLA. LAWS at 705, 708 (to be codified at FLA. STAT. § 651.083 (1991)).

324. Ch. 91-127, 1991 FLA. LAWS at 1298.

325. Ch. 91-127, § 1, 1991 Fla. Laws 1298, 1299.

policy.

Real Property is also noteworthy because it ventured beyond the perimeter of federal law, which historically established forfeiture policy involving property, due process, and punishment. This point demonstrates an important principle of federalism that should not be lost to a footnote.³²⁶ Florida forfeiture law is now less vulnerable to shifts in federal forfeiture policy. The decision numbers among others of this court announcing a level of protection for article I rights that eclipse federal constitutional analogues.³²⁷

The court fulfills its most essential mission by deciding constitutional questions.³²⁸ State constitutional scholarship is most apparent when the court grounds a decision explicitly, exclusively, and soundly on principles of state law. The court legitimizes its divergence from the federal constitutional base by articulating a well-reasoned decision, and by relying on policy choices of Floridians reflected, for instance, in textual distinctions between state and federal constitutions. The court also fulfills its unique interpretive role in those rare instances when it relies on its authority to craft rules of constitutional dimension to protect substantive rights newly-acknowledged in the opinion itself.³²⁹ The uncommon occurrence of rule making in this context implies a decision of profound importance.

Occasionally, the court contributes to state constitutional policy under circumstances when it is not compelled to decide constitutional questions. This practice is commendable when the court disregards a procedural bar and reaches the merits of a constitutional claim due to "fundamental fairness,"³³⁰ although traditionally, the court will not address the merits of a claim that is procedurally barred.³³¹ Express reliance on state procedural rules is today, more than before, likely to be accorded finality by federal courts.³³² Other practices equally should be encouraged, such as the reliance on dicta to offer insight into seldom-

326. See *Reynolds v. State*, 576 So. 2d 1300, 1303 (Fla. 1991) (taking the opportunity to correct an erroneous, "tacit assumption" that Florida's *Neil* decision provides less protection than *Batson v. Kentucky*, 476 U.S. 79 (1986)).

327. See *Decade Survey supra* note 2 at 857-58 (identifying five cases); *1990 Survey supra* note 2 at 1129-30 (identifying two cases).

328. FLA. CONST. art. V, §§ 1, 3(b)(1), (3).

329. See *supra* notes 104-14 and accompanying text.

330. See *supra* note 54 and accompanying text.

331. See *supra* notes 165, 274, 279 and accompanying text.

332. See *Coleman v. Thompson*, 59 U.S.L.W. 4789, 4796 (U.S. June 25, 1991).

litigated article I guarantees,³³³ and the issuance of a special concurring opinion to express, clarify, or qualify a position on a fundamental matter.³³⁴ This year, the court disregarded a providential rule of self-restraint and considered a constitutional question said to be particularly important, or extensively argued.³³⁵ These cases add a welcome measure of understanding to the field, even though the rationale for disregarding the rule is inappropriate, or the holding affords only dubious precedential value.

As a group, race-based discrimination cases continue to demand attention. This year, as in the past, strong majority votes characterize the *Neil* line of cases, which is designed to rid Florida's courtrooms of racially discriminatory jury selection practices.³³⁶ In these cases, the court fulfills its traditional role of protecting minorities.

A postscript: the 1991 Florida Legislature created a right of action to redress interferences by threats, intimidation, or coercion with rights secured by the state constitution or laws.³³⁷ The enactment authorizes the Attorney General to sue for appropriate relief on behalf of injured persons, provides that damages shall accrue to those persons, and prescribes a civil penalty, which enures to the state. Because article I itself creates no affirmative remedy, the potential that this statutory sword will vindicate certain violations of article I can only enhance the importance of the state bill of rights.

333. See *supra* notes 68-70 and accompanying text.

334. See, e.g., *supra* note 58 and accompanying text.

335. See *supra* note 156.

336. See *supra* notes 251-81 and accompanying text. For other racial discrimination cases cast in an equal protection context, see *supra* notes 38-55 and accompanying text.

337. Ch. 91-74, § 4, 1991 FLA. LAWS 567, 569 (to be codified at FLA. STAT. § 760.51 (1991)).

Criminal Law: 1991 Survey of Florida Law

Hugh L. Koerner*

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I. INTRODUCTION

This article is a survey of substantive criminal law cases decided between December 1, 1990, and December 1, 1991, excluding opinions relating to the death penalty. Although the survey focuses on the decisions of the Florida Supreme Court, selected cases from Florida's district courts of appeal have been included, as well.

A large percentage of the Florida Supreme Court's criminal law decisions continue to concern sentencing. Although Florida's sentencing guidelines have been employed since October 1, 1983, it is apparent that numerous sentencing issues remain unresolved. However, during the survey period, the Florida Supreme Court made substantial progress towards clarifying some of these issues. In other instances, though, the solutions offered by the Court only raise new questions.

II. SENTENCING

A. *Legislative Enactments*

Effective May 30, 1991, the Legislature adopted the revisions recommended by the Florida Supreme Court¹ in *Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 and 3.988)*,² concerning the issues of legal status³ and victim injury points.⁴ Although the Florida Supreme Court determined that the revisions were substantive⁵ in nature and required legislative approval, the supreme court

1. 1991 Fla. Sess. Law Serv. 270 (West), *amending* FLA. R. CRIM. P. 3.701(d)(6), 3.701(d)(7).

2. 576 So. 2d 1307 (Fla. 1991).

3. FLA. R. CRIM. P. 3.701(d)(6).

4. FLA. R. CRIM. P. 3.701(d)(7).

5. *Florida Rules*, 576 So. 2d at 1308-09 (quoting FLA. STAT. § 921.001(1))

characterized the changes as clarifications of original legislative intent.⁶

1. Legal Constraint

The use of a so-called “multiplier” for purposes of assessing legal status points frequently resulted in potentially draconian sanctions for persons accused of committing multiple offenses while subject to a legal constraint.⁷ By amending Rule 3.701(d)(6), of the Florida Rules of Criminal Procedure, the legislature directed that “points are to be assessed only once whether there are one or more [primary or additional] offenses at conviction.”⁸

The Florida Supreme Court followed its opinion in *Florida Rules* with its decision in *Flowers v. State*.⁹ In *Flowers*, the supreme court was required to decide whether the legal constraint “multiplier” should be applied to offenses occurring before May 30, 1991, the effective date of the substantive amendments to Rule 3.701(d)(6). The supreme court first determined that “Florida Rules of Criminal Procedure 3.701(d)(6) and 3.988 do not address the use of a multiplier when calculating legal constraint points.”¹⁰ However, by applying the principle of lenity found in section 775.021(1) of the Florida Statutes,¹¹ the supreme court concluded that the use of a “multiplier” is inappropriate.

2. Victim Injury

The recent legislative amendments recommended by the supreme court in *Florida Rules* also clarified the assessment of victim injury points, pursuant to Rule 3.701(d)(7) of the Florida Rules of Criminal

(1989)).

6. *Id.* at 1309.

7. *See* *Scott v. State*, 574 So. 2d 247 (Fla. 2d Dist. Ct. App. 1991) (rejecting the trial court’s assessment of legal constraint points for each of 24 offenses committed while on probation, thereby resulting in a recommended sentence of life imprisonment).

8. FLA. R. CRIM. P. 3.701(d)(6), *as amended*, 1991 Fla. Sess. Law Serv. 270 (West), pursuant to Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 and 3.988), 576 So. 2d 1307, 1309-10 (Fla. 1991).

9. 586 So. 2d 1058 (Fla. 1991).

10. *Id.* at 1059.

11. FLA. STAT. § 775.021(1) (Supp. 1988) provides: “The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.” *See* *Lambert v. State*, 545 So. 2d 838 (Fla. 1989) (applying the principle of lenity found in Florida Statutes section 775.021(1) to the sentencing guidelines).

Procedure. That amendment provides that for offenses occurring after May 30, 1991, victim injury points are properly assessed not only for each victim physically injured during a criminal offense, but for each count resulting in injury, regardless of the number of counts or victims.¹²

Based upon the fact that the supreme court in *Flowers* concluded that the principle of lenity in section 775.021(1) applies to the sentencing guidelines, it seems appropriate that victim injury points should be scored differently depending upon whether an offense occurs before May 30, 1991, the effective date of Chapter 91-270.¹³ On the other hand, this result is made less clear by the Florida Supreme Court's observation in *Florida Rules* that the Florida Sentencing Guidelines Commission "never intended"¹⁴ for victim injury to be scored only once, in instances of multiple offenses against the same victim.¹⁵

B. Scoresheet Errors

In *Goene v. State*,¹⁶ the Florida Supreme Court determined that principles of double jeopardy are not violated when a defendant is re-sentenced to an increased term where the defendant affirmatively misrepresented his identity during sentencing. The defendant in *Goene* received a guideline sentence of four and one-half years imprisonment for the offenses of armed robbery, false imprisonment, and carrying a con-

12. FLA. R. CRIM. P. 3.701(d)(7), *as amended*, 1991 Fla. Sess. Law Serv. 270 (West) (amendment pursuant to Florida Rules of Criminal Procedure re: Sentencing Guidelines (Rules 3.701 & 3.988), 576 So. 2d 1307, 1310 (Fla. 1991) [hereinafter *Florida Rules*]).

13. For offenses occurring prior to May 30, 1991, recent cases have consistently concluded that it is error to score victim injury twice for the same victim, regardless of the number of offenses committed against that victim. *Weekly v. State*, 553 So. 2d 239 (Fla. 3d Dist. Ct. App. 1989); *Williams v. State*, 565 So. 2d 838 (Fla. 1st Dist. Ct. App. 1990); *Stermer v. State*, 567 So. 2d 13 (Fla. 2d Dist. Ct. App. 1990); *Gordon v. State*, 575 So. 2d 736 (Fla. 4th Dist. Ct. App. 1991).

14. *Florida Rules*, 576 So. 2d at 1308.

15. In an asterisk near the conclusion of their opinion, the supreme court added: Of course, if the Legislature approves the amendments, they then must be accorded the same legal status as any other express clarification of original legislative intent. Our opinion today is not meant to deny that the proposals in Appendix B are in fact a clarification, only to say that they will become a clarification only if and when the Legislature approves them.

Id. at 1309.

16. 577 So. 2d 1306 (Fla. 1991).

cealed weapon. At his sentencing hearing, the defendant represented to the trial court that Edwin Goene was his real name.

After Goene had commenced the service of his sentence, the state received information that the defendant had an extensive criminal history under his true name, Russell Dean Gorham, and properly scored twelve to seventeen years imprisonment under the sentencing guidelines. Accordingly, the trial court resentenced the defendant to a term of seventeen years imprisonment.

The Florida Supreme Court rejected Goene's contention that his resentencing violated the prohibition against double jeopardy. Instead, the supreme court concluded that the defendant's affirmative misrepresentation of his identity constituted a fraud upon the trial court, and that "orders, judgments or decrees which are the product of fraud, deceit, or collusion 'may be vacated, modified, opened or otherwise acted upon at any time.'"¹⁷

In *Manuel v. State*,¹⁸ the Second District Court of Appeal read the Florida Supreme Court's decision in *Goene* narrowly. The defendant in *Manuel* appeared before the trial court for a violation of community control. After the imposition of the defendant's original community control sentence, the state discovered several additional prior convictions obtained by the defendant under aliases. Utilizing a corrected scoresheet prepared by the state, the trial court sentenced the defendant to five years' incarceration for the community control violation.

On appeal, the court reversed the defendant's sentence, and remanded for resentencing in accordance with the defendant's original scoresheet. Citing the Florida Supreme Court's decision in *Goene*, the *Manuel* court concluded that the defendant was entitled to sentencing under the original, and incorrect, scoresheet, in the absence of evidence that the defendant "took any affirmative action to mislead the trial court as to his prior record."¹⁹

C. Consolidated Sentencing Hearings

Rule 3.701(d)(1), of Florida Rules of Criminal Procedure, requires that "[o]ne guideline scoresheet shall be utilized for each de-

17. *Id.* at 1309 (emphasis in original) (quoting *State v. Burton*, 314 So. 2d 136, 138 (Fla. 1975)).

18. 582 So. 2d 823 (Fla. 2d Dist. Ct. App. 1991).

19. *Id.* at 824.

fendant covering all offenses pending before the court for sentencing."²⁰ No definition of the term "pending" is provided by the Rule 3.701. On the other hand, Rule 3.720 requires the court to order a sentencing hearing "[a]s soon as practicable after the determination of guilt and after the examination of any presentence reports."²¹

In *Clark v. State*,²² the defendant was found guilty of sale and possession of cocaine on November 19, 1986, after a trial by jury. On November 21, 1986, the defendant was brought to trial in a separate case before a different judge in the same circuit. During the jury's deliberations in the second trial, the judge in the first case sentenced the defendant to a guideline sentence of four years' incarceration, without objection by the defendant.

After the jury in the defendant's second trial also returned verdicts of guilty, the defendant was again sentenced to four years' incarceration. However, the trial court directed that the defendant serve the second four-year sentence consecutively to the sentence imposed two days earlier. Again, the defendant failed to object.

In *Clark*, the Florida Supreme Court concluded that unless a defendant can show that a postponement of sentencing would not result in "unreasonable delay,"²³ an offense should generally be considered pending for purposes of Rule 3.701(d)(1) only if "a verdict of guilt or plea of guilty or nolo contendere has been obtained."²⁴ The supreme court specifically placed the burden on the defendant to request a "consolidated sentencing"²⁵ hearing, and cautioned that the defendant's failure to raise a timely objection would constitute "a procedural bar for appellate review."²⁶

As guidelines, the supreme court suggested that unreasonable delay would result in instances where sentencing "might be postponed for an extended period of time—for example, for many months,"²⁷ as juxtaposed by situations where a defendant's second case is "likely" to be pending for sentencing "within the same day or week."²⁸

Applying this approach, the supreme court in *Clark* concluded

20. FLA. R. CRIM. P. 3.701(d)(1).

21. FLA. R. CRIM. P. 3.720.

22. 572 So. 2d 1387 (Fla. 1991).

23. *Id.* at 1391.

24. *Id.* at 1390-91.

25. *Id.* at 1391.

26. *Id.*

27. *Clark*, 572 So. 2d at 1391.

28. *Id.*

that the defendant was entitled to a consolidated sentencing hearing. However, the supreme court determined that the defendant was procedurally barred from raising the issue on appeal.²⁹ Although the supreme court had little difficulty reaching this result, their opinion was less equivocal concerning other matters. For example, the supreme court failed to suggest what result is appropriate when a defendant's second case is not "likely" to be completed within "the same day or week," but "might" be concluded in less than "many months."³⁰

D. *Departure Sentences*

During the survey period, the Florida Supreme Court issued several decisions concerning the propriety of various departure sentences. In a related issue, the supreme court modified its holding in *Ree v. State*,³¹ by slightly relaxing the requirement that written reasons be filed contemporaneous with a guidelines departure sentence.³²

29. The supreme court stated:

The burden falls on the defendant to assert a desire for simultaneous sentencing and to demonstrate to the sentencing court's satisfaction that such a sentencing will not result in an unreasonable delay. This, Clark failed to do. Accordingly, the issue now is procedurally barred.

Id.

30. Aside from the supreme court's unfortunate reliance on terms such as "likely" or "might," other problems are apparent, as well. For example, does a defendant's demand for speedy trial in a second prosecution constitute sufficient grounds to postpone sentencing in the defendant's first case. If so, are constitutional concerns adequately safeguarded by presenting a defendant with the "Hobson's choice" of either foregoing adequate discovery in a second prosecution, or waiving the right to a consolidated sentencing hearing, and concurrent sentences, in each of the defendant's "pending" cases. *See State v. Frank*, 573 So. 2d 1070 (Fla. 4th Dist. Ct. App. 1991) (a defendant cannot be forced to choose between the independently guaranteed right to discovery and the right to a speedy trial); *Harris v. Moe*, 538 So. 2d 145 (Fla. 4th Dist. Ct. App. 1989) (same); *State ex rel. Wright v. Yawn*, 320 So. 2d 880 (Fla. 1st Dist. Ct. App. 1975) (same).

On the other hand, what result is appropriate where an "unreasonable delay" in a defendant's second prosecution is attributable to supplemental discovery provided by the state, or by the filing of additional charges, or delay caused by the unavailability of a state witness, or defense witness?

31. 565 So. 2d 1329 (Fla. 1990).

32. *See Pamela Cole Bell, Substantive Criminal Law*, 15 NOVA L. REV. 1037, 1039 (1991).

1. Contemporaneous Writing Requirement

In *State v. Lyles*,³³ the supreme court determined that the contemporaneous writing requirement of *Ree* was satisfied where, at sentencing, the court made oral findings in support of its departure sentence, which were "reduced to writing without substantive change on the same date."³⁴ It cautioned, however, that even "a few days"³⁵ delay in entering written reasons would not be considered contemporaneous.³⁶

2. Nonscoreable Juvenile Convictions

Juvenile convictions may be scored as prior record only if the disposition date of the juvenile offense occurred within three years from the date of a defendant's primary offense at conviction.³⁷ However, in instances where juvenile convictions are too remote in time to be included as prior record, they may be considered as a basis for departure from the sentencing guidelines.³⁸

In *Puffinberger v. State*,³⁹ the Florida Supreme Court clarified when, and to what extent, a defendant's nonscoreable juvenile convictions may be used as a basis for departure from the sentencing guidelines. Initially, the supreme court in *Puffinberger* concluded that "minimal or insignificant juvenile dispositions"⁴⁰ are insufficient grounds to serve as a basis for departure from the guidelines. On the other hand, the *Puffinberger* court reasoned that a "significant"⁴¹ juvenile record would support a departure sentence.

In determining what is "significant," the supreme court directed

33. 576 So. 2d 706 (Fla. 1991).

34. *Id.* at 708.

35. *Id.* at 709.

36. The supreme court also concluded that the "ministerial act" of filing the written departure order with the clerk of the court on the first business day after the defendant's sentencing hearing resulted in no prejudice and complied with *Ree*. *Id.* The Fifth District Court of Appeal subsequently extended this aspect of the Florida Supreme Court's decision in *Lyles* to a case where the written reasons for departure were not filed with the clerk of the court until three business days after sentencing. *Rodwell v. State*, 588 So. 2d 19 (Fla. 5th Dist. Ct. App. 1991).

37. FLA. R. CRIM. P. 3.701(d)(5)(c).

38. *See Weems v. State*, 469 So. 2d 128 (Fla. 1985).

39. 581 So. 2d 897 (Fla. 1991).

40. *Id.* at 899; *see Crocker v. State*, 581 So. 2d 580 (Fla. 1991).

41. *Id.*

that not only the “number,” but the “nature and seriousness”⁴² of the juvenile offenses must be examined.⁴³ However, the *Puffinberger* court concluded that any departure is “per se invalid” to the extent that it exceeds the maximum sentence a defendant could have received had the juvenile dispositions been scored as prior record.⁴⁴

3. Escalating Patterns of Criminal Activity

Shortly after the establishment of the sentencing guidelines, the Florida Supreme Court determined in *Keys v. State*⁴⁵ that an “escalation from crimes against property to violent crimes against persons” constitutes a sufficient basis for departure from the sentencing guidelines.⁴⁶ In *Williams v. State*,⁴⁷ the Florida Supreme Court determined

42. *Id.*

43. The supreme court offered some guidance in defining the term “significant,” stating: “[A]n unscored juvenile record is significant for departure purposes if the record is extensive or serious, or if the number and nature of the dispositions, when considered in combination, amount to a significant record under the circumstances.” *Id.* at 899.

The supreme court also determined that Puffinberger’s three nonscoreable burglary convictions were not “significant,” and therefore, could not be used by the trial court as a basis for enhancing Puffinberger’s presumptive guidelines sentence for the offense of aggravated child abuse.

In concluding that Puffinberger’s juvenile record was not “significant,” the supreme court examined seemingly every facet of Puffinberger’s juvenile record, noting that Puffinberger: 1) burglarized his parents home on each occasion; 2) all three burglaries occurred within a ten-day period; 3) Puffinberger was again living at home when he plead guilty to each of the three burglaries; 4) the victim, Puffinberger’s father, cosigned the defendant’s plea forms; 5) Puffinberger was required to make restitution for unrecovered items as a condition of his sentence. *Id.* at 900.

44. *Id.* at 899. *But see* FLA. STAT. § 921.001(5) (Supp. 1990) which provides in pertinent part: “The extent of departure from a guideline sentence shall not be subject to appellate review.”

45. 500 So. 2d 134 (Fla. 1986).

46. *Id.* at 136. The holding in *Keys* was codified by the legislature in FLA. STAT. § 921.001(8) (1987):

A trial court may impose a sentence outside the guidelines when credible facts proven by a preponderance of the evidence demonstrate that the defendant’s prior record, including offenses for which adjudication was withheld, and the current criminal offense for which the defendant is being sentenced indicate an escalating pattern of criminal conduct. The escalating pattern of criminal conduct may be evidenced by a progression from nonviolent crimes to violent crimes or a progression of increasingly violent crimes.

that a pattern of "increasingly serious" *nonviolent* criminal activity may also constitute a valid basis for departure from the sentencing guidelines.⁴⁸

4. Continuing and Persistent Patterns of Criminal Conduct

The Florida Supreme Court has consistently concluded that the "timing"⁴⁹ or "temporal proximity"⁵⁰ of a defendant's prior offenses may, under certain circumstances, constitute a valid basis for departure from the sentencing guidelines, where the offenses demonstrate a "continuing and persistent pattern of criminal activity."⁵¹ Unfortunately, the circumstances required to sustain such a departure have continued to avoid easy definition.

In the 1988 decision of *Jones v. State*,⁵² the supreme court determined that before the temporal proximity of a defendant's offenses could serve as a valid basis for departure from the sentencing guidelines:

it must be shown that the crimes committed demonstrate a defendant's involvement in a continuing and persistent pattern of criminal activity as evidenced by the timing of each offense in relation to prior offenses and the release from incarceration or other supervision.⁵³

In reaching this conclusion, the supreme court referred to its earlier decision in *Williams v. State (Williams I)*,⁵⁴ and emphasized that the

47. 581 So. 2d 144 (Fla. 1991).

48. *Id.* at 146. In *Williams*, the defendant's prior record consisted of fifteen misdemeanor convictions, followed by a conviction for the offense of grand theft, a third degree felony. The defendant was then placed on probation by the trial court for the offense of possession of cocaine with intent to sell, a second degree felony.

When Williams violated his probationary sentence, the trial court departed from the sentencing guidelines, relying upon the defendant's escalating pattern of criminal conduct. *See infra* notes 68-85 and accompanying text. The Florida Supreme Court approved the trial court's departure sentence based upon Williams' pattern of increasingly serious nonviolent criminal activity. *Williams*, 581 So. 2d at 146.

49. *State v. Simpson*, 554 So. 2d 506, 510 (Fla. 1989).

50. *State v. Jones*, 530 So. 2d 53, 56 (Fla. 1988).

51. *Id.*

52. 530 So. 2d 53 (Fla. 1988).

53. *Id.* at 56.

54. 504 So. 2d 392 (Fla. 1987).

defendant's conduct must demonstrate a "definite pattern."⁵⁵ The supreme court's opinion failed, however, to suggest that any escalation in the severity of the defendant's offenses was necessary to support a departure sentence.

Subsequent to *Jones*, the supreme court concluded in *State v. Simpson*⁵⁶ that the "timing"⁵⁷ of a defendant's offenses may serve as grounds for departure from the sentencing guidelines "if based on facts that demonstrate the type of escalating or persistent pattern described with approval in *Keys*, *Williams I*, *Rousseau* and *Jones*."⁵⁸

During the survey period, the Florida Supreme Court again revisited this issue in *State v. Smith*,⁵⁹ and in their opinion, cited to their earlier decision in *State v. Simpson*, and quoted from *Jones v. State*. Discussing *Simpson*, the supreme court stated that "we suggested that the temporal proximity of crimes could, under some circumstances, be grounds for departure."⁶⁰ Without articulating precisely what "circumstances" are necessary to support such a departure sentence, the *Smith* court determined that the defendant's commission of the offenses of grand theft, petit theft, and resisting arrest without violence—only thirty days after release from incarceration—was not a sufficient basis to support a departure from the sentencing guidelines. The *Smith* court specifically noted that all of defendant's crimes were "nonviolent property crimes with no substantial escalation in severity."⁶¹ Although their decision quoted the "temporal proximity" language of *Simpson* and *Jones*, the supreme court nevertheless concluded that "one successive criminal episode of no greater significance than the first, even though committed only thirty days after release from incarceration, is not a sufficient reason to depart from the guidelines."⁶²

55. *Jones*, 530 So. 2d at 56.

56. 554 So. 2d 506 (Fla. 1989).

57. *Id.* at 510.

58. *Id.* (citations omitted in original). The citations to *Jones*, *Williams I*, *Rousseau*, and *Keys* are as follows: *State v. Jones*, 530 So. 2d 53 (Fla. 1988); *Williams v. State*, 504 So. 2d 392 (Fla. 1987); *State v. Rousseau*, 509 So. 2d 281 (Fla. 1987); *Keys v. State*, 500 So. 134 (Fla. 1986).

It is unclear why the supreme court in *Simpson* mixed the terms "escalating" and "persistent." Each term had historically referred to a separate and distinct basis for departure.

59. 579 So. 2d 75 (Fla. 1991).

60. *Id.* at 76.

61. *Id.*

62. *Id.* at 77.

In the final analysis, then, it is unclear based upon the supreme court's decisions in *Jones*, *Simpson*, and now *Smith*, exactly what factors are necessary, and should be considered, when examining whether the timing of an individual's offenses support a departure sentence. The supreme court's decision in *Jones* suggests that where a definite pattern exists, a defendant's continuing and persistent criminal activity need not necessarily escalate in severity to give rise to a departure sentence. On the other hand, *Smith* suggests that an escalation in severity, combined with the temporal proximity of the defendant's offenses, may give rise to a departure, regardless of whether the defendant has exhibited a persistent pattern of criminal conduct.⁶³

5. Professional Manner

In *Hernandez v. State*,⁶⁴ the Florida Supreme Court determined that a departure sentence may never be based upon the "professional" manner of a criminal act. The *Hernandez* court found the term "professionalism" incapable of easy definition, and simply "too vague" a basis upon which to substantiate a departure sentence.⁶⁵ Alternatively, the supreme court reasoned that to the extent "professionalism" relates to a defendant's background or experience, this factor is already weighed into the sentencing guidelines, based upon a defendant's prior record.⁶⁶

6. Probation and Community Control Sentences

In recent years, the Florida Supreme Court has consistently con-

63. *Simpson* appears to suggest that either possibility is correct. See *supra* notes 57-59 and accompanying text.

Because of the lack of clarity in the *Jones-Simpson-Smith* line of cases, the Florida Supreme Court's decision in *Smith* will undoubtedly cause confusion for the district courts of appeal. See *Wilson v. State*, 573 So. 2d 915 (Fla. 2d Dist. Ct. App. 1991) (concluding that a departure sentence may be based upon the temporal proximity of a defendant's offenses, without any showing of an escalation in the seriousness of the offenses, "notwithstanding language in *Smith* which might arguably be taken otherwise").

64. 575 So. 2d 640 (Fla. 1991).

65. *Id.* at 642.

66. *Id.* Citing its earlier decision in *Hendrix v. State*, 475 So. 2d 1218 (Fla. 1985), the supreme court concluded that "Florida law now is settled that a departure may not be based on any matter already factored into the guidelines' computations." *Id.* at 641.

cluded that it is improper to impose a departure sentence following a violation of probation.⁶⁷ However, in *Williams v. State*,⁶⁸ the supreme court concluded that a departure sentence may be imposed following a violation of probation if the legal basis for the departure existed at the time the offender was originally placed on probation.⁶⁹

The supreme court reasoned that their earlier decisions in *Lambert v. State*,⁷⁰ and *Ree v. State*,⁷¹ prohibited only those departure sentences which relied upon conduct occurring during the defendant's probationary sentence, as opposed to reasons for departure which existed at the time the defendant was originally sentenced.⁷² As a matter of policy, the supreme court expressed concern that efforts to curtail the discretionary authority of the courts following a probation violation might discourage courts from imposing probationary sentences.⁷³

Following the *Williams* opinion, the supreme court rejected a post-probation violation departure sentence in *State v. Johnson*.⁷⁴ The defendant in *Johnson* received a split sentence,⁷⁵ and subsequently violated the probationary portion of that sentence. Upon revoking the defendant's probation, the trial court imposed a departure sentence. As a basis for the departure, the trial court relied upon conduct which occurred during the defendant's probationary sentence—the same practice prohibited in *Williams*.

Without citing *Williams*, the supreme court instead discussed and rejected the theory that departure sentences could be based upon "non-

67. *Ree v. State*, 565 So. 2d 1329 (Fla. 1990); *Lambert v. State*, 545 So. 2d 838 (Fla. 1989).

68. 581 So. 2d 144 (Fla. 1991); see *supra* notes 47-48 and accompanying text.

69. *Id.* at 146. Although the supreme court's decision failed to specifically address the issue, it logically follows that the holding in *Williams* pertains to offenders placed on community control.

70. 545 So. 2d 838 (Fla. 1989).

71. 565 So. 2d 1329 (Fla. 1990).

72. *Williams*, 581 So. 2d at 145-46.

73. *Id.* at 146. The supreme court found additional support for their holding in FLA. STAT. § 948.06(1) (1987) which provides in part:

If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control.

74. 585 So. 2d 272 (Fla. 1991).

75. See generally *Poore v. State*, 531 So. 2d 161 (Fla. 1988) (describing the various types of split sentences recognized in Florida).

criminal" violations occurring during a defendant's probationary sentence.⁷⁶ It reasoned that "[t]his construction would require us to overrule both *Franklin* and *Poore*,"⁷⁷ and added that "[i]t would be incongruous to permit guideline departures for noncriminal probation violations but prohibit departures for new criminal conduct."⁷⁸

Curiously, the supreme court's opinion in *Johnson* failed to make any reference whatsoever to its decision in *Williams*.⁷⁹ Equally odd was its failure in *Johnson* to cite *Ree v. State*,⁸⁰ the other case relied upon in *Williams*.

One explanation is an implicit recognition by the supreme court in *Johnson* that the rationale in *Williams* is inapplicable to cases involving split sentences. *Williams* stands for the proposition that a departure sentence may be imposed following a violation of probation if the legal basis for the departure existed at the time the offender was originally placed on probation. *Johnson*, on the other hand, implies that a trial court may never depart from the sentencing guidelines when a defendant violates the probationary portion of a split sentence, regardless of whether valid reasons existed for a departure sentence at the time the offender was originally placed on probation.⁸¹

This reading of *Johnson* is directly supported by the supreme court's earlier decision in *Franklin v. State*,⁸² which discussed sentencing options following violations of a true split sentence and a probationary split sentence. In both instances, the *Franklin* court concluded on the authority of *Lambert v. State*⁸³ and Rule 3.701(d)(14) of the Florida Rules of Criminal Procedure,⁸⁴ that departure sentence were

76. *Johnson*, 585 So. 2d at 273.

77. *Id.* (citing *Franklin v. State*, 545 So. 2d 851 (Fla. 1989); *Poore v. State*, 531 So. 2d 161 (Fla. 1988)).

78. *Id.*

79. *Williams* was decided on May 30, 1991 and *Johnson* on August 22, 1991.

80. 565 So. 2d 1329 (Fla. 1990).

81. If this reading of *Johnson* is correct, split sentences remain a safe harbor for defendants seeking to avoid the types of post-probation violation departure sentences approved in *Williams*.

82. 545 So. 2d 851 (Fla. 1989).

83. *Id.* at 838.

84. FLA. R. CRIM. P. 3.701(d)(14) provides:

Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. The sentence imposed after revocation of probation or community control may be included within the original cell (guidelines range) or may be increased to the next higher cell (guidelines range) without requiring a reason for departure.

prohibited.⁸⁵

E. *Modifications of Probation or Community Control*

In *Clark v. State*,⁸⁶ the Florida Supreme Court determined that before a probation or community control sentence may be enhanced, "either by extension of the period or by addition of terms,"⁸⁷ an offender must be 1) formally charged; 2) brought before the court; and 3) advised of the charge, in accordance with the procedures in section 948.06 of the Florida Statutes.⁸⁸ The supreme court concluded that "[a]bsent proof of a violation,"⁸⁹ a court may not enhance an offenders probationary or community control sentence, even where the defendant and the probation or community control officer agree to the modification in writing, and waive notice and hearing.⁹⁰

But see Williams v. State, 581 So. 2d 144 (Fla. 1991).

85. Concerning true split sentences, the supreme court in *Franklin* stated:

Upon the violation of probation after incarceration, the judge may resentence the defendant to any period of time not exceeding the remaining balance of the withheld or suspended portion of the original sentence, provided that the total period of incarceration, including time already served, may not exceed the one-cell upward increase permitted by Florida Rule of Criminal Procedure 3.701(d)(14). *Any further departure for violation of probation is not allowed. Lambert v. State.*

Franklin v. State, 545 So. 2d 851, 852-53 (Fla. 1989) (emphasis added) (citation omitted).

The Court reached the same result regarding probationary split sentences:

Upon a violation of probation during a probationary split sentence, a trial court may resentence the defendant to any term falling within the original guidelines range, including the one-cell upward increase. *However, no further increase or departure is permitted for any reason. Lambert.*

Id. at 853 (emphasis added) (citation omitted).

86. 579 So. 2d 109 (Fla. 1991).

87. *Id.* at 110.

88. *Id.* at 110-111.

89. *Id.* at 111 (emphasis added).

90. *Id.* In a footnote, the supreme court stated:

We recognize that section 948.03(7), Florida Statutes (1987), permits the court to "rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control." However, that statute is not applicable here because the court did not modify a term or condition previously imposed. Rather, it added an entirely new condition to the order of community control.

Id. at 110 n.3.

The court's reasoning seems less convincing when considered in conjunction with

F. *Youthful Offender Sentences*

In *Kepner v. State*,⁹¹ the Florida Supreme Court examined the language and amendments to section 958.04(3) of the Florida Statutes, concerning the sentencing of youthful offenders.⁹² The supreme court determined that section 958.04(3) allows for three possible results, depending upon an offender's guidelines scoresheet, and the sentence imposed by the court. While emphasizing in their opinion that the maximum youthful offender sentence is six years, the supreme court concluded in a multi-part holding:

First, if the recommended guidelines sentence exceeds six years . . . and the court sentences the youthful offender to six years of sanctions, written reasons for a sentence less than the recommended guidelines sentence are not required. Second, if the recommended guidelines sentence is less than . . . six years, the court must sentence within the guidelines or give written reasons for the departure whether upward or downward. Third, if the recommended sentence is six years or greater and the court imposes a [sentence of] . . . less than six years, the court must provide written

the first sentence of FLA. STAT. § 948.03(7) (1987). The language quoted by the supreme court comes exclusively from the second sentence of that section. Read together, the first two sentences of section 948.03(7) provide:

The enumeration of specific kinds of terms and conditions *shall not prevent the court from adding* thereto such other or others as it considers proper. The court may rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer or offender in community control.

FLA. STAT. § 948.03(7) (1987) (emphasis added).

Other portions of this section have subsequently been amended and renumbered as

FLA. STAT. § 948.03(8) (Supp. 1990).

91. 577 So. 2d 576 (Fla. 1991).

92. FLA. STAT. § 958.04(3) (1985) provided:

The provisions of this section shall not be used to impose a greater sentence than the maximum recommended range as established by statewide sentencing guidelines pursuant to s. 921.001 unless clear and convincing reasons are explained in writing by the trial court judge. A sentence imposed outside of such guidelines shall be subject to appeal by the defendant pursuant to s. 924.06.

Portions of both sentences in this section were subsequently amended. The supreme court's decision in *Kepner* concerned the changes to the final sentence of FLA. STAT. § 958.04(3) (1987) which was amended to provide: "A sentence imposed outside of such guidelines shall be subject to appeal pursuant to s. 924.06 or s. 924.07."

reasons for departure.⁹³

The supreme court in *Kepner* specifically recognized that a youthful offender sentence is an “alternative sentence.”⁹⁴ However, the holding in *Kepner* makes the sentencing guidelines applicable to the extent provided above, with one caveat—unlike other sentencing schemes within the guidelines, the supreme court’s rationale necessarily considers “sanctions” to include probation and community control. In all other instances under the sentencing guidelines, probation and community control cannot be used interchangeably, or in lieu of incarceration, insofar as each is a different type of “sanction” for purposes of the sentencing guidelines.

G. *Alternative Sentencing Provisions*

Several recent decisions of the district courts of appeal have addressed the conflict between the mandatory minimum sentencing provision contained in section 893.13(1)(e)(1), Florida Statutes,⁹⁵ relating to the manufacture, sale, or purchase of controlled substances within one thousand feet of a school, and section 397.12, Florida Statutes, which is an alternative sentencing provision for drug offenders.⁹⁶ Section 397.12

93. 577 So. 2d at 578.

94. *Id.*; see *infra* notes 99-102 and accompanying text. See generally FLA. STAT. § 958.04 (Supp. 1990).

95. This section provides that individuals convicted of various offenses, including the manufacture, sale, or purchase of controlled substances such as cocaine within 1000 feet of a school are:

guilty of a felony of the first degree . . . and shall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or release under the Control Release Authority . . . or statutory gain-time . . . prior to serving such minimum sentence.

FLA. STAT. § 893.13(1)(e)(1) (Supp. 1990).

96. FLA. STAT. § 397.12 (1989) provides:

When any person, including any juvenile, has been charged with or convicted of a violation of any provision of chapter 893 or of a violation of any law committed under the influence of a controlled substance, the court, Department of Health and Rehabilitative Services, Department of Corrections, or Parole Commission, whichever has jurisdiction over that person, may in its discretion require the person charged or convicted to participate in a drug treatment program licensed by the department under the provisions of this chapter. If referred by the court, the referral may be in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any other similar action. If the accused desires final adjudication, his

permits courts to require persons charged or convicted of a violation relating to controlled substances to participate in a licensed drug treatment program, "in lieu of or in addition to final adjudication, imposition of any penalty or sentence."⁹⁷

With some reservations,⁹⁸ the Fourth District Court of Appeal has consistently held that the alternative sentencing scheme provided by section 397.12 may not be used to avoid the mandatory minimum sentencing language contained in section 893.13(1)(e)(1).⁹⁹ Several reasons were offered. First, section 397.12 provides an alternative sentencing option only for persons charged with the possession of controlled substances, as opposed to purchasing offenses.¹⁰⁰ Additionally, it is unlikely that the legislature intended that simple drug addiction should overcome the mandatory provisions of section 893.13(1)(e)(1).¹⁰¹ Fi-

constitutional right to trial shall not be denied. The court may consult with or seek the assistance of any agency, public or private, or any person concerning such a referral. Assignment to a drug program may be contingent upon budgetary considerations and availability of space.

97. *Id.*

98. *State v. Liataud*, 587 So. 2d 1155, 1156 (Fla. 4th Dist. Ct. App. 1991) (Anstead, J., specially concurring) ("[T]his is another case of the left hand of the legislature not knowing what the right hand is doing."); *State v. Scates*, 585 So. 2d 385 (Fla. 4th Dist. Ct. App. 1991) (question certified); *State v. Jenkins*, 16 Fla. L. Weekly D2628 (4th Dist. Ct. App. 1991) (same); *State v. Vola*, 16 Fla. L. Weekly D2246, 2249 (4th Dist. Ct. App. 1991) (Anstead, J., specially concurring) ("[T]he legislature's intent to see persons such as the appellee receive treatment is obviously being thwarted by our reversal of the trial judge's order.").

99. *State v. Baxter*, 581 So. 2d 937 (Fla. 4th Dist. Ct. App. 1991); *State v. Lane*, 582 So. 2d 77 (Fla. 4th Dist. Ct. App. 1991); *State v. Baumgardner*, 587 So. 2d 1147 (Fla. 4th Dist. Ct. App. 1991); *State v. Liataud*, 587 So. 2d 1155 (Fla. 4th Dist. Ct. App. 1991); *State v. Jenkins*, 16 Fla. L. Weekly D2038 (4th Dist. Ct. App. 1991); *State v. Scates*, 585 So. 2d 385 (Fla. 4th Dist. Ct. App. 1991); *State v. Greisdorf*, 587 So. 2d 1153 (Fla. 4th Dist. Ct. App. 1991); *State v. Vola*, 16 Fla. L. Weekly D2246 (4th Dist. Ct. App. 1991); *State v. Kalogeras*, 587 So. 2d 591 (Fla. 4th Dist. Ct. App. 1991); *State v. Jenkins*, 16 Fla. L. Weekly D2628 (4th Dist. Ct. App. 1991).

100. *Baxter*, 581 So. 2d at 938; *Lane*, 582 So. 2d at 78; *Vola*, 16 Fla. L. Weekly at D2247; *Jenkins*, 16 Fla. L. Weekly at D2628. This argument is derived from the language of FLA. STAT. § 397.011(2) (1989) which provides in pertinent part:

For a violation of any provision of chapter 893 . . . relating to *possession* of any substance regulated thereby, the trial judge may, in his discretion, require the defendant to participate in a drug treatment program . . . pursuant to the provisions of this chapter.

Id. (emphasis added).

101. *Vola*, 16 Fla. L. Weekly at D2247. This line of analysis further reasons that the minimum mandatory sentencing provision in section 893.13(1)(e)(1) was promul-

nally, pursuant to Rule 3.701(d)(9), of the Florida Rules of Criminal Procedure, mandatory sentences take precedence over guideline sentences.¹⁰²

H. Habitual Offender Sentences

During the survey period, two closely related issues concerning the habitual felony offender statute divided the district courts of appeal. Both issues concern the meaning of section 775.084(4)(a)(1), Florida Statutes, which provides: "The court . . . shall sentence the habitual felony offender as follows: 1. In the case of a felony of the first degree, for life."

On the one hand, the district courts of appeal have reached contrary conclusions concerning whether section 775.084(4)(a)(1) permits trial courts to impose habitual felony offender sanctions for individuals convicted of first degree felonies punishable by life. Some courts have determined such offenders are not subject to habitual felony offender sanctions. Other courts have reached a contrary result.¹⁰³

On the other hand, the district courts of appeal have issued conflicting decisions concerning whether section 775.084(4)(a)(1) is mandatory or permissive in nature. Some courts have decided that section 775.084(4)(a)(1) permits the imposition of sentences of less than life in prison, as an habitual offender, where the offender is convicted of

gated more recently, and therefore, evinces the intent of the legislature. *Id.*; *accord Lane*, 582 So. 2d at 78.

102. *Baxter*, 581 So. 2d at 938; *Jenkins*, 16 Fla. L. Weekly at D2628. FLA. R. CRIM P. 3.701(d)(9) provides:

Mandatory sentences: For those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed.

103. *Compare Gholston v. State*, 589 So. 2d 307, 307 (Fla. 1st Dist. Ct. App. 1990) ("[s]ection 775.084, Florida Statutes, makes no provision for enhancing penalties for first-degree felonies punishable by life, life felonies, or capital felonies"); *Johnson v. State*, 568 So. 2d 519 (Fla. 1st Dist. Ct. App. 1990) (same) *and Power v. State*, 568 So. 2d 511 (Fla. 5th Dist. Ct. App. 1990) (same) *with Paige v. State*, 570 So. 2d 1108 (Fla. 5th Dist. Ct. App. 1990) (first degree felonies punishable by life are subject to enhancement under habitual felony offender statute); *Swain v. State*, 579 So. 2d 842 (Fla. 3d Dist. Ct. App. 1991) (same); *Westbrook v. State*, 574 So. 2d 1187 (Fla. 3d Dist. Ct. App. 1991) (same); *Burdick v. State*, 584 So. 2d 1035 (Fla. 1st Dist. Ct. App. 1991) (question certified) *and Ford v. State*, 586 So. 2d 511 (Fla. 1st Dist. Ct. App. 1991) (question certified).

a first degree felony. These courts reason that the language contained in section 775.084(4)(a)(1) is permissive, rather than mandatory. Other courts have disagreed, finding the statute's language mandatory.¹⁰⁴

I. Restitution

In *State v. Hawthorne*,¹⁰⁵ the Florida Supreme Court refined the analysis for determining the value of property in restitution hearings.¹⁰⁶ In those instances when "the value of property is an essential element of a crime,"¹⁰⁷ value is determined as the market value of the property on the date of the offense.¹⁰⁸ In this regard, fair market value of an item should be derived from "direct testimony or through evidence of the four factors announced by the supreme court in *Negron*."¹⁰⁹

In other instances, though, the standard method of determining value is inadequate. In these situations, "a court is not tied to fair market value as the sole standard for determining restitution amounts, but rather may exercise such discretion as required to further the purposes of restitution."¹¹⁰ Examples might include the theft of a family heirloom, new automobiles—which immediately depreciate in value after purchase—or property which has undergone restoration, and thus, has

104. Compare *State v. Fannin*, 578 So. 2d 471, 471 (Fla. 1st Dist. Ct. App. 1991) ("section 775.084(4)(a) mandates a life sentence in the case of felonies of the first degree," but question certified); *Burdick v. State*, 584 So. 2d 1035 (Fla. 1st Dist. Ct. App. 1991) (same) and *Walsingham v. State*, 576 So. 2d 365 (Fla. 2d Dist. Ct. App. 1991) (same) (question certified) with *Henry v. State*, 581 So. 2d 928, 929 (Fla. 3d Dist. Ct. App. 1991) ("the 'shall sentence' provision of the habitual offender statute . . . is permissive, not mandatory"); *Cotton v. State*, 588 So. 2d 694 (Fla. 3d Dist. Ct. App. 1991) and *Smith v. State*, 16 Fla. L. Weekly D151 (3d Dist. Ct. App. 1991).

105. 573 So. 2d 330 (Fla. 1991).

106. See generally FLA. STAT. § 775.089 (1989).

107. *Hawthorne*, 573 So. 2d at 332 (citing *Negron*, 306 So. 2d at 108).

108. *Id.*

109. *Id.* at 333 (footnote omitted). The four factors used to determine the appropriate market value in *Negron v. State*, 306 So. 2d 104 (Fla. 1974), *receded from on other grounds*, *Butterworth v. Fluellen*, 389 So. 2d 968 (Fla. 1980), were summarized by the supreme court as follows: "(1) original market cost; (2) manner in which the item was used; (3) the general condition and quality of the item; and (4) the percentage of depreciation." *Hawthorne*, 573 So. 2d at 332.

110. *Id.* at 333. As authority for this proposition, the supreme court looked to FLA. STAT. § 775.089(6) (1987) which includes reference to the fact that the court "shall consider . . . such other factors which it deems appropriate." *Id.*

not depreciated in value since the time of purchase.¹¹¹

III. DEFENSES

A. Entrapment

1. Entrapment as a Matter of Law

In *State v. Hunter*,¹¹² the Florida Supreme Court determined that the objective entrapment standard established in *Cruz v. State*¹¹³ was not superseded by section 777.201.¹¹⁴ The supreme court's conclusion was predicated upon an implicit recognition that constitutional considerations of due process cannot be superseded by statutory enactment,¹¹⁵ combined with an explicit recognition that, "[b]y focusing on police conduct," the objective entrapment aspects of their decision in *Cruz* "includes due process considerations."¹¹⁶

The facts in *Hunter* were typical of many drug transactions. First,

111. *Hawthorne*, 573 So. 2d at 333 nn.4-5. The facts in *Hawthorne* concerned the theft of an older car that had been repaired shortly before it was stolen, but was otherwise in good working condition. As a result of the theft, the car was destroyed. Although the vehicle had been purchased by the victim for \$1,530 14 months prior to the theft, the supreme court, cognizant of the repairs made to the vehicle and the fact that the car was in good working condition, approved the trial court's award of \$1,500 restitution.

112. 586 So. 2d 319 (Fla. 1991).

113. 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905 (1985).

114. Following the Florida Supreme Court's decision in *Cruz*, the legislature enacted FLA. STAT. § 777.201 (1987) which states in pertinent part:

(1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.

(2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. *The issue of entrapment shall be tried by the trier of fact.*

115. See *Strickland v. State*, 588 So. 2d 269 (Fla. 4th Dist. Ct. App. 1991) (concluding in light of the Florida Supreme Court's decision in *Hunter* that "*Cruz* is still alive and well").

116. *Hunter*, 586 So. 2d at 322.

an individual named Ron Diamond agreed to perform substantial assistance¹¹⁷ for the police in exchange for a reduction of sentence in his drug trafficking conviction. Diamond approached Kelly Conklin, who was not involved in any ongoing criminal activity, seeking to purchase drugs. Conklin, after much persistence from Diamond, turned to the defendant, David Hunter for assistance. Through a friend, Hunter was able to produce drugs to sell to Diamond. On the day of the sale, both Conklin and Hunter were arrested. Because Conklin had not been engaged any specific, ongoing criminal activity, the Court concluded that he had been entrapped by the State's agent, Diamond, as a matter of law.¹¹⁸

The supreme court, however, affirmed Hunter's conviction:

Although Diamond's acts amounted to entrapment of Conklin, the middleman, he had minimal telephone contacts with Hunter. When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense.¹¹⁹

2. Entitlement to Jury Instruction

In a separate case, *Wilson v. State*,¹²⁰ the supreme court held that where evidence exists to support a defendant's claim of entrapment, a request for a jury instruction on the defense of entrapment "should be refused only if the defendant has denied under oath the acts constituting the crime that is charged."¹²¹ In *Wilson*, the defendant was charged with sale of cocaine and possession of cocaine with intent to sell, after allegedly selling a twenty dollar piece of crack cocaine to an undercover police officer. Wilson testified under oath all of the factual allegations concerning his arrest were untrue, and that another man was actually responsible for the offenses. Under these circumstances, the supreme court determined that Wilson was not entitled to an in-

117. See generally FLA. STAT. § 893.135(3) (1985).

118. *Hunter*, 586 So. 2d at 322.

119. *Id.* In dicta, the supreme court stated that defendants may not vicariously assert due process violations suffered by third persons. Therefore, to the extent that a third party is the victim of outrageous police conduct, rising to the level of a due process violation, others who are induced to commit crimes based upon the third party's actions have no standing to raise constitutional challenges. See *State v. Glosson*, 462 So. 2d 1082 (Fla. 1985).

120. 577 So. 2d 1300 (Fla. 1991).

121. *Id.* at 1302.

struction on the defense of entrapment. However, the supreme court recognized that "there are some circumstances under which a defendant who claims entrapment may deny commission of the crime without necessarily committing perjury."¹²² In these instances, an entrapment instruction is appropriate.¹²³

B. *Self-Defense*

Under section 776.041(1), Florida Statutes,¹²⁴ the defense of self-defense is not available to defendants charged with a "forcible felony," as enumerated in section 776.08, Florida Statutes. That section contains a laundry list of "forcible felony" offenses, along with the proviso that a "forcible felony" includes "any other felony which involves the use of threat or physical force or violence against any individual."¹²⁵

In *Perkins v. State*,¹²⁶ the defendant, Marcus Perkins, was charged with attempted trafficking in cocaine, and first degree murder, for the death of Anthony Kimble. On the date of Kimble's death, Perkins arranged to purchase cocaine from Kimble in exchange for \$11,000. At the transaction Kimble failed to bring any cocaine, and instead, demanded Perkins' money at gun-point. A struggle ensued, and Kimble shot Perkins. Although injured, Perkins somehow took the firearm from Kimble, and fatally wounded him.¹²⁷

In pre-trial proceedings, the State agreed that Perkins acted in self-defense, but argued that Perkins was prohibited from raising self-defense as a defense, based upon the State's contention that trafficking in cocaine is a "forcible felony" for purposes of section 776.08.¹²⁸ The

122. *Id.* at 1301.

123. *Id.* The supreme court cited several cases as examples of instances where a defendant could properly claim entrapment and at the same time still deny the commission of any criminal act, without committing perjury. *Mathews v. United States*, 485 U.S. 58 (1988); *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *Stripling v. State*, 349 So. 2d 187 (Fla. 3d Dist. Ct. App. 1977), *cert denied*, 359 So. 2d 1220 (Fla. 1978).

124. FLA. STAT. § 776.041(1) (1989) provides, in part, that the defense of self defense is not available to a person who: "(1) Is attempting to commit, committing, or escaping after the commission of a *forcible felony*" *Id.* (emphasis added).

125. FLA. STAT. § 776.04(1) (1987).

126. 576 So. 2d 1310 (Fla. 1991).

127. *Id.* at 1311.

128. *Id.* FLA. STAT. § 776.08 (1987) provides:

"Forcible felony" means treason; murder; manslaughter; sexual battery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated bat-

Florida Supreme Court disagreed based upon their conclusion that “a ‘forcible felony’ under the final clause of section 776.08 is a felony whose statutory elements include the use or threat of physical force or violence against any individual.” Drug trafficking fails to meet this definition.¹²⁹

C. *Double Jeopardy*

In *Grady v. Corbin*,¹³⁰ the United States Supreme Court clarified the coverage provided by the double jeopardy clause of the United States Constitution¹³¹ by holding that double jeopardy prohibits a second prosecution if, “to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”¹³² The United States Supreme Court indicated that double jeopardy clause analysis necessitates a two-part test. First, the trial court must apply the analysis articulated in *Blockburger v. United States*.¹³³ This stage is commonly referred to as the “traditional *Blockburger* test.”¹³⁴

If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the

tery; aircraft piracy; unlawful throwing, placing or discharging of a destructive device or bomb; any other felony which involves the use or threat of physical force or violence against any individual.

129. *Perkins*, 576 So. 2d at 1313. The supreme court conceded that neither treason or burglary meet this definition either, although each is designated as a “forcible felony” in section 776.08. Nevertheless, it reiterated that due process concerns require “that penal statutes must be strictly construed according to their letter.” *Id.* (citing *State v. Jackson*, 526 So. 2d 58 (Fla. 1988); *State ex rel. Cherry v. Davidson*, 139 So. 177 (1931); *Ex parte Bailey*, 23 So. 552 (1897)). The Court concluded that the offense of drug trafficking does not inherently “involve” the use or threat of physical force or violence on every occasion, as required by section 776.08, although, obviously, drug trafficking offenses are sometimes violent. *Id.* at 1313.

130. 110 S. Ct. 2084 (1990).

131. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides, “nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V; *see also* FLA. CONST. art. I, § 9. The Double Jeopardy Clause is enforceable against the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

132. *Grady*, 110 S. Ct. at 2087.

133. 284 U.S. 299, 304 (1932).

134. *Grady*, 110 S. Ct. at 2090.

other, then the inquiry must cease, and the subsequent prosecution is barred.¹³⁵

However, the Court indicated, “a subsequent prosecution must do more than merely survive the *Blockburger* test.”¹³⁶

[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an “actual evidence” or “same evidence” test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct.¹³⁷

135. *Id.* (citation omitted).

136. *Id.* at 2093.

137. *Id.* The Court indicated that this secondary inquiry had its genesis in the Court’s opinion in *Illinois v. Vitale*, 447 U.S. 410 (1980).

Factually, *Grady v. Corbin* concerned a traffic fatality. The State of New York first successfully prosecuted the defendant, Thomas Corbin, for various traffic offenses. In separate a prosecution, the defendant was subsequently charged with a more serious manslaughter offense, stemming from the same conduct.

In its Double Jeopardy Clause analysis, the United States Supreme Court relied heavily upon a bill of particulars filed by the State of New York prior to Corbin’s trial on the charge of reckless manslaughter. The bill of particulars revealed that the same traffic violations for which the defendant had already plead guilty would again be relied upon by the State as predicate offenses for proving the defendant’s recklessness in the manslaughter charge.

Although the elements of the offenses survived the traditional *Blockburger* analysis, the Court concluded that the same conduct was being relied upon by the prosecution in the defendant’s subsequent case, thereby violating the second prong of the Double Jeopardy Clause. Relying on the bill of particulars filed by the State of New York, the Court concluded:

By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault charges. Therefore, the Double Jeopardy Clause bars this successive prosecution.

Grady, 110 S. Ct. at 2094.

The Court was aware of the additional burdens their holding would place on prosecuting agencies. The Court noted that “[p]rosecutors’ offices are often overworked and may not always have the time to monitor seemingly minor cases as they wind through the judicial system.” *Id.* at 2095. However, the Court concluded that “these facts cannot excuse the need for scrupulous adherence to our constitutional principles.” *Id.* (citing *Santobello v. New York*, 404 U.S. 257 (1971)).

The United States Supreme Court's opinion in *Grady v. Corbin* has had an immediate impact on Florida Courts. Most importantly, in *Scalf v. State*,¹³⁸ the First District Court of Appeal properly recognized that *Grady* may be at variance with section 775.021(4)(b), Florida Statutes,¹³⁹ as well as the Florida Supreme Court's decision in *State v. Smith*.¹⁴⁰ Relying upon *Grady v. Corbin*, several district courts of appeal decisions have barred subsequent prosecutions on double jeopardy clause grounds.¹⁴¹ However, at least one district court opinion successfully distinguished *Grady v. Corbin*, and sustained a second prosecution for an offense arising from previously prosecuted conduct.¹⁴²

IV. SUBSTANTIVE CRIMINAL OFFENSES

A. Aggravated Battery

In *Lareau v. State*,¹⁴³ the Florida Supreme Court concluded that the offense of aggravated battery, resulting in great bodily harm, permanent disability, or permanent disfigurement, contrary to section 784.045(1)(a) of the Florida Statutes,¹⁴⁴ when committed with a

138. 573 So. 2d 202 (Fla. 1st Dist. Ct. App. 1991).

139. The appeals court in *Scalf* stated:

In reaching our conclusion we acknowledge that our disposition of this case may be at variance with certain language set forth in Section 775.021(4)(b), Florida Statutes (Supp. 1988), as approved in *State v. Smith*, 547 So. 2d 613 (Fla. 1989), in that the statute provides that it is the legislature's intent to "convict and sentence for each criminal offense." If the legislature intended to permit a successive prosecution based on conduct that constituted an offense for which the defendant had previously been prosecuted, any such intent would no doubt be forced to give way to the interpretation placed on the Double Jeopardy clause by the United States Supreme Court.

Scalf, 573 So. 2d at 204 n.5 (emphasis in original).

140. 547 So. 2d 613 (Fla. 1989).

141. *Scalf v. State*, 573 So. 2d 202 (Fla. 1st Dist. Ct. App. 1991); *Dixon v. State*, 584 So. 2d 195 (Fla. 5th Dist. Ct. App. 1991); *Anderson v. State*, 570 So. 2d 1101 (Fla. 1st Dist. Ct. App. 1990).

142. *Walls v. State*, 580 So. 2d 131 (Fla. 1st Dist. Ct. App. 1991). In *Walls*, the court factually distinguished the holding in *Grady v. Corbin*, and approved a second prosecution for possession of a firearm by a convicted felon, even though the defendant had previously been convicted of grand theft of the same firearm and armed burglary.

143. 573 So. 2d 813 (Fla. 1991).

144. FLA. STAT. § 784.045 (1989) provides:

(1) A person commits aggravated battery who, in committing battery:

weapon or firearm, may properly be reclassified as a felony of the first degree, pursuant to the enhancement provision contained in section 775.087(1)(b) of the Florida Statutes.¹⁴⁵ The supreme court found this result gives full effect to both section 784.045(1)(a) and the enhancement provision of 775.087(1)(b), and additionally, conforms with the legislative intent of providing increased punishments for violent criminal acts perpetrated with a firearm, or other weapon.¹⁴⁶

In an unrelated case, *State v. Nelson*,¹⁴⁷ the Fourth District Court of Appeal affirmed the dismissal of an information charging the offense of aggravated battery upon a person 65 years of age or older, on the grounds that the information failed to allege that the offense was carried out "knowingly."¹⁴⁸ The *Nelson* court concluded that the language of section 784.08(2), Florida Statutes,¹⁴⁹ requires that the state prove the defendant *knew* the victim was at least 65 years of age.¹⁵⁰

(a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or

(b) Uses a deadly weapon.

(2) Whoever commits aggravated battery shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

145. FLA. STAT. § 775.087 (1985) provides in pertinent part:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows: . . .

(b) In the case of a felony of the second degree, to a felony of the first degree.

146. *Lareau*, 573 So. 2d at 815.

147. 577 So. 2d 971 (Fla. 4th Dist. Ct. App. 1991).

148. *Id.* at 972.

149. FLA. STAT. § 784.08 (1989) provides in part:

(2) Whenever a person is charged with knowingly committing an assault or aggravated assault or a battery or aggravated battery upon a person 65 years of age or older, the offense for which the person is charged shall be reclassified as follows:

(a) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.

150. *Nelson*, 577 So. 2d at 972.

B. *Aggravated Child Abuse*

In *State v. Gethers*,¹⁵¹ the Fourth District Court of Appeal rejected the contention that the use of cocaine during pregnancy may constitute aggravated child abuse, contrary to section 827.04(1), Florida Statutes.¹⁵² On the other hand, persons who ingest cocaine during pregnancy might violate other statutory provisions.¹⁵³

C. *Controlled Substances*

In *Campbell v. State*,¹⁵⁴ the defendant was convicted of the offense of trafficking in cocaine. The Florida Supreme Court reversed the defendant's conviction after concluding that the defendant was entitled to a special jury instruction concerning the issue of dominion or control, based upon language in *Graces v. State*.¹⁵⁵

The defendant in *Campbell* was arrested in a reverse-sting operation after negotiating the purchase of four kilos of cocaine from an undercover police officer. Just prior to the completion of the transaction, the defendant was permitted to inspect one of the four kilos of cocaine while seated in the back seat of a car. The defendant placed the kilo on his lap and examined its contents. After expressing satisfaction with the cocaine, the defendant placed the kilo on the rear seat, exited the vehicle, and was arrested.¹⁵⁶

Based upon this factual scenario, the supreme court concluded that the defendant was entitled to a special jury instruction on the issue of dominion or control:

Temporary control of the contraband in the presence of its actual owner, for the purpose of verifying that it is what it purports to be

151. 585 So. 2d 1140 (Fla. 4th Dist. Ct. App. 1991).

152. FLA. STAT. § 827.04(1) (1987) provides:

Whoever, willfully, or by culpable negligence, deprives a child of, or allows a child to be deprived of, necessary food, clothing, shelter, or medical treatment, or who, knowingly or by culpable negligence, permits physical or mental injury to the child, and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to such child, shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

153. See *infra* notes 166-69 and accompanying text.

154. 577 So. 2d 932 (Fla. 1991).

155. 485 So. 2d 847, 848 (Fla. 3d Dist. Ct. App. 1986).

156. *Campbell*, 577 So. 2d at 932-33.

*or to conduct a sensory test for quality, prior to the consummation of the contemplated transaction, without more, does not constitute legal possession.*¹⁵⁷

The supreme court also reiterated that “a judgment of acquittal is proper where there is no evidence from which dominion or control can be inferred.”¹⁵⁸

In an unrelated matter, the definition of a “school,” for purposes of section 893.13(1)(e) of the Florida Statutes,¹⁵⁹ relating to narcotics offenses at or near schools, was decided in *State v. Roland*.¹⁶⁰ In that case, the Fourth District Court of Appeal held that offenses occurring near “kindergartens and preschools”¹⁶¹ are not subject to the enhancement penalties provided in section 893.13(1)(e)(1) of the Florida Statutes.¹⁶² The court determined that an elementary school, for purposes of the statute, means the “first through sixth grades.”¹⁶³ However, grade level is determined by performance level, not chronological age.¹⁶⁴

Finally, in *Johnson v. State*,¹⁶⁵ the Fifth District Court of Appeal

157. *Id.* at 934 (emphasis in original) (quoting *Garces v. State*, 485 So. 2d 847, 848 (Fla. 3d Dist. Ct. App. 1986)).

158. *Id.* at 935.

159. FLA. STAT. § 893.13(1)(e) (Supp. 1990) provides in part:

Except as authorized by this chapter, it is unlawful for any person to sell, manufacture, or deliver, or to possess with intent to sell, purchase, manufacture, or deliver, a controlled substance in, on, or within 1,000 feet of the real property comprising a public or private elementary, middle, or secondary school.

160. 577 So. 2d 680 (Fla. 4th Dist. Ct. App. 1991).

161. *Id.* at 681.

162. FLA. STAT. § 893.13(1)(e)(1) (Supp. 1990) provides, in part, that persons convicted of offenses occurring within 1000 feet of a school:

[S]hall be sentenced to a minimum term of imprisonment of 3 calendar years and shall not be eligible for parole or release under the Control Release Authority . . . or statutory gain-time . . . prior to serving such minimum sentence.

163. *Roland*, 577 So. 2d at 681.

164. Compare *State v. Edwards*, 581 So. 2d 232 (Fla. 4th Dist. Ct. App. 1991) (definition of school satisfied where one child was performing at the first grade level) with *State v. Lee*, 583 So. 2d 1055, 1055 (Fla. 4th Dist. Ct. App. 1991) (school for severely mentally handicapped and retarded persons, ages five to twenty-two years old; not a school for purposes of enhancement statute where “the students have a minimal I.Q. and function below the level of a two year old”).

165. 578 So. 2d 419 (Fla. 5th Dist. Ct. App. 1991).

determined that a pregnant person who ingests cocaine may violate section 893.13(1)(c) of the Florida Statutes,¹⁶⁶ concerning the delivery of controlled substances to minors. Under the theory advanced in *Johnson*, the criminal act occurs at the moment of birth:

Appellant voluntarily took cocaine into her body, knowing it would pass to her fetus and knowing (or should have known) that birth was imminent. She is deemed to know that an infant at birth is a person, and a minor, and that delivery of cocaine to the infant is illegal. We can reach no other conclusion logically.¹⁶⁷

The court concluded that it was “singularly unimpressed” with “what pregnant mothers might resort to if they know they may be charged with this crime.”¹⁶⁸

D. *Driving Under the Influence*

Section 316.193(1)(2)(b), Florida Statutes, provides that any person convicted of a fourth or subsequent offense of driving under the influence is guilty of a third degree felony.¹⁶⁹ In *State v. Rodriguez*,¹⁷⁰ the Florida Supreme Court determined that in order to invoke the jurisdiction of the circuit court, an information alleging the offense of felony driving under the influence must “unambiguously” charge a felony.¹⁷¹ The supreme court concluded that reference in the information to section 316.193(1)(2)(b) was sufficient for this purpose.¹⁷²

However, to comply with due process requirements, the supreme court held that the charging document must specifically allege each predicate DUI offense.¹⁷³ Therefore, to the extent that a jury is provided with a copy of the information during its deliberations, any refer-

166. FLA. STAT. § 893.13(1)(c) (1987) provides in part: “Except as authorized by this chapter, it is unlawful for any person 18 years of age or older to deliver any controlled substance to a person under the age of 18 years.”

167. *Johnson*, 578 So. 2d at 420.

168. *Id.*

169. FLA. STAT. § 316.193(1)(2)(b) (Supp. 1988) provides: “Any person who is convicted of a fourth or subsequent violation of subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.”

170. 575 So. 2d 1262 (Fla. 1991).

171. *Id.* at 1264.

172. *Id.*

173. *Id.* at 1266.

ence to the predicate offenses must be redacted.¹⁷⁴

Additionally, in the event that a verdict of guilty is obtained, the supreme court's decision in *Rodriguez* directs that the trial court, sitting as fact-finder, "shall" conduct a separate evidentiary hearing to determine whether the defendant has, in fact, been previously convicted of DUI on three or more occasions. The State bears the burden of proving the existence of the predicate offenses beyond a reasonable doubt.¹⁷⁵

In a related issue, the supreme court held in *Hlad v. State*,¹⁷⁶ that an uncounseled DUI conviction may serve as a predicate offense in a prosecution for felony driving under the influence, but only if the maximum penalty for the prior offense was no greater than six months incarceration, and the defendant was not actually incarcerated as a result of the conviction.¹⁷⁷ This bright-line test expressly approves the analysis urged by United States Supreme Court Justice Harry Blackmun in *Baldasar v. Illinois*.¹⁷⁸

Finally, in *State v. Reisner*,¹⁷⁹ the Fifth District Court of Appeal found Rules 10D-42.023¹⁸⁰ and 10D-42.024¹⁸¹ of the Florida Administrative Code, relating to chemical breath testing, unconstitutionally void for vagueness. Section 316.1932(1)(f)(1) of the Florida Statutes requires the Department of Health and Rehabilitative Services to implement rules governing the administration of all chemical breath testing in the State of Florida.¹⁸² The results of a chemical breath test are

174. *Id.*

175. *Rodriguez*, 575 So. 2d at 1266.

176. 16 Fla. L. Weekly S586 (Fla. 1991).

177. *Id.* at S586.

178. 446 U.S. 222 (1980) (Blackmun, J. concurring).

179. 584 So. 2d 141 (Fla. 5th Dist. Ct. App. 1991).

180. FLA. ADMIN. CODE ANN. r.10D-42.023 (1990) governing the *registration* and *yearly testing* of chemical breath test instruments provides in part: "All such chemical tests, instruments or devices registered hereunder shall be checked at least once each calendar year (January 1 through December 31) for *accuracy* and *reproducibility*." (emphasis added).

181. FLA. ADMIN. CODE ANN. r. 10D-42.024(1)(c) (1990), governing the *monthly maintenance* of chemical breath test instruments, provides:

Chemical tests, instruments and devices used in the breath test method shall be inspected at least once each calendar month by a technician to ensure *general cleanliness, appearance, and accuracy*.

Id. (emphasis added).

182. FLA. STAT. § 316.1932(1)(f)1 (Supp. 1988) provides in part: "The tests determining the weight of alcohol in the defendant's blood shall be administered at the

inadmissible in a criminal proceeding¹⁸³ if the testing procedures fail to substantially comply with section 316.1932,¹⁸⁴ and the applicable administrative rules.¹⁸⁵ Pursuant to section 316.1932((1)(f)(1):

Such rules and regulations shall be adopted after public hearing, shall specify precisely the test or tests which are approved by the Department of Health and Rehabilitative Services for reliability of result and facility of administration which shall be followed in all such tests given under this section.¹⁸⁶

In *Reisner*, the court determined that the rules and incorporated forms promulgated to maintain the "accuracy" and "reproducibility" of chemical breath test machines failed to define those terms adequately, and were unconstitutionally void for vagueness.¹⁸⁷ Therefore, the court excluded the results of the defendant's chemical breath test.

request of a law enforcement officer substantially in accordance with rules and regulations which *shall* have been adopted by the Department of Health and Rehabilitative Services." (emphasis added).

183. FLA. STAT. § 316.1932(1)(f)(1) (Supp. 1988) provides in part: "The tests determining the weight of alcohol in the defendant's blood shall be administered at the request of a law enforcement officer substantially in accordance with rules and regulations which *shall* have been adopted by the Department of Health and Rehabilitative Services." (emphasis added). *But see* State v. Bender, 382 So. 2d 697, 700 (Fla. 1980) ("[T]he results of blood alcohol tests are admissible into evidence without compliance with the administrative rules if the traditional predicate is laid which establishes the reliability of the test, the qualifications of the operator, and the meaning of the test results by expert testimony.").

184. FLA. STAT. § 316.1932(1)(b) (Supp. 1988) provides:

An analysis of a person's breath, in order to be considered valid under this section, must have been performed *substantially* according to methods approved by the Department of Health and Rehabilitative Services. For this purpose, the department is authorized to approve satisfactory techniques or methods. Any insubstantial differences between approved techniques and actual testing procedures in any individual case shall not render the test or test results invalid.

(emphasis added). FLA. STAT. § 316.1932(1)(f)(1) (Supp. 1988) provides in part: "The tests determining the weight of alcohol in the defendant's blood shall be administered at the request of a law enforcement officer *substantially in accordance* with rules and regulations which shall have been adopted by the Department of Health and Rehabilitative Services." (emphasis added).

185. *See supra* notes 180-81.

186. FLA. STAT. § 316.1932((1)(f)(1) (Supp. 1988).

187. State v. Reisner, 584 So. 2d 141, 144 (Fla. 5th Dist. Ct. App. 1991) (citing State v. Cumming, 365 So. 2d 153 (Fla. 1978)).

E. Grand Theft

In *State v. G.C.*,¹⁸⁸ the Florida Supreme Court held that “mere presence as an after-acquired passenger in a vehicle, with knowledge that it has been stolen,”¹⁸⁹ was insufficient to sustain a conviction for the offense of grand theft.¹⁹⁰ The facts revealed that G.C., a fourteen-year-old juvenile, accepted a ride in a stolen vehicle. The defendant admitted that he suspected the car was stolen due to the fact that the vehicle’s steering column was broken.¹⁹¹

However, unlike the driver of a stolen car, the supreme court determined that the defendant’s mere presence as a passenger was insufficient evidence to prove “possession, dominion, or control” over the vehicle.¹⁹² The supreme court distinguished the defendant’s “use” from the specific intent to either temporarily or permanently “deprive” or “appropriate” the property of another.¹⁹³ To prove the “taking,” the G.C.

188. 572 So. 2d 1380 (Fla. 1991).

189. *Id.* at 1382.

190. FLA. STAT. § 812.014 (1987) provides in part:

(1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.

FLA. STAT. § 812.012 (1987) provides in part:

(2) “Obtains or uses” means any manner of:

(a) Taking or exercising control over property.

(b) Making any unauthorized use, disposition, or transfer of property.

(c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.

(d) 1. Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or

2. Other conduct similar in nature.

191. *G.C.*, 572 So. 2d at 1380-81.

192. *Id.* at 1382.

193. *Id.* at 1381. The supreme court concluded, however, that the defendant’s unauthorized entry into the stolen motor vehicle constituted the offense of trespass to a conveyance, contrary to FLA. STAT. § 810.08(1) (1987) which provides:

Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so,

court concluded that proof of a specific intent to commit the offense of theft is necessary. This, the supreme court suggested, requires "some active step" on the part of the defendant beyond merely riding in the vehicle as a passenger.¹⁹⁴

F. *Keeping a House of Ill Fame*

In *Warren v. State*,¹⁹⁵ the Florida Supreme Court examined the constitutionality of section 796.01, Florida Statutes.¹⁹⁶ Finding the term "ill fame" unconstitutionally vague, the court declared the statute unconstitutional. Although the supreme court concluded that the term "ill fame" may have provided sufficient notice of prohibited conduct in the past, it was nevertheless persuaded that in today's society, the term fails to provide sufficient notice between permitted and prohibited conduct.¹⁹⁷

commits the offense of trespass in a structure or conveyance.

194. *G.C.*, 572 So. 2d at 1381-82; *see State v. Allen*, 362 So. 2d 10, 12 (Fla. 1978).

195. 572 So. 2d 1376 (Fla. 1991).

196. FLA. STAT. § 796.01 (1987) provides: "Whoever keeps a house of ill fame, resorted to for the purpose of prostitution or lewdness, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084." On the other hand, FLA. STAT. § 796.07 (1987) provides in part:

(2) It is unlawful in the state:

(a) To keep, set up, maintain, or operate any place, structure, building, or conveyance for the purpose of lewdness, assignation, or prostitution.

(5) Any person who violates any provision of this section is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

According to the *Warren* court, "[i]ll fame' is the element that distinguishes the felony prohibited by § 796.01, Fla. Stat. (1987), from the misdemeanor prohibited by § 796.07(2)(a), Fla. Stat. (1987)." *Warren*, 572 So. 2d at 1377 n.3.

197. *Warren*, 572 So. 2d at 1377. The supreme court in *Warren* conceded that "[w]hile the general population might have understood the meaning of 'ill fame' a century ago, the lack of definition in the statutes, jury instructions, and cases is fatal to its continued validity." *Id.*

The term "ill fame" is defined by one source as follows: "Evil repute; notorious bad character. Houses of prostitution, gaming houses, and other such disorderly places are called 'houses of ill fame,' and a person who frequents them a person of ill fame." BLACK'S LAW DICTIONARY 673 (5th ed. 1979).

The *Warren* court made special reference to the frustrations of one prosecutor, who, referring to the term "ill fame," unabashedly stated: "How are we going to prove that element, what witnesses are we going to use?" *Warren*, 572 So. 2d at 1377 (citing to *State v. Warren*, 558 So. 2d 55, 58 n.4 (Fla. 2d Dist. Ct. App. 1990) (quot-

G. Robbery

Section 812.13, of the Florida Statutes, defines the offense of robbery.¹⁹⁸ The element of “taking,” for purposes of section 812.13, is defined in the Florida Standard Jury Instructions as one of the four elements necessary to prove the offense of robbery. This element requires proof that:

The taking was with the intent to permanently [deprive (*victim*) of his right to the property or any benefit from it.] [appropriate the property of (*victim*) to his own use or to the use of any person not entitled to it.]¹⁹⁹

In *Daniels v. State*,²⁰⁰ the Florida Supreme Court held that “the specific intent to commit robbery is the intent to steal, i.e., to deprive an owner of property either permanently or temporarily.”²⁰¹ By holding that the specific intent to commit robbery is either the permanent or temporary deprivation of the property of another, the supreme court’s opinion in *Daniels* expands the definition of “taking,”²⁰² and necessa-

ing an unpublished portion of the trial court record in *State v. Palmieri*, 558 So. 2d 53 (Fla. 2d Dist. Ct. App. 1990), *rev’d*, *Palmieri v. State*, 572 So. 2d 1378 (Fla. 1991)).

198. FLA. STAT. § 812.13 (1989) provides in part: “(1) ‘Robbery’ means the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear.”

199. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 155 (The Florida Bar 1989).

200. 587 So. 2d 460 (Fla. 1991).

201. *Id.* at 462.

202. The supreme court’s determination in *Daniels* that the “taking” may be temporary or permanent was based on a 1977 legislative amendment to chapter 812. *Id.*; see Chapter 77-342, Laws of Florida, codified at FLA. STAT. § 812.014 (concerning the offense of theft). That revision changed the language of the theft statute, in part, by adding the words “temporarily or permanently” to subsection 812.014(1).

In *State v. Denumann*, 427 So. 2d 166 (Fla. 1983), the Florida Supreme Court suggested in dicta that the 1977 legislative amendment had no impact on section 812.13, relating to the offense of robbery. *Id.* at 169. *Daniels* specifically recedes from that portion of *Denumann*. *Daniels*, 587 So. 2d at 462.

Additionally, in *State v. Bell*, 394 So. 2d 979 (Fla. 1991), the following question was certified: “Whether specific intent (i.e., the intent to *permanently* deprive the owner of property) is still a requisite element of the crime of robbery as now defined by Section 812.13, Florida Statutes (1975).” *Id.* at 979 (emphasis added). The supreme court answered the question in the affirmative, stating: “We hold that specific intent is still a requisite element of the crime of robbery.” *Id.* at 980.

rily amends the appropriate jury instruction when the offense of robbery is alleged.

V. CONCLUSION

The Florida Supreme Court's numerous decisions in the area of sentencing, and the guidelines, continues to provide much needed refinement. Most, but not all, of the supreme court's sentencing decisions conceived reasonably appropriate solutions to difficult problems. In other instances, however, the supreme court's efforts failed to provide adequate guidance

In particular, the supreme court has again failed to clearly define what constitutes a continuing and persistent patterns of criminal conduct. Similarly, the test announced by the supreme court in *Clark v. State*,²⁰³ concerning consolidated sentencing hearings, seems certain to foster numerous appeals.

Other important sentencing issues appear on the horizon, as well. One area which seems especially ripe for review concerns matters relating to the sentencing of habitual felony offenders. In the final analysis, then, it appears that as long as the sentencing guidelines remain in existence, there will be a fresh supply of criminal law cases to decipher and digest, and most importantly, to survey.

Based upon the manner in which the certified question in *Bell* was phrased, the supreme court's answer to the certified question reasonably suggested that the specific intent necessary to commit the offense of robbery included "permanent" deprivation. To this extent, the supreme court's decision in *Daniels* recedes from the language contained within the parenthetical portion of the certified question in *Bell*. *Daniels*, 587 So. 2d at 462.

203. See *supra* notes 23-30 and accompanying text.

Elder Law: 1991 Survey of Florida Law

John Sanchez*

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I. INTRODUCTION

This survey will treat recent decisions by Florida courts which impact the elderly. The cases chart statutory measures which punish crimes against the elderly, issues bearing on vital medical decisions over the elderly's right to proper care and treatment, and in some cases, to die. It covers as well matters dealing with the right of support and pension benefits sounding in the elderly setting and those issues unfolding in adult communities. It wraps up with a look at the state of legal representation for the elderly.

II. MEDICAL ISSUES

In *In re Guardianship of Browning*,¹ a landmark ruling, the Florida Supreme Court delivered a sweeping declaration on a competent or incompetent person's right to say no to all forms of medical treatment. It was a ringing endorsement of privacy, personal autonomy, and self-determination.

In 1985, Estelle Browning drew up a living will, a document containing instructions on whether aggressive medical care is to be applied

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1. 568 So. 2d 4 (Fla. 1990).

at life's twilight. Beyond refusing the customary life supports, like respirators, Mrs. Browning also recorded her steadfast opposition to forced feeding.

The following year, Mrs. Browning suffered a stroke which left her unable to swallow. Overriding her written directive, the hospital inserted a feeding tube directly into her stomach, where it remained for eighteen uncomfortable months before giving way to a nasogastric tube. In the meantime, Doris Herbert, Mrs. Browning's court-appointed guardian, citing the living will, asked the trial court for permission to cut off the unwanted life line.

In the course of an evidentiary hearing, an earlier living will bearing identical language offered striking proof that Mrs. Browning's intentions were more than casual chatter. Neighbors also testified that, time and again, Mrs. Browning voiced horror at the prospect of a protracted death. Grim medical evidence indicated that while not comatose, Mrs. Browning had lapsed into a persistent vegetative state. Without the feeding tubes, she would die within ten days. With them, she could linger in limbo for a year or longer.

The trial court refused to order the tube removed because Mrs. Browning's death was not imminent. In support of its conclusion, the court relied on Florida law which at the time flatly ruled out sustenance from its definition of "life-prolonging procedure."² Reaching out beyond statutory law, however, the appellate court backed Mrs. Browning's decision to turn down aggressive intervention,³ citing the right to privacy embedded in the Florida Constitution as authority.⁴ The Florida Supreme Court agreed.⁵

In sizing up the sweep of Florida's constitutional privacy guarantee, the supreme court opened its analysis with the premise that each individual holds, as an article of faith, "sole control of his or her person."⁶ One measure of self-determination, the supreme court noted, "is the right to make choices pertaining to one's health, including the right to refuse unwanted medical treatment."⁷ Citing dicta contained in the United States Supreme Court ruling in *Cruzan v. Director, Missouri*

2. 1990 Fla. Laws ch. 90-223. Since October 1, 1990, a patient may authorize the withholding or withdrawal of nutrition or hydration under certain circumstances.

3. *In re Guardianship of Browning*, 543 So. 2d 258, 267 (Fla. 2d Dist. Ct. App. 1989).

4. FLA. CONST. art. I, § 23.

5. *Browning*, 568 So. 2d at 4.

6. *Id.* at 10.

7. *Id.*

Department of Health,⁸ the Florida Supreme Court emphasized that a competent person has a constitutional right to refuse extraordinary medical intervention without regard to medical condition.⁹ In support of this principle, the Florida Supreme Court applauded the result reached in *Bouvia v. Superior Court*, a California case sustaining a competent patient's prerogative to refuse *any* medical treatment.¹⁰

The supreme court also relied on its earlier decision in *Public Health Trust v. Wons*, which recognized the right of a competent and middle-aged Jehovah's Witness to turn down an emergency blood transfusion, even though it meant certain death.¹¹ In *Wons*, the supreme court expanded their previous holding by ruling an incompetent person¹² is equally entitled to refuse medical treatment, if such intent was communicated while the individual was competent.¹³

Throughout the balance of the opinion, the supreme court measured the countervailing interests advanced by the state, against an individual's bid to refuse medical treatment.¹⁴ It rejected outright the suggestion that Mrs. Browning may have had a change of heart since drawing up her living will.¹⁵ As for the state's interest in preserving life, a potent argument in the proper setting, the supreme court concluded that this interest is weakened when the question is "not whether, but when, for how long and at what cost to the individual . . . life may be briefly extended."¹⁶

Moreover, the supreme court reasoned that the state's interest in preventing suicide bears little heft when removing life support merely lets nature take its course.¹⁷ Finally, it roundly dismissed the idea that honoring a person's right to halt all life-saving measures somehow compromises the integrity of the medical profession.¹⁸

8. 110 S. Ct. 2841, 2852 (1990).

9. *Browning*, 568 So. 2d at 10.

10. *Id.* at 10-11 (citing *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1142-43 (1986)).

11. 541 So. 2d 96 (Fla. 1989).

12. Reform legislation has since replaced the "incompetency" concept with "incapacity."

13. *Browning*, 568 So. 2d at 12 (citing *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 923 (Fla. 1984)).

14. *Id.* at 13-14.

15. *Id.* at 13.

16. *Id.* at 14.

17. *Id.*

18. *Browning*, 568 So. 2d at 14.

In what is likely to be its signature feature, the supreme court firmly cast aside all argument that the judiciary should serve as a watchdog upon the decision to pull life supports.¹⁹ In a bold stroke, it held that a court order was not necessary to halt medical treatment, if “do not resuscitate” instructions are contained either in a living will, or in oral declarations; or if the decision is arrived at by a proxy authorized in writing to make all health care decisions for the patient.²⁰ Furthermore, life supports may be removed upon evidence of the patient’s intent, without a court order, without regard to whether a surrogate has been named to carry out the instructions.²¹

When a patient leaves oral or written “end of life” directions and designates a proxy to carry out these instructions, common sense safeguards are in order. For example, the proxy, with written authority, must support the patient’s decision to remove life supports by clear and convincing evidence.²² The surrogate also must be satisfied that the patient drew up the plans knowingly, willingly, and without undue influence; and, that the evidence of the patient’s oral declarations is reliable.²³ Beyond this, there must be a medical finding that the patient’s prognosis is hopeless.²⁴ Finally, the surrogate must ensure that the patient’s instructions have been carefully weighed and satisfied.²⁵

When a patient leaves no instructions, except to name someone to act on her behalf, a couple of conditions must first be met before life support may be removed. For example, the surrogate must certify that the proxy authorization was made knowingly, willingly, and without undue influence.²⁶ Furthermore, the proxy must obtain the statements of three physicians that the patient is unlikely to recover.²⁷

When ambiguity clouds the patient’s instructions, or challenges to the proxy’s decision emerge, courts will unavoidably end up breaking the deadlock.²⁸ Any proceeding, however, will be streamlined and the court will only look at conflicting testimony bearing on the patient’s

19. *Id.* at 15.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Browning*, 568 So. 2d at 15.

24. *Id.* at 16.

25. *Id.* at 15.

26. *Id.* at 15-16.

27. *Id.* at 16.

28. *Browning*, 568 So. 2d at 16.

intent.²⁹ To move matters along, written proxy authorizations carry a rebuttable presumption as clear and convincing evidence of the patient's wishes.³⁰ Likewise, physicians' medical findings draw a rebuttable presumption that the conditions for removal of life support have been met.³¹

Not surprisingly, courts note that penned instructions of the patient's wishes are more reliable evidence, and thus, the written word draws broader judicial deference.³² Accordingly, while a patient's written statements can stand on their own, the surrogate must bear the burden of proof when her decision to discontinue life support rests on oral evidence alone, and is challenged.³³

In Mrs. Browning's case, the only question which called for judicial resolution was whether her condition was terminal. Reviewing the medical evidence, the supreme court was satisfied her prognosis was dim.³⁴ Accordingly, it found that the guardian's request to remove the feeding tube should have been honored.³⁵

Justice Overton, in dissent, would require court approval whenever oral declarations by the patient represent the only evidence cited by a surrogate in the bid to terminate the patient's life supports.³⁶ Justice Overton voiced concern over the possibility that proxies may profit financially from an early death of the incompetent.³⁷

III. COMMUNITY AGE RESTRICTIONS

*Brookridge Community Property Owners v. Brookridge, Inc.*³⁸ concerned a dispute over whether age restrictions burdening a retirement community in Hernando County were binding on the owners of undeveloped lots in the development. The defendant homeowners association recorded age restrictions six years after the plaintiff, the community's developer, assigned management powers to the defendant. Before the age restrictions were recorded, however, lots were sold with-

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Browning*, 568 So. 2d at 16.

34. *Id.* at 17.

35. *Id.*

36. *Id.* at 18 (Overton, J., dissenting).

37. *Id.*

38. 573 So. 2d 972 (Fla. 5th Dist. Ct. App. 1991).

out regard to the buyer's age.

Under the disputed restrictions, at least one permanent occupant had to be at least fifty-five years of age and all permanent occupants were required to be at least eighteen years of age. While the restriction only covered about 140 of the 2,856 platted lots that remained undeveloped when the covenant was recorded, nearly eighty percent of the occupied homes already contained at least one person fifty-five years or older.

The plaintiff developer, who owned the bulk of the undeveloped lots, sought declaratory and injunctive relief against the homeowners association, claiming that the age rule was unreasonable. Plaintiff's successful motion for summary judgment persuaded the trial court that the line drawn by the age rule between improved and unimproved lots, and the series of exemptions for improved homes, were arbitrary.

In siding with the developer, the trial court reasoned that a rule which exempts from sixty to ninety-five percent of the lots in question was not crafted to serve the goal of building an older adult community.³⁹ The court pointed out that it was flatly arbitrary to prohibit current owners of unimproved lots from building a residence in which grandchildren might reside.⁴⁰ Accordingly, the homeowners association was permanently enjoined from enforcing the age rule.⁴¹

While the Fifth District Court of Appeal agreed with the result, it took issue with the trial court's reasoning.⁴² Even if the rule was reasonable, the appellate court found that the homeowners association lacked the authority to enact such a rule in the first place.⁴³ The power to enact age restrictions could not have been assigned by the developer, the court concluded, because it lacked the authority "to assign as against owners who purchased lots without notice of age restrictions"⁴⁴

IV. ADULT CONGREGATE LIVING FACILITIES

Mang v. Country Comfort Inn,⁴⁵ addressed whether an administrator of a retirement community could be sued for violating a resi-

39. *Id.* at 975.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Brookridge*, 573 So. 2d at 975.

44. *Id.*

45. 559 So. 2d 672 (Fla. 3d Dist. Ct. App. 1990).

dent's right, under the Florida Adult Congregate Living Facilities Act,⁴⁶ to receive proper medical attention.

Mang suffered injuries after falling in a pool of urine on the floor of a bathroom at the Country Comfort Inn, an adult congregare living facility. Not only had Mang lain in the urine unattended overnight, a full day passed before he was seen by a doctor. The trial court dismissed Mang's charge that Perez, the facility's administrator, violated Mang's statutory rights.

After reviewing Florida's Adult Congregate Living Facilities Act, the appellate court reinstated Mang's claim against Perez.⁴⁷ The Act accords residents of adult congregare living facilities the right to live in a safe and decent living environment, free from abuse and neglect. The Act also gives residents the right to receive proper health care.⁴⁸ Finally, it assigns to the administrators of such facilities a continuing duty to assess whether a resident is "incontinent of bladder and bowel"⁴⁹

Under the Act, residents are expressly entitled to press claims against administrators who fail in their duties as caretakers.⁵⁰ The appellate court concluded Mang's second drafting effort stated an adequate case to survive pre-trial challenge.⁵¹ The claim against Perez was accordingly remanded to the trial court for further proceedings.⁵²

The negligent administration of an adult congregare living facility drew judicial notice in *B.B.A. v. Department of Health and Rehabilitative Services*.⁵³ The defendant, B.B.A., and his wife were the owners, and the wife was the administrator, of an adult congregare living facility in which the plaintiff, C.C., a mentally disabled person with a history of seizures, had resided for several years.⁵⁴ While the plaintiff was hospitalized, a defendant physician prescribed dilantin to control the seizures.⁵⁵ The defendant failed to check plaintiff's dilantin blood level for seventeen months after the plaintiff left the hospital to return once

46. FLA. STAT. § 400.401 (1987).

47. *Mang*, 559 So. 2d at 673-75.

48. FLA. STAT. § 400.28 (1987).

49. FLA. ADMIN. CODE ANN. r.10A-5.0181(3)(e) (1986) (Adult Congregate Living Facilities).

50. FLA. STAT. § 400.29 (1987).

51. *Mang*, 559 So. 2d at 675.

52. *Id.*

53. 581 So. 2d 955 (Fla. 1st Dist. Ct. App. 1991).

54. *Id.*

55. *Id.*

again to the defendant's care.⁵⁶ Subsequently, the plaintiff was re-hospitalized and lapsed into seizures.⁵⁷

An HRS investigator, suspecting neglect, poured over the plaintiff's medical files and interviewed medical personnel. The HRS investigator concluded that the plaintiff was, indeed, a victim of neglect.⁵⁸ HRS approved the investigator's findings and entered the defendant's name on its central abuse registry.⁵⁹ The defendant challenged this move and requested that HRS expunge the record of neglect.⁶⁰

In the course of an administrative hearing conducted by HRS, a neurology specialist testified that a seizure patient's dilantin level should be checked annually.⁶¹ Furthermore, the specialist noted that a caregiver must be acutely alert when handling a mentally disabled individual who may not wholly appreciate the importance of taking his medication regularly.⁶²

After finding, under Florida law, that the plaintiff was a "disabled adult"⁶³ and that the defendant was a "caregiver,"⁶⁴ the hearing officer ratified the finding of neglect and recommended that HRS deny the defendant's request to wipe out the registry entry of his neglect.⁶⁵ HRS adopted the hearing officer's recommendations and an appeal followed.⁶⁶

The court of appeal addressed the question of whether competent, substantial evidence supported HRS' finding of neglect.⁶⁷ Citing the neurologist's un rebutted testimony and the defendant's admission that he had not measured the plaintiff's dilantin blood level for seventeen months, the court affirmed the finding of neglect.⁶⁸

In his defense, the defendant also claimed that HRS failed to connect the defendant's level of care with the plaintiff's subsequent

56. *Id.*

57. *Id.* at 957 (Zehmer, J., dissenting).

58. *B.B.A.*, 581 So. 2d at 956.

59. FLA. STAT. § 415.103(3)(c) (1989) (the statute requires that HRS maintain a central registry and tracking system where all reports of abuse are logged, including the HRS final disposition indicating the results of its investigation).

60. *B.B.A.*, 581 So. 2d at 956.

61. *Id.*

62. *Id.*

63. FLA. STAT. § 514.102(8) (1989).

64. FLA. STAT. § 415.102(4) (1989).

65. *B.B.A.*, 581 So. 2d at 956.

66. *Id.*

67. *Id.*

68. *Id.* at 957.

seizures.⁶⁹ Unlike tort claims, where doctrines like proximate cause and contributory negligence must be weighed, the court concluded that once it was established that the defendant did not take the steps a prudent caregiver would follow, the statutory definition of neglect had been met.⁷⁰

The court's opinion was not unanimous, however. Judge Zehmer, in dissent, disputed whether competent, substantial evidence proved that the plaintiff's injury was the outcome of the defendant's failure to act; in other words, the plaintiff had failed to prove that the defendant's acts were the proximate cause of the plaintiff's injury.⁷¹ Judge Zehmer pointed out that each time the plaintiff entered the hospital, his dilantin level was satisfactory.⁷² Given that, the judge noted it was altogether possible that the plaintiff's dilantin level was normal over the course of those seventeen months between hospital stays.⁷³ Moreover, the judge pointed out that the plaintiff's seizures may not even be traced to a low dilantin level; the seizures could be credited to a cerebral vascular accident.⁷⁴

Finally, no statute or HRS guideline called for an annual check of dilantin blood level in this type of setting.⁷⁵ Indeed, the expert did not testify to a minimum standard of care, but said, "I think an optimum standard of care is to do it at least once a year."⁷⁶ Accordingly, the judge concluded that since the statute does not define "neglect" as failure to extend optimum care, no competent or substantial evidence laid out a minimum statutory standard.⁷⁷ Therefore, without notice of the prevailing benchmarks of professional care, the defendant's right to due process had been violated.⁷⁸

V. PENSION AND SUPPORT ISSUES

The question of whether a husband's disability pension may be

69. *Id.*

70. *Id.*

71. *B.B.A.*, 581 So. 2d at 957 (Zehmer, J., dissenting).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 958.

76. *B.B.A.*, 581 So. 2d at 958.

77. *Id.*

78. *Id.*

cast as a marital asset was at the heart of *Hoffner v. Hoffner*.⁷⁹ The lower court had awarded the wife part of her ex-husband's disability pension as permanent periodic alimony, treating these regular payments as a marital asset which survived the wife's remarriage.⁸⁰

While the court of appeal acknowledged that there would be times when a future-vesting pension would hold all the earmarks of marital property, it is not so when the spouse is presently drawing benefits.⁸¹ Under these circumstances, the pension acts as a proxy for future lost income, and that lies beyond the reach of a former spouse.⁸² Although the pension was not marital property, subject to equitable distribution, it could continue to be a source of alimony.⁸³ Accordingly, the lower court was free to count pension distributions as income in arriving at the proper amount of alimony.⁸⁴ However, unlike marital property, the wife's claim to a share of the pension is terminated by her re-marriage or the death of either spouse.⁸⁵

In contrast, the court of appeal in *Lovelady v. Lovelady*, concluded that a husband's pension plan should be treated as a marital asset in calculating the proper amount of alimony.⁸⁶

In *Town of Davie Police Pension Fund v. Cummings*, the Fourth District Court of Appeal held that a public pension fund was immune to a garnishment claim by a creditor of a police officer over an outstanding debt.⁸⁷

Nowadays, and with regard to support, grandparents are thrust more and more into the role of surrogate parents to their grandchildren. In *Wilson v. Department of Health and Rehabilitative Services*, a court had placed two children in their wayward mother's custody as long as she lived under the watchful eye of the children's grandmother.⁸⁸ Although the children's mother was drawing food stamps, the grandmother suspected the children were being shortchanged.⁸⁹ For this reason, the grandmother applied separately for food stamps for the

79. 577 So. 2d 703 (Fla. 4th Dist. Ct. App. 1991).

80. *Id.* at 704.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Hoffner*, 577 So. 2d at 704.

85. *Id.*

86. 576 So. 2d 946 (Fla. 2d Dist. Ct. App. 1991).

87. 576 So. 2d 1331 (Fla. 4th Dist. Ct. App. 1991).

88. 561 So. 2d 660, 661 (Fla. 1st Dist. Ct. App. 1990).

89. *Id.*

children, averring their status as one of an independent food stamp household, apart from their mother and grandparents.⁹⁰

In the course of administrative hearings, HRS ruled that the grandmother was acting as a “custodial parent,” that she and her husband were a part of the children’s food stamp household, and because the household income exceeded the cap on eligibility, the application was denied.⁹¹

In a reversal of fortunes, the First District Court of Appeal judged the agency’s definition of a “food stamp household” tightfisted and, moreover, at odds with federal eligibility standards.⁹² Indeed, federal law carves out an exception to the definition of a parent-child household when “one of the parents . . . is an elderly or disabled member.”⁹³ As it turned out, appellant Wilson’s 82-year-old husband handily met the federal definition of elderly.⁹⁴

The only other roadblock bearing on food stamp eligibility—whether the putative food stamp household routinely buys food and prepares meals together—was not addressed by the administrative hearing officer and the court remanded for further attention on this matter.⁹⁵

VI. CRIMES AGAINST THE ELDERLY

Florida lawmakers recently stiffened penalties for assault and battery when the victim is sixty-five years of age or older.⁹⁶ The measure’s language, however, is unclear about whether the “knowingly” element of the offense refers to the assault and battery or whether it means that the aggressor must know that his victim is elderly.

In *State v. Nelson*, the trial court ruled that “knowingly” cannot bear on the assault and battery offense because intent is already part of its definition.⁹⁷ The Fourth District Court of Appeal reluctantly agreed, but at the same time cast doubt on whether the lawmakers seriously intended that the state would have to prove the criminal *knew* the victim was sixty-five years or older before the stepped-up sanction could

90. *Id.*

91. *Id.*

92. *Id.* (citing 7 U.S.C. § 2012(i) (1988)).

93. 7 U.S.C. § 2012(i) (1988).

94. *Wilson*, 561 So. 2d at 663 (citing 7 U.S.C. § 2012(r)(1) (1988)).

95. *Id.*

96. FLA. STAT. § 784.08(2) (1989).

97. 577 So. 2d 971 (Fla. 4th Dist. Ct. App. 1991).

be applied.⁹⁸ After all, the court wryly noted, the law was adopted to protect the elderly, not the criminal.⁹⁹

In support of its reading of the law, the court assayed identical wording in another penal code provision that sharpens penalties when the victim of assault and battery is a law enforcement officer or firefighter. The Florida Supreme Court interpreted the word "knowingly" to mean "that the accused *know* that his victim is a law enforcement officer or firefighter."¹⁰⁰ But, the "knowingly" element makes more sense in the situation where off-duty police officers or fire fighters are not identifiable as such. By contrast, calling on the state to prove that the defendant knew his victim was elderly is an intolerable burden.

While the Eleventh Circuit reached the opposite conclusion recently on a similar matter,¹⁰¹ the Fourth District Court of Appeal prudently aligned itself with Florida Supreme Court precedent for the time being.

VII. ATTORNEY'S FEES AND ISSUES OF REPRESENTATION

Availability of attorney's fees earned from efforts to force HRS to hand over its report on nursing home abuse was taken up by the Third District Court of Appeal in *Department of Health & Rehabilitative Services v. Martin*.¹⁰² After Idora Smith died in a nursing home at the end of 1988, HRS conducted an investigation under chapter 415 of Florida law¹⁰³ in response to grapevine reports of elder abuse. Smith's personal representative, appellee Harriet J. Roberts Martin, enlisted Herman M. Klemick as counsel to assess the odds of pressing a successful wrongful death action against the nursing home.¹⁰⁴ HRS steadfastly refused to hand over to Klemick the fruits of its chapter 415 investigation under the mistaken belief that access was blocked by chapter 415.¹⁰⁵ Striking a balance between accommodating Klemick

98. *Id.*

99. *Id.*

100. *Street v. State*, 383 So. 2d 900, 901 (Fla. 1980) (emphasis added).

101. *See United States v. Williams*, 922 F.2d 737 (11th Cir. 1991) (holding that the government need only prove that a person was under age eighteen when employed in the commission of a drug offense, not that defendant knew the person was under eighteen).

102. 574 So. 2d 1223 (Fla. 3d Dist. Ct. App. 1991).

103. *See Adult Protective Service Act*, FLA. STAT. §§ 415.101-608 (1987).

104. *Martin*, 574 So. 2d at 1223.

105. *Id.* at 1224 (citing FLA. STAT. § 415.107(2)(d) (1987)).

and covering its own hide, HRS suggested Klemick invite the probate court to order the agency to turn over its findings, but the probate court would not go along.¹⁰⁶ Finally, Klemick got his hands on the chapter 415 file by suing for access under chapters 119 and 415.¹⁰⁷ After an *in camera* inspection, the trial court released the report to appellee Martin.¹⁰⁸

Seeking his just desserts, Klemick moved for an award of attorney's fees under chapter 119.¹⁰⁹ The trial court awarded not only attorney's fees, but costs as well and HRS appealed.¹¹⁰ The Third District Court of Appeal upended the award of attorney's fees upon a close reading of chapter 119. Under this chapter, fees are recoverable "[i]f a civil action is filed against an agency to enforce the provisions of *this chapter*. . . ."¹¹¹ Disclosure of HRS' report was ordered under chapter 415, not chapter 119 which squarely shields from public scrutiny records of abuse investigations.¹¹² Unhappily for Klemick, attorney's fees are not authorized under chapter 415.¹¹³

In the case of *In re Skinner*,¹¹⁴ Indian River County and HRS squared off over which one should shoulder attorney's fees incurred on behalf of Lloyd H. Skinner, a disabled 82-year-old caught in the cross-fire. HRS had gone to court seeking protective services under Chapter 415¹¹⁵ for the elderly man who had been victimized by his caretaker, Julia Brinson.¹¹⁶ At the same time the court authorized the protective services, it appointed attorney Martin E. Wall to serve as Skinner's counsel and later charged the county for Wall's fees.¹¹⁷

Finding no guidance on this matter under Chapter 415, the trial court cast about in state law until it hit upon section 43.28 which prescribes "[t]he counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the state, *personnel necessary*

106. *Id.*

107. *Id.*; see also FLA. STAT. §§ 119.01-.14 (1987).

108. *Martin*, 574 So. 2d at 1224.

109. *Id.*; see also FLA. STAT. § 119.12 (1987).

110. *Martin*, 574 So. 2d at 1224.

111. FLA. STAT. § 119.12(1) (1987) (emphasis added).

112. *Martin*, 574 So. 2d at 1224.

113. *Id.*

114. 541 So. 2d 781 (Fla. 4th Dist. Ct. App. 1989).

115. See FLA. STAT. § 415.105(3) (Supp. 1986).

116. *Skinner*, 541 So. 2d at 781.

117. *Id.*

to operate the circuit and country courts."¹¹⁸

The district court of appeal agreed that neither Chapter 415 nor its legislative history shed light on which public body should pay the tab for appointed counsel.¹¹⁹ Turning to case law, the court reviewed *In the Interest of D.B. & D.S.*¹²⁰ where the Florida Supreme Court had pinned appointed counsel fees on the county citing section 43.28 in a case involving juvenile dependency proceedings. Drawing upon the kinship between juvenile dependency proceedings and protective services proceedings, the District Court concluded the county must pay Mr. Wall's fees, glossing over the fact that appointed counsel in juvenile proceedings is constitutionally founded while appointed counsel in proceedings for the elderly rests on statute.¹²¹

In a footnote, the court distinguished decisions burdening HRS with appointed counsel fees because in those cases counsel was not legally required.¹²² Finally, the court of appeal supported its assessment of fees against the county on policy grounds as well. Conflicting loyalties are likely to emerge whenever HRS seeks protective services at the same time that it must pay for counsel to resist the agency's efforts in such proceedings. To be sure, HRS may well think twice before triggering protective services if it knows it must pay counsel fees.

In an unusual advisory opinion, *Florida Bar re Advisory Opinion—Nonlawyer Preparation of Pension Plans*,¹²³ the Florida Supreme Court tackled the sensitive subject of nonlawyer preparation of employee pension plans. Federal law, the Employee Retirement Income Security Act of 1974 (ERISA)¹²⁴ regulates the preparation of pension plans and authorizes such nonlawyers as certified public accountants—to prepare pension plans for Internal Revenue Service approval. Crafting pension plans also calls for tax, actuarial, accounting, economics, insurance and investment advice.

The opinion, with Solomonic wisdom, sorted out those things only lawyers can do and those things nonlawyers can do. Nonlawyers can gather information and digest it to arrive at plan options for clients.¹²⁵ What is more, nonlawyers can explain alternatives to employers, pre-

118. *Id.* (citing FLA. STAT. § 43.28 (1987) (emphasis added)).

119. *Skinner*, 541 So. 2d at 782.

120. 385 So. 2d 83, 86 (Fla. 1980).

121. *Skinner*, 541 So. 2d at 782.

122. *Id.* at 782 n.1.

123. 571 So. 2d 430 (Fla. 1990).

124. 29 U.S.C. §§ 1001-1461 (1988).

125. *Advisory Opinion*, 571 So. 2d at 437-38.

pare annual returns and reports incident to pension plan administration, administer the plan day-to-day, and market and sell pension plans.¹²⁶

On the other hand, only lawyers may analyze client information and counsel clients on the best plan, draft plan documents, qualify plans before the IRC, and terminate a pension plan.¹²⁷ Moreover, the nonlawyer professionals may not select the attorney for the employer.¹²⁸ Even a lawyer working in a nonlawyer company cannot draft pension plans or select plan options for a customer of the company.¹²⁹

The Court acknowledged that pension planning draws on several overlapping professional disciplines. A similar issue was addressed by the Florida Supreme Court in *Florida Bar v. Turner*.¹³⁰ Like the decision at bar, *Turner* ruled that some work connected with structuring pension plans could legitimately be performed by nonlawyers, but that other components could only be rendered by attorneys.¹³¹ Unfortunately, the lines drawn by *Turner* were fuzzy, spawning confusion, with lawyers reading the decision narrowly and nonlawyer professionals resolving doubts in their favor. This confusion prompted the Standing Committee to issue an opinion. The State Bar introduced evidence that the public was being harmed because nonlawyer practitioners were more concerned with the sale of a product or service other than the plan itself. At the same time, nonlawyers are unable to gauge the impact of the plan on other legal areas such as estate tax or probate planning. Ideally, the client is best served when all the experts, legal and nonlegal, have a say in the shape of the plan.

126. *Id.*

127. *Id.* at 438.

128. *Id.* at 440.

129. *Id.* at 441.

130. 355 So. 2d 766 (Fla. 1978).

131. *Id.*

Ethics: 1991 Survey of Florida Law

Jacquelyn P. Needelman*

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I. INTRODUCTION

The 1990 amendments to the Rules Regulating the Florida Bar ("the Rules") constitute significant changes in The Florida Bar's ("the Bar") disciplinary process.¹ This article addresses those changes which have effected the Bar's grievance procedures and confidentiality rules due to the substantial revision of these areas. The article goes on to discuss changes made to the rules concerning perjured testimony.

II. AMENDMENTS TO THE FLORIDA BAR'S GRIEVANCE PROCEDURES AND CONFIDENTIALITY RULES

A. *Grievance Procedure Changes*

The first procedural change is that a formal complaint can now be filed by the Bar against a respondent attorney if: 1) a grievance com-

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1. The Fla. Bar re Amendments to the Rules Regulating the Fla. Bar (Grievance Procedures & Confidentiality), 558 So. 2d 1008 (Fla. 1990) (citing The Fla. Bar re Amendments to the Rules Regulating the Fla. Bar (Grievance Procedures & Confidentiality), (Fla. No. 74,570 filed February 15, 1990)) [hereinafter *Amendments*].

The Rules took effect on January 1, 1987. The Fla. Bar re Rules Regulating the Fla. Bar, 494 So. 2d 977 (Fla. 1986).

mittee or the board of governors of the Bar finds probable cause to believe that the respondent is guilty of misconduct justifying disciplinary action; 2) the member has been temporarily suspended for the same misconduct that is the subject matter of the formal complaint; 3) the respondent has been determined or adjudged to be guilty of committing a felony; or 4) the respondent has been disciplined by another entity having jurisdiction over the practice of law or, with the concurrence of the chairperson of the grievance committee, if the member has been charged with the commission of a felony under applicable law which warrants the imposition of discipline.²

The ability to file formal complaints based upon a temporary suspension or being charged with a felony are new in the 1990 amendments. Previously, a formal complaint could only be filed upon a finding of probable cause, a conviction or determination of a crime by a criminal court, or where the respondent had been disciplined by another entity having jurisdiction over the practice of law.³

Under the previous rule, even if the Bar had obtained a temporary suspension⁴ from the Supreme Court of Florida based upon misappropriation of funds or other great public harm, the Bar continued to need a finding of probable cause prior to the filing of a formal complaint.⁵

Private reprimands⁶ for minor misconduct have been renamed as "admonishments" in the 1990 amendments.⁷ Additionally, within fifteen days after a finding of probable cause by a grievance committee, a respondent may tender a written admission of minor misconduct to bar

2. *Amendments*, 558 So. 2d at 1008; RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a).

3. RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a). Former Rule 3-3.2(a) provided:

Authority to file complaint. No formal complaint shall be filed by the Bar in disciplinary proceedings against a member of the bar unless either a grievance committee or the board shall first find probable cause exists to believe that the respondent is guilty of misconduct justifying disciplinary action or unless the respondent has been determined or adjudged to be guilty of the commission of a felony or unless the respondent has been disciplined by another entity having jurisdiction over the practice of law. The finding of probable cause shall be made by a grievance committee or by the board in accordance with these rules.

RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a) (1989).

4. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(g) (1989).

5. RULES REGULATING THE FLORIDA BAR Rule 3-3.2(a) (1989).

6. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(a) (1989).

7. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(a).

counsel or the grievance committee.⁸ Under the prior rule, a respondent was able to tender an admission of minor misconduct after a finding of probable cause and before the filing of the *formal complaint*.⁹ Under the current or prior rule, the grievance committee can accept or reject such a tender of minor misconduct.

Rule 3-5.1(d) now requires that the public reprimands be reported in the *Southern Reporter*. Also, the rule mandates that a respondent shall appear personally before the Supreme Court of Florida, the board of governors and a judge designated to administer the reprimand, or the referee if required.¹⁰ The former rule did not require the public reprimand to be published in the *Southern Reporter*, and did not allow any judge to be designated. The previous rule allowed the Supreme court, the referee or the board of governors to administer the reprimand.

Another significant change in the 1990 amendments concerns Rule 3-6.1(c) of the Rules of Discipline regarding employment of certain disciplined attorneys. The former rule provided: "(c) client contact. No suspended or disbarred attorney shall have direct contact with any client or receive, disburse, or otherwise handle funds or property of a client."¹¹ Occasionally, when an attorney has disciplinary action pending, the attorney will decide to tender a petition for resignation.¹² The resignation must list all pending disciplinary actions and if granted, terminates the respondent's status as an attorney.

Prior to the 1990 amendments, a loophole existed regarding Rule 3-6.1(c) in that an attorney who resigned pending disciplinary action was not precluded from direct contact with any client and was not prohibited from handling trust funds. The 1990 amendments included attorneys who resign with suspended and disbarred attorneys, and prohibited all such disciplined or resigned attorneys from direct contact with clients and trust funds.¹³

Rule 3-7.3¹⁴ is a new rule which separates complaints into inquir-

8. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(b)(5).

9. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(b)(5) (1989).

10. RULES REGULATING THE FLORIDA BAR Rule 3-5.1(d).

11. RULES REGULATING THE FLORIDA BAR Rule 3-6.1(c) (1989).

12. The petition to resign is considered pending disciplinary action and is filed pursuant to RULES REGULATING THE FLORIDA BAR Rule 3-7.11.

13. Rule 3-6.1(c) provides: "Client contact. No suspended, resigned or disbarred attorney shall have direct contact with any client or receive, disburse or otherwise handle trust funds or property." RULES REGULATING THE FLORIDA BAR Rule 3-6.1(c).

14. RULES REGULATING THE FLORIDA BAR Rule 3-7.3 provides:

ies and disciplinary files (complaints) and requires the complainant to be notified and given reasons for dismissal of the inquiry/complaint. If the bar counsel decides to pursue an inquiry, a disciplinary file shall be opened and the inquiry shall be considered as a complaint if the complaint is provided under oath.¹⁵

For the first time, pursuant to Rule 3-7.3(c), complaints, except those initiated by the Bar, must be in writing and under oath.¹⁶ Most

a) Screening of inquiries. Prior to opening a disciplinary file, bar counsel shall review the inquiry made and determine whether the alleged conduct, if proven, would constitute a violation of the Rules warranting the imposition of discipline. If bar counsel determines that the facts, if proven, would not constitute a violation of the Rules warranting the imposition of discipline bar counsel may decline to pursue the inquiry. A decision by bar counsel not to pursue an inquiry shall not preclude further action or review under the Rules. The complainant shall be notified of a decision not to pursue an inquiry and shall be given the reasons therefor.

b) Complaint processing and bar counsel investigation. If bar counsel decides to pursue an inquiry, a disciplinary file shall be opened and the inquiry shall be considered as a complaint, if the form requirement of (c) is met. Bar counsel shall investigate the allegations contained in the complaint.

c) Form for complaints. All complaints, except those initiated by The Florida Bar, shall be in writing and under oath. The complaint shall contain a statement providing that: "Under penalty of perjury, I declare the foregoing facts are true, correct and complete."

d) Dismissal of disciplinary cases. Bar counsel may dismiss disciplinary cases if, after complete investigation, bar counsel determines that the facts show that the attorney did not violate the Rules Regulating the Florida Bar. Dismissal by bar counsel shall not preclude further action or review under the Rules Regulating The Florida Bar. Nothing in these rules shall preclude bar counsel from obtaining the concurrence of the grievance committee chairperson on the dismissal of a case. If a disciplinary case is dismissed, the complainant shall be notified of the dismissal and shall be given the reasons therefor.

e) Referral to grievance committees. Bar counsel may refer disciplinary cases to a grievance committee for its further investigation or action as authorized elsewhere in these rules. Bar counsel may recommend specific action on a case referred to a grievance committee.

f) Information concerning closed inquiries and complaints dismissed by staff. When bar counsel does not pursue an inquiry or dismisses a disciplinary case, such action shall be deemed a finding of no probable cause for further disciplinary proceedings and the matter shall become public information.

15. RULES REGULATING THE FLORIDA BAR Rule 3-7.3(b).

16. RULES REGULATING THE FLORIDA BAR Rule 3-7.3(c).

significantly, under the 1990 amendments, a complainant no longer has absolute immunity,¹⁷ but now is subject to applicable Florida law which provides for a qualified privilege. When the law required an absolute immunity for a complainant arising out of making a grievance complaint, confidentiality rules existed which required summarily dismissed files, files closed with no probable cause findings and files resulting in private reprimands to remain confidential.¹⁸ Further, during the pendency of a grievance case, most files were confidential prior to the filing of a formal complaint.¹⁹ The changes made regarding confidentiality will be addressed later in this article.

The 1990 amendments changed portions of the grievance committee procedures.²⁰ Admonishments made after no probable cause findings are now called "letters of advice."²¹ Previously, in order to have a quorum of the grievance committee, the chairperson, or vice-chairperson, another lawyer member and any other member were required to be present. Currently, three members of a grievance committee are required, two of whom must be lawyers.²² Three-member panels can now determine matters.²³ The chairperson or vice-chairperson need not be a member of the panel.²⁴ Dividing a grievance committee into panels allows the committee to determine matters more expeditiously.

Another new requirement to the grievance committee procedures is that a lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigating member of the committee.²⁵ However, nonlawyer grievance committee members can vote on matters they investigated. At least one-third of grievance committees are comprised of non-lawyer members.²⁶

There have been significant changes regarding the rights and responsibilities of the respondent. Under the prior rule, a grievance committee could not find probable cause unless the respondent had been

17. Previously, a complaining party had absolute immunity when filing a complaint against an attorney with the Bar. *Stone v. Rosen*, 348 So. 2d 387 (Fla. 3d Dist. Ct. App. 1977).

18. RULES REGULATING THE FLORIDA BAR Rule 3-7.1 (1989).

19. *Id.*

20. RULES REGULATING THE FLORIDA BAR Rule 3-7.4.

21. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(e).

22. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(f).

23. *Id.*

24. *Id.*

25. *Id.*

26. RULES REGULATING THE FLORIDA BAR Rule 3-3.4(c).

granted the right to be present at any grievance committee hearing at which evidence was presented, to face the accuser, to call witnesses or present evidence and to cross-examine, subject to reasonable limitation.²⁷

Under the 1990 amendments, a respondent no longer has the right to be present when evidence is presented to the grievance committee.²⁸ The grievance committee now has the option of holding an evidentiary hearing with the respondent and complainant present or determining the matter based upon a paper hearing consisting of documents.²⁹ If the grievance committee determines the matters based on documents without the respondent present, the respondent shall be provided with all materials considered by the committee and shall be given an opportunity to provide a written response for consideration by the grievance committee. In any event, the respondent has a right to be advised of the conduct which is being investigated and the rules which may have been violated before a hearing at which any finding of probable cause or minor misconduct is made.³⁰

Providing the grievance committees with the option of holding open hearings should help to expedite probable cause determinations.³¹ However, it is important to be reminded that the grievance committee determination is a decision regarding whether probable cause exists for further proceedings after a finding of probable cause is found. A *de novo* adversary hearing is held before a referee appointed by the Su-

27. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(g) (1989).

28. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(g).

29. *Id.* Rule 3-7.4(g) provides:

Rights and responsibilities of the respondent. The respondent may be required to testify and to produce evidence as any other witness unless the respondent claims a privilege or right properly available to the respondent under applicable federal or state law. The respondent may be accompanied by counsel. At a reasonable time before any finding of probable cause or minor misconduct is made the respondent shall be advised of the conduct which is being investigated and the rules which may have been violated. The respondent shall be provided with all materials considered by the committee and shall be given an opportunity to make a written statement sworn or unsworn, explaining, refuting, or admitting the alleged misconduct.

30. *Id.*

31. In a previous article written on the changes in the bar rules, the author expressed concern regarding the respondent's rights being changed at the grievance committee level. See Diane Marger Moore, "New" Grievance Procedures: A Summary and Analysis, FLA. B.J., Jan. 1991, at 35, 40.

preme Court of Florida.³² A trial is held before the referee and the referee's findings and recommendations are forwarded to the Supreme court which issues its opinion or order in the matter.³³

Similarly, the complainant is granted the right to be present at any grievance committee hearing when the respondent is present before the committee unless found to be impractical by the chairperson of the grievance committee due to unreasonable delay or other good cause.³⁴ Accordingly, both the complainant and the respondent have the same right to be present when the grievance committee determines their presence is appropriate.³⁵

The new Rule 3-7.4(j) defines the record before the grievance committee as consisting of all reports, correspondence, papers and/or recordings furnished to or received from the respondent, and the transcript of grievance committee meetings or hearings if the proceedings were attended by a court reporter.³⁶

Notice of the grievance committee's action is provided to the reviewer (the local member of the board of governors that oversees the actions of a particular grievance committee).³⁷ If the reviewer disagrees with the grievance committee's action, the designated reviewer shall make a report and recommendation to the disciplinary review committee.³⁸ If the designated reviewer does not make a report and recommendation within twenty-one days following the mailing date of the notice of grievance committee action, then the grievance committee action shall become final.³⁹

32. RULES REGULATING THE FLORIDA BAR Rule 3-7.6(b).

33. RULES REGULATING THE FLORIDA BAR Rule 3-7.7.

34. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(h). Rule 3-7.4(h) provides:

Rights of the complaining witness. The complaining witness is not a party to the disciplinary proceeding. Unless found to be impractical by the chairman of the grievance committee due to unreasonable delay or other good cause, the complainant shall be granted the right to be present at any grievance committee hearing when the respondent is present before the committee. Neither unwillingness nor neglect of the complaining witness to cooperate, nor settlement, compromise, or restitution will excuse the completion of an investigation. The complaining witness shall have no right to appeal.

35. RULES REGULATING THE FLORIDA BAR Rule 3-7.4(g), (h).

36. See RULES REGULATING THE FLORIDA BAR Rule 3-7.4(j).

37. RULES REGULATING THE FLORIDA BAR Rule 3-7.5(b).

38. *Id.*

39. *Id.*

B. Confidentiality Rule Changes

The 1990 amendments to the Rules extensively changed the confidentiality rule and definition of public records regarding disciplinary proceedings.⁴⁰ Rule 3-7.1, as amended, opened the grievance process to

40. RULES REGULATING THE FLORIDA BAR Rule 3-7.1. Rule 3-7.1 provides:

Confidentiality. All matters including files, preliminary investigation reports, inter-office memoranda, records of investigations, and the records in trials and other proceedings under these rules, except those disciplinary matters conducted in circuit courts, are property of The Florida Bar. All of those matters shall be confidential and shall not be disclosed except as provided in these rules. When disclosure is permitted under these rules, it shall be limited to information concerning the status of the proceedings and any information which is part of the public record as defined in these rules.

(a) Public record. The public record shall consist of the record before a grievance committee, the record before a referee, the record before the Supreme Court of Florida and any reports, correspondence, papers, recordings and/or transcripts of hearings furnished to, served on or received from the respondent or the complainant.

(b) Circuit court proceeding. Proceedings under rule 3-3.5 shall be public information. Contempt proceedings authorized elsewhere in these rules shall be public information even though the underlying disciplinary matter is confidential as defined in these rules.

(c) Limitations on disclosure. Any material provided to the Florida Bar which is confidential under applicable law shall remain confidential and shall not be disclosed except as authorized by the applicable law. If this type of material is made a part of the public record, that portion of the public record may be sealed by the grievance committee chairman, the referee or the Supreme Court of Florida.

(d) Disclosure of information. Unless otherwise ordered by this Court or the referee in proceedings under this rule, nothing in these rules shall prohibit the complainant, respondent or any witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.

(e) Response to inquiry. Representatives of the Florida Bar, authorized by the board of governors, shall respond to specific inquiries, concerning matters which are in the public domain, but otherwise confidential under the rules, by acknowledging the status of the proceedings.

(f) Notice to law firms. When a disciplinary file is opened the respondent shall disclose to his or her current law firm and, if different, respondent's law firm at the time of the act(s) giving rise to the complaint, the fact that a disciplinary file has been opened. Disclosure shall be in writing and in the following form: "A complaint of unethical conduct against me has been filed with the Florida Bar. The nature of the allegations are [insert allegations]. This notice is provided pursuant to Rule 3-7.1(f) of the Rules

Regulating the Florida Bar."

The notice shall be provided within fifteen (15) days of notice that a disciplinary file has been opened and a copy of the above notice shall be served on the Florida Bar.

(g) Pending investigation. Disciplinary matters pending at the initial investigatory and grievance committee levels shall be treated as confidential by the Florida Bar, except as provided in rule 3-7.1(e).

(h) Minor misconduct cases. Any case in which a finding of minor misconduct has been entered, by action of the grievance committee or board, shall become public information.

(i) Probable cause cases. Any disciplinary case in which a finding of probable cause for further disciplinary proceedings has been entered shall be public information. For purposes of this paragraph a finding of probable cause shall be deemed to have been made in those cases authorized by rule 3-3.2(a), for the filing of a formal complaint without the prior necessity of a finding of probable cause.

(j) No probable cause cases. Any disciplinary case which has been concluded by a finding of no probable cause for further disciplinary proceedings shall become public information.

(k) Production of disciplinary records pursuant to subpoena. The Florida Bar, pursuant to a valid subpoena, issued by a regulatory agency, may provide any documents, which are a portion of the public record, even if the disciplinary proceeding is confidential under these rules. The Florida Bar may charge a reasonable fee for identification of and photocopying the documents.

(l) Notice to judges. Any judge of a court of record may be advised as to the status of a confidential disciplinary case and may be provided with a copy of the public record. The judge shall maintain the confidentiality of the matter.

(m) Evidence of crime. The confidential nature of these proceedings shall not preclude the giving of any information or testimony to authorities authorized to investigate alleged criminal activity.

(n) Alcohol and drug treatment. That an attorney has voluntarily sought, received, or accepted treatment for alcoholism or alcohol or drug abuse shall be confidential and shall not be admitted as evidence in disciplinary proceedings under these rules unless agreed to by the attorney who sought the treatment.

It is the purpose of this paragraph to encourage attorneys to voluntarily seek advice, counsel, and treatment available to attorneys, without fear that the fact it is sought or rendered, will or might cause embarrassment in any future disciplinary matter.

(o) Response to false or misleading statements. If public statements which are false or misleading are made about any otherwise confidential disciplinary case, the Florida Bar may disclose all information necessary to correct such false or misleading statements.

Disclosure by waiver of respondent. Upon written waiver executed by a respondent, the Florida Bar may disclose the status of otherwise confi-

public review.⁴¹

The confidentiality rule amendments pertain to any inquiry or complaint file received by the Bar on or after March 17, 1990, as the rules became effective March 17, 1990.⁴² However, the removal of the gag rule was applied retroactively and applied to disciplinary files received prior to or subsequent to March 17, 1990.⁴³

The gag rule concerned the previous requirement that a complainant or witness could not disclose the existence of a Florida Bar matter unless the matter reached a public level.⁴⁴ This rule has been eliminated by the 1990 amendments. Additionally, prior to the Florida Supreme Court issuing its opinion amending the confidentiality rules, the United States District Court for the Southern District of Florida found the gag rule unconstitutional.⁴⁵

The Florida Supreme Court's March 16, 1990 amended opinion summarized the confidentiality rule changes as follows:

Rule 3-7.1, as amended, opens the grievance process to public review. Disclosure under the rule is limited to information concerning the status of the proceedings and information which is part of the public record. Paragraph (a) clarifies what constitutes the "public record." Paragraph (b), as amended, provides that proceedings under Rule 3-3.5 are public and contempt proceedings authorized under the rules are public, even if the underlying disciplinary matter is otherwise confidential. Consistent with this amendment, paragraph (f)(2) of former Rule 3-7.10 dealing with the preservation of confidentiality during contempt proceedings has been deleted. Likewise, paragraph (g) of Rule 3-7.11 (former Rule 3-7.10) has been amended to reflect this change. Paragraph (d) of the Rules 3-7.1 allows the complainant, respondent, or any witness to disclose the existence of disciplinary proceedings and any documents or corre-

dential disciplinary proceedings and provide copies of the public record to:

- (1) The Florida Board of Bar Examiners or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of an applicant for admission to practice law in that jurisdiction; or
- (2) Florida judicial nominating commissions or the comparable body in other jurisdictions for the purpose of evaluating the character and fitness of a candidate for judicial office.

41. *Id.*

42. *See Amendments*, 558 So. 2d at 1011.

43. *Id.*

44. *See RULES REGULATING THE FLORIDA BAR* Rule 3-7.1 (1989).

45. *See Doe v. Gonzales*, 723 F. Supp. 690 (S.D. Fla. 1988), *aff'd*, 886 F.2d 1323 (11th Cir. 1989) (construing FLA. STAT. § 112.317(6) (1987)).

spondence served on or provided them. Consistent with this change, paragraph (e) of Rule 3-7.11 (former Rule 3-7.10) no longer prohibits witnesses from disclosing the existence of a disciplinary proceeding or the identity of the respondent. Paragraph (e) of Rule 3-7.1 allows authorized representatives of the Bar to respond to inquiries concerning matters in the public domain, but otherwise confidential, by acknowledging the status of the proceedings. Under paragraph (g) of that rule, disciplinary matters pending at the initial investigatory and grievance committee levels shall be treated as confidential by the Bar, except as provided in paragraph (e). Under paragraph (h) of Rule 3-7.1, disciplinary cases in which a finding of minor misconduct has been entered became public information. Similarly, upon a finding of probable cause or no probable cause disciplinary cases become public information, under paragraphs (i) and (j), respectively. Paragraph (i) also provides that for purposes of that paragraph a finding of probable cause shall be deemed to have been made in those cases authorized by Rule 3-3.2(a) for filing of a formal complaint without the prior necessity of a finding of probable cause. Paragraph (k) authorizes the Bar to provide information pursuant to subpoenas of regulatory agencies. Paragraph (l) provides that any judge may be advised as to the status of a confidential matter and provided with a copy of the public record. Paragraph (o), which is new, replaces paragraph 3-7.1(a)(1)(e) which allowed the Bar to disclose information necessary to correct a false or misleading statement made by a candidate for public office concerning a disciplinary action against the candidate. This paragraph authorizes the Bar to respond to false and misleading statements made by any person regarding disciplinary cases by disclosing all information necessary to correct the false or misleading statements. Paragraph ¶, which is also new, allows the Bar, upon written waiver by the respondent, to disclose the status of the proceeding and to provide copies of the public record to the Florida Board of Bar Examiners, the Florida judicial nominating commissions and comparable bodies in other jurisdictions.⁴⁶

The "public record" is now defined as the public record before a grievance committee, referee, and the Supreme Court of Florida, and any reports, correspondence, papers, recordings and/or transcripts of hearings furnished to, served on, or received from the respondent or the complainant.⁴⁷

46. *See Amendments*, 558 So. 2d at 1010.

47. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(a).

Any party other than the Bar can disclose the existence of a grievance at any time because the gag rule no longer exists. However, the Bar must maintain the confidential nature of its files regarding pending matters being reviewed by staff or a grievance committee. Once staff or a grievance committee closes a matter, the public record portion of the file is public and subject to public review.⁴⁸

Any material provided to the Bar which is confidential under applicable law shall remain confidential and shall not be disclosed except as authorized by the applicable law and may be sealed in the proceedings.⁴⁹

While a matter is pending with the Bar, representatives of the Bar shall respond to specific inquiries concerning matters which are in the public domain, but otherwise confidential under the rules by acknowledging the status of the proceedings.⁵⁰

When a disciplinary file is opened, the respondent is required to disclose to his or her current law firm, and if different, respondent's law firm at the time of the acts giving rise to the complaint, the fact that a disciplinary file has been opened.⁵¹

Disciplinary matters pending at the initial investigatory and grievance committee levels shall be treated as confidential by the Bar except where a specific inquiry is made pursuant to Rule 3-7.1(e).⁵²

A major distinction between the new and old rules concerns the fact that pursuant to the 1990 amendments, any case in which a finding of minor misconduct has been entered by action of the grievance

48. *Id.*

49. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(c).

50. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(e).

51. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(f). Rule 3-7.1(f) provides:

Notice to law firms. When a disciplinary file is opened the respondent shall disclose to his or her current law firm and, if different, respondent's law firm at the time of the act(s) giving rise to the complaint, the fact that a disciplinary file has been opened. Disclosure shall be in writing and in the following form: "A complaint of unethical conduct against me has been filed with the Florida Bar. The nature of the allegations are [insert allegations]. This notice is provided pursuant to rule 3-7.1(f) of the Rules Regulating the Florida Bar."

The notice shall be provided within fifteen (15) days of notice that a disciplinary file has been opened and a copy of the above notice shall be served on the Florida Bar.

52. See RULES REGULATING THE FLORIDA BAR Rule 3-7.1(g).

committee or board shall become public information.⁵³ Under the former rules, private reprimands for minor misconduct were treated as confidential.⁵⁴

Once probable cause or no probable cause for further proceedings has been entered, the proceedings shall become public information.⁵⁵ Under the former rules, the proceedings were not public information until a formal complaint had been filed in the Supreme Court of Florida, and the proceedings were confidential upon findings of no probable cause.⁵⁶

Rule 3-7.1(k)⁵⁷ now authorizes the Bar to provide documents which are a portion of the public record to regulatory agencies pursuant to a subpoena.

Judges may be advised in confidence as to the status of a confidential disciplinary case and may be provided with a copy of the public record.⁵⁸

The confidential nature of the former and current rule both authorize the furnishing of information or testimony to authorities authorized to investigate alleged criminal activity.⁵⁹

For the first time, the amended rules allow the Bar to disclose all information necessary to correct public statements which are false and misleading which are made about any otherwise confidential disciplinary case.⁶⁰

Upon a respondent's written waiver, the Bar may disclose the status of otherwise confidential disciplinary proceedings and provide copies of the public record to the Florida Board of Bar Examiners or comparable body, or The Florida Judicial Nominating Committee or comparable body.⁶¹

53. *Id.*

54. RULES REGULATING THE FLORIDA BAR Rule 3-7.1 (1989).

55. RULES REGULATING THE FLORIDA BAR Rules 3-7.1(i), (j).

56. RULES REGULATING THE FLORIDA BAR Rules 3-7.1(1), (2) (1989).

57. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(k) provides:

Production of disciplinary records pursuant to subpoena. The Florida Bar, pursuant to a valid subpoena, issued by a regulatory agency, may provide any documents which are a portion of the public record, even if the disciplinary proceeding is confidential under these rules. The Bar may charge a reasonable fee for identification of and photocopying the documents.

58. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(l).

59. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(m); RULES REGULATING THE FLORIDA BAR Rule 3-7.1(m) (1989).

60. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(o).

61. RULES REGULATING THE FLORIDA BAR Rule 3-7.1(p).

The amended rules allow the Bar to charge for reproduction charges and a reasonable fee incident to a request to review disciplinary records or for research into the records of disciplinary proceedings and identification of documents to be reproduced.⁶²

The Florida Supreme Court stated in its opinion amending the rules: "[W]e agree with the commission that public respect and confidence primarily in the self-operated lawyer disciplinary system can best be gained by allowing the public to determine for itself that the grievance system works efficiently, fairly and accurately."⁶³

III. AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR REGARDING PERJURED TESTIMONY

In 1990, The Florida Supreme Court also amended the Rules regarding an attorney's duties and obligations concerning a client who wishes to present or has presented perjured testimony.⁶⁴

Rule 4-3.3 was amended to include the following:

(a) A lawyer shall not knowingly: . . . (4) permit any witness, including a criminal defendant to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony which he knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.⁶⁵

Previously, it was believed that it was acceptable for a lawyer to allow his client to testify in a narrative fashion if the client intended to testify falsely. The comment to Rule 4-3.3 explains that legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.⁶⁶

An attorney has the following obligations if he or she learns that a client is about to or has offered false testimony or evidence: 1) the lawyer should seek to persuade the client that the evidence should not be offered; 2) if it has been offered, that its false character should immedi-

62. See RULES REGULATING THE FLORIDA BAR Rule 3-7.6(n).

63. See *Amendments*, 558 So. 2d at 1009.

64. See *The Florida Bar re Amendments to the Rules Regulating The Florida Bar*, 557 So. 2d 1368 (Fla. 1990); RULES REGULATING THE FLORIDA BAR Rule 4-3.3.

65. See RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4).

66. RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4) cmt.

ately be disclosed; or 3) if the persuasion is ineffective, the lawyer must take reasonable remedial measures.⁶⁷

A lawyer who knows that his client is about to testify falsely faces a great dilemma. Ethically, the lawyer cannot allow the client to testify falsely. However, to prevent the client from testifying falsely, the lawyer may have to disclose the existence of the client's deception to the court or opposing party.⁶⁸ Such a disclosure can cause severe consequences to the client.

The best alternative is to dissuade the client from testifying falsely or if the false testimony has already been given, the client should be persuaded to correct the false testimony. If the client is aware that the lawyer will disclose the intention to testify falsely or the fact that it has occurred, then the client should be motivated to correct the situation. However, the attorney-client relationship can certainly be affected by a client knowing that the lawyer has or will reveal information harmful to the client. The comment to Rule 4-3.3 has an excellent discussion of the lawyer's responsibilities and dilemmas when a client has or will testify falsely.⁶⁹

Rule 4-3.3 was amended after the Bar's Special Committee on Perjured Testimony proposed the amendment to the Rules of Professional Conduct.⁷⁰ The Special Committee on Perjured Testimony was approved by Florida Bar President Ray Ferrero after a Florida attorney was held in contempt for refusing to continue representation of a criminal defendant who the lawyer implied intended to lie when testifying.⁷¹

Thus, 1990 amendments to Rule 4-3.3 clarified an attorney's obligation if and when the dilemma of a client intending to or testifying falsely arises.

67. RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4).

68. RULES REGULATING THE FLORIDA BAR Rule 4-3.3(a)(4) cmt.

69. See RULES REGULATING THE FLORIDA BAR Rule 4-3.3 cmt.

70. See Randolph Braccialarghe, *Client Perjury: The Law in Florida*, 12 Nova L. Rev. 708, 709 (1988).

71. *Id.*

Evidence: 1991 Survey of Florida Law

Dale Alan Bruschi*

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I. INTRODUCTION

This year's survey of Florida evidence has once again followed the same predictable patterns as seen in previous survey years.¹ Hearsay

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The author would like to thank Howard Nelson who helped in the research of this article and Kee Juen Eng and Hugh L. Koerner who supplied helpful comments during the writing of this article.

1. This is the sixth annual survey of Florida evidence that the *Nova Law Review* has published. A break in the annual survey of evidence occurred in 1988-89. The 1990 Survey of Florida Evidence was brought up to date and included Florida evidence decisions from October 1988 through October 1990. In order to make the Survey of Flor-

generated the most case law during the survey period, while criminal decisions outnumbered civil cases in evidentiary case law. The survey period has been moved up from last year and, consequently, fewer cases were decided during the survey period.

The only legislative change in the rules of evidence came in section 90.803, the public records exception.² The change affects the criminal case exclusion in public records for matters observed by police officers. The change appears to affect only drunk driving criminal cases and is, once again, a legislative overreaction to the public outcry of drunk driving.

II. RELEVANCE³

An interesting relevance case reached the Florida Supreme Court during the survey period. The Florida Supreme Court decided the case of *Sims v. Brown*⁴ which involved medical malpractice. In the *Sims* case, Mary Brown sued David Sims, a gynecologist, Christian Keedy, a neurosurgeon, and South Miami Hospital claiming the defendants' negligence caused her to suffer a stroke either during, or shortly after, an

ida law more useful, the *Nova Law Review* has changed the publication date of the survey from the last issue published during the year to the first issue published during the year.

2. 1991 Fla. Sess. Law Serv. 255 (West), amending FLA. STAT. § 90.803(8) (1989).

3. Relevance involves the following three sections of the evidence code:

FLA. STAT. § 90.401 (1989).

Definition of Relevant Evidence.

Relevant evidence is evidence tending to prove or disprove a material fact.

FLA. STAT. § 90.402 (1989).

Admissibility of Relevant Evidence.

All relevant evidence is admissible, except as provided by law.

FLA. STAT. § 90.403 (1989).

Exclusion on Grounds of Prejudice or Confusion.

Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. This section shall not be construed to mean that evidence of the existence of available third-party benefits is inadmissible.

Though sections 90.404 to 90.410 involve relevance, no significant cases were reported during the survey period. Therefore, only the above-referenced sections will be examined in this article.

4. 574 So. 2d 131 (Fla. 1991).

operation performed by Sims to remove an ovarian cyst.⁵ Sims requested Keedy to perform a preoperative neurological examination of Ms. Brown prior to Ms. Brown's surgery. Keedy cleared Ms. Brown for surgery, but did not write a report until after the operation. Another doctor for the hospital, a Doctor Albanes, also cleared Ms. Brown for the surgery.⁶ Sims removed the ovarian cyst, and either during, or after, the surgery, Ms. Brown suffered a stroke. Ms. Brown contended that had a proper preoperative examination been conducted, any condition which could have been a factor in the stroke would have been discovered and corrected before surgery.⁷

Ms. Brown's counsel attempted to enter into evidence a 1979 report of the Joint Commission of Accreditation of Hospitals (JCAH) which found a deficiency in the hospital's recording of a patient's current history and their physical examination.⁸ The trial judge rejected this evidence because it was remote in time, a subsequent report issued by the same commission did not indicate any deficiency in the hospital's record keeping, and the trial court found the report irrelevant and confusing.⁹

In upholding the trial court's rejection of this evidence, the supreme court examined two areas. First, the supreme court stated that for evidence to be relevant, especially when it is remote, "a prior dangerous condition or negligent cause of conduct must be shown to continue uncorrected up to the time of the act sued upon."¹⁰ Because of the passage of time, the probative value of the report was minimal since the cause of conduct could not be shown to be continuous. Since the 'subsequent' report did not indicate that the prior deficient conduct was continuing, the probative value of the evidence was minimal, thus rendering it inadmissible.¹¹ The court examined the logical relevance of the evidence and stated:

5. *Id.* On a jurisdictional basis, the supreme court did not hear argument regarding Doctor Sims. However, the supreme court granted review in the case regarding Doctor Keedy and South Miami Hospital and reversed the district court's order vacating the jury verdicts for Doctor Keedy and South Miami Hospital.

6. *Id.* Doctor Albanes report was documented but there is no indication in the record if it was written before the surgery.

7. *Id.*

8. *Id.* at 133.

9. *Sims*, 574 So. 2d at 133.

10. *Id.*

11. *Id.*

The chief object in introducing evidence is, to secure a rational ascertainment of facts; therefore facts should not be submitted to the jury unless they are logically relevant to the issues. A fact in a cause must be both logically and legally relevant, for even logical relevancy does not in all cases render proposed evidence admissible. A fact which in connection with other facts, renders probable the existence of a fact in issue, should still be rejected where, under the circumstances of the case, it is essentially misleading or too remote.¹²

Second, the supreme court found that the excluded report was not legally relevant under section 90.403, since the excluded report was more prejudicial than probative and created needless confusion which could mislead the jury. Since the report was remote in time and the activity was not continuous, the report's probative value was minimal. The jury could have given undue weight to this marginal evidence and arrived at an erroneous verdict.¹³

Another point in issue was whether the trial judge should have excluded a manual of the JCAH.¹⁴ The manual contained standards for hospitals and interpretive commentaries. The trial judge was willing to admit the standards but not the commentaries. Brown chose an all or nothing position and the manual was excluded. In reversing the district court, and upholding the trial court's decision to exclude the manual, the supreme court pointed out that there was already testimony in the record regarding what is required for a patient preoperative examination. Therefore, the supreme court found that the exclusion of cumulative testimony, the standards and the commentaries, is not an adequate basis for vacating a jury verdict.¹⁵

In *Carr v. State*¹⁶ the district court demonstrates the interplay between section 90.403 and section 90.404(2),¹⁷ in reversing the defendant's conviction for possession of cocaine. In *Carr*, a deputy sheriff observed the defendant talking with other persons in front of a home in

12. *Id.* at 133-34 (quoting *Atlantic Coast Line v. Campbell*, 139 So. 886, 890 (1932)).

13. *Id.* at 133-34.

14. *Id.* at 134.

15. *Id.*

16. 578 So. 2d 398 (Fla. 1st Dist. Ct. App. 1991).

17. FLA. STAT. § 90.404(2) (1989) covers similar fact evidence otherwise known as *Williams* Rule after *Williams v. State*, 110 So. 2d 654 (Fla.), *cert. denied*, 361 U.S. 847 (1959).

Lake City. The deputy called the defendant over and asked permission to search him. After obtaining permission to search, and finding no contraband, the deputy ran a computer check on the defendant which revealed an outstanding warrant for a violation of probation. The defendant was handcuffed and taken to a detention center where a second search revealed two plastic baggies of cocaine allegedly found in the defendant's left shirt pocket.¹⁸

At trial, defense witnesses testified that the street search of the defendant was thorough and no contraband was discovered during this initial search.¹⁹ The assistant state attorney, outside the presence of the jury, sought and received permission to elicit testimony that the defendant was a cocaine user and that he had previously been convicted of cocaine possession.²⁰ The assistant state attorney argued that the defendant's prior conviction and cocaine use were admissible to prove knowledge of the presence of the drug on his person and "that a person who had possessed cocaine in the past would possess cocaine on the occasion at issue."²¹ Over the defendant's objections, the trial court allowed the State's use of the prior conviction and indicated that the 10-day rule for use of similar fact evidence was not needed since the evidence was offered as impeachment and rebuttal of the defendant's defense that the cocaine was planted on him.²²

18. *Carr*, 578 So. 2d at 398.

19. *Id.* at 398-99.

20. *Id.* at 399. It is hard to imagine a more egregious error than to elicit the *type* of prior crime the Defendant was convicted of and then use the conviction of the prior crime to link up evidence needed in the present trial. Unless proper notice and care is given for this unauthorized use of similar fact evidence, a reversal is almost sure to follow. One of the most common reasons for reversal of criminal cases is the improper use of similar fact, *Williams* Rule, evidence.

Even when notice is properly given for the use of this type of evidence, care must be taken not to misuse it or allow it to become a feature of the trial. The prosecutor walks a tightrope, with essentially devastating evidence, when similar fact evidence is utilized. A proper understanding of the pitfalls of using similar fact evidence must be understood by the proponent, otherwise, a reversal is inevitable.

21. *Id.*

22. *Id.* How the court determined that a previous conviction of cocaine would in any way rebut whether the cocaine was planted on the defendant in *this* particular case is beyond common imagination. It can only be assumed that a complete misunderstanding of the use of *Williams* Rule pervades or that the trial court record was unclear.

In any event, a common rule of thumb is that if the State in any way perceives the need for similar fact evidence it should file the ten-day notice. Generally, only if the similar fact evidence in the case is inextricably interwoven with the facts of the case will the 10 day notice be inapplicable. *See Austin v. State*, 500 So. 2d 262 (Fla. 1st

The district court disagreed with the trial court and reversed the defendant's conviction. The district court found that the credibility of the defendant was the real jury issue²³ and that the evidence of the defendant's prior conviction for possession of cocaine was not related to the charge being tried.²⁴ The jury was permitted to infer guilt regarding the present charge because the "Williams Rule" evidence suggested that the defendant had a propensity to commit this type of crime. Since the evidence of guilt was not overwhelming, the "Williams Rule" evidence should have been excluded because the probative value was outweighed by the danger of unfair prejudice.

III. WITNESSES

A. *The Deadman's Statute*

The "Deadman's Statute" concerns an area of evidence which has not generated much case law over the past few years. The "Deadman's Statute" is codified in section 90.602²⁵ of the evidence code and is basi-

Dist. Ct. App. 1986); *Tumulty v. State*, 489 So. 2d 150 (Fla. 4th Dist. Ct. App. 1986).

23. *Carr*, 578 So. 2d at 400. The issue in this case came down to simply who the jury chose to believe. Evidence of the crime of possession of cocaine was clear, if you believed the officer that arrested the Defendant. However, if the jury chose to believe the defendant's story that the evidence was planted on him (he was thoroughly searched), then no crime occurred. Clearly, the case came down to one of credibility, who would the jury believe. The improper admission of similar fact evidence in this context demonstrates to the jury that since the defendant was involved in another similar possession crime it was more likely that he would be involved in committing this crime. This would, of course, devastate any chance the defendant had of being believed based on the facts of this case only.

24. *Id.* at 400. The admission of irrelevant similar fact evidence will be presumed harmful where the evidence of guilt is not overwhelming. However, the admission of such evidence is not harmful, or reversible, when the evidence of guilt is clear and convincing. See *Keen v. State*, 504 So. 2d 396 (Fla. 1987); *Straight v. State*, 397 So. 2d 903 (Fla.) *cert. denied*, 454 U.S. 1022 (1981). Though the Florida Supreme Court uses the term 'clear and convincing,' most courts simply examine the record to see if the proof of guilt is overwhelming without reference to the impermissible similar fact evidence.

25. FLA. STAT. § 90.602 (1989). The statute is set out as follows:

Testimony of Interested Persons.

(1) No person interested in an action or proceeding against the personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or against the assignee, committee, or guardian of an insane person, shall be examined as a witness regarding any oral communication between the interested person and the person who is deceased or insane at

cally a narrow prohibition which prevents the testimony of an interested person regarding transactions and communications between the interested person and an individual who has since died.²⁶ The "Deadman's Statute" protects the estate of a decedent against false and fraudulent claims, since the decedent is not able to testify, and refute oral evidence of claims against his estate.

In *Sun Bank v. Saewitz*,²⁷ the Third District Court of Appeal, in a two to one decision, discussed the proper application of the "Deadman's Statute," since its revision and recodification from section 90.05 to section 90.602. In *Sun Bank*, the plaintiff, who was the son of the decedent, brought an action against Sun Bank, as personal representative of the decedent's estate, to recover money the son allegedly loaned to his mother, the decedent. In the plaintiff's complaint he attached a copy of a check for \$100,000.00 payable to the decedent and signed by the plaintiff's wife from their joint account. The word 'loan' appeared on the check to the decedent. Additionally, the son claimed in the complaint that the check was a loan to his mother with whom he had a business relationship. Both parties stipulated that the plaintiff and his wife were interested parties.²⁸

At trial, the check and the testimony of the plaintiff and his wife were admitted into evidence over the objection of Sun Bank. The trial court entered a final judgment in favor of the plaintiff for \$100,000.00 and Sun Bank appealed. Sun Bank argued on appeal that the trial court erred in admitting the check as evidence, since checks are used for a variety of reasons and do not demonstrate clear evidence of debt sufficient to avoid the application of the 'Deadman's Statute.' The appellate court distinguished Sun Bank's argument by demonstrating that

the time of the examination.

(2) This section does not apply when:

(a) A personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee, or guardian of an insane person, is examined on his own behalf regarding the oral communication.

(b) Evidence of the subject matter of the oral communication is offered by the personal representative, heir-at-law, assignee, legatee, devisee, or survivor of a deceased person, or the assignee, committee, or guardian of an insane person.

FLA. STAT. § 90.602 (1989).

26. See FLA. STAT. § 90.05 (1975). This statutory section was where the original "Deadman's Statute" was codified.

27. 579 So. 2d 255 (Fla. 3d Dist. Ct. App. 1991).

28. *Id.* at 255-56.

the check in the case *sub judice* evidenced a debt because of the inscription of the word 'loan' on its face, which was endorsed without restriction. The appellate court felt that under these circumstances the check constituted a writing which demonstrated an indebtedness and, thus, was admissible into evidence.²⁹

The appellate court also rejected Sun Bank's second argument that the trial court erred in admitting the testimony of the interested plaintiff and his wife. The appellate court pointed out that section 90.602 only excludes testimony that refers to conversations between an interested party and a deceased person.³⁰ It does not exclude testimony by an interested party regarding written transactions or written communications with a deceased person.³¹

The *Sun Bank* case drew a sharp dissent from Justice Ferguson of the Third District Court of Appeal.³² Justice Ferguson stated that since the 'Deadman's Statute' bars critical communications, regarding omitted contract terms, the plaintiff in the case *sub judice* simply went through the back door by having inferences drawn from testimony of dealings with the deceased and other transactions.³³ Justice Ferguson pointed out that the notation on the check does not answer the main question, that is, whether the decedent rather than the plaintiff, was the borrower.³⁴ Justice Ferguson adhered to the court's earlier decision in *Fabian v. Ryan*³⁵ and stated "that where the inescapable inference from the testimony of an interested party would show that the decedent agreed to a material term or condition which is missing from the written contract, the testimony would violate the Deadman's Statute, section 90.602."³⁶

29. *Id.* at 256. The appellate court also distinguished between the old "Deadman's Statute," FLA. STAT. § 90.05 (1975), which precluded interested persons from acting as witnesses regarding "transactions" and "oral communications" between the interested person and the deceased, and the revised language of FLA. STAT. § 90.602, which only prohibits such testimony from an interested person insofar as it concerns "oral communications." Section 90.602 omits any language regarding "transactions" which is not impermissible.

30. *Id.*

31. *Id.*

32. *Sun Bank*, 579 So. 2d at 258 (Ferguson, J., dissenting).

33. *Id.*

34. *Id.*

35. 486 So. 2d 10 (Fla. 3d Dist. Ct. App.), *rev. denied*, 494 So. 2d 1150 (Fla. 1986), *cert. denied*, 479 U.S. 1096 (1987).

36. *Sun Bank*, 579 So. 2d at 258 (Ferguson, J., dissenting).

IV. OPINION AND EXPERT TESTIMONY

During the survey period the Florida courts decided, and reversed, cases based on improper expert testimony.³⁷ In *Seibert v. Bayport Beach & Tennis Club Ass'n*,³⁸ an architect, Mr. Seibert was charged in a complaint filed by the Bayport Beach Condominium Association for damages arising from a defective roofing design and construction, defective fire exit design, defective stucco design and construction, and defective ceiling slab design. The jury returned a verdict finding Mr. Seibert not guilty of negligence or building code violations with respect to the roof, the stucco, and the ceiling slabs, but found him liable for the defective fire exit design.³⁹

At trial, the Condominium Association presented an expert witness to testify regarding Mr. Seibert's liability. Mr. Robert Crain, a structural engineer, testified that under his interpretation the fire exit design did not comply with the Standard Building Code.⁴⁰ Mr. Seibert, in turn, testified that in his professional opinion the fire exit design did meet the requirements of the code and had two additional experts, Mr. Herbert Lovett and Mr. Gary Walker testify on his behalf.⁴¹

Mr. Lovett testified that he interpreted the code as requiring only the type of fire exit that Mr. Seibert had designed. Mr. Walker testified that he had been employed by the Southern Building Congress which had promulgated the Standard Building Code. Mr. Walker testified that the official interpretation of the code indicated that Mr. Seibert's design of the fire exit was appropriate. After hearing the testimony the jury returned a verdict against Mr. Seibert for damages regarding the design of the fire exit.⁴²

The Second District Court of Appeal made short shrift of the expert testimony presented in the lower court and reversed. During trial,

37. Opinion and expert testimony is found in the following sections of the evidence code: FLA. STAT. § 90.701 (1989) (opinion testimony of lay witnesses); FLA. STAT. § 90.702 (1989) (testimony by experts); FLA. STAT. § 90.703 (1989) (opinion on ultimate issue); FLA. STAT. § 90.704 (1989) (basis of opinion testimony by experts); FLA. STAT. § 90.705 (1989) (disclosure of facts or data underlying expert opinion); FLA. STAT. § 90.706 (1989) (authoritativeness of literature for use in cross-examination).

38. 573 So. 2d 889 (Fla. 2d Dist. Ct. App. 1990).

39. *Id.* at 890-91.

40. *Id.* at 891.

41. *Id.*

42. *Id.*

the jury was asked to decide if the fire exits were designed in compliance with the Standard Building Code. To make this determination the jury needed to know what the code required. This information was presented to them by expert testimony concerning the interpretation of the code. This was improper. Expert testimony may only be presented if scientific, technical, or other specialized knowledge which will assist the jury in understanding the evidence, or determining a fact in issue.⁴³ Expert testimony is improper when its only use will be to interpret a legal question of law.⁴⁴ The interpretation of the building code was a question of law.⁴⁵ Therefore, the trial court erred by not interpreting the meaning of the code and instructing the jury accordingly. Conflicts in interpretation of the Building Code should have been resolved by the trial court and not the jury.

In addition to reversing the case for submitting a question of law to the jury, the Second District Court of Appeal found that the trial court should have interpreted the Building Code as accepting the design submitted by Mr. Seibert and then should have directed a verdict in his favor.⁴⁶ The district court came to this conclusion because Mr. Lovett, who was the chief building inspector when Mr. Seibert submitted his fire exit design, interpreted the code to require only one exit as designed by Mr. Seibert.⁴⁷ The district court stated that “[w]hen an agency with the authority to implement a statute construes the statute in a permissible way, that interpretation must be sustained even though

43. *Siebert*, 573 So. 2d at 891; see FLA. STAT. §§ 90.702, .703 (1989). Though testimony has been allowed to explain the character of an object in order to determine if it complies with a statute, ordinance, or code, the actual language of the statute, ordinance or code was not being interpreted for the jury. The jury, in these cases, had before it the necessary legal language, the expert testimony was only used to determine the character or type of object in issue and then to determine its application to the legal language. See *Noa v. United Gas Pipeline Co.*, 305 So. 2d 182 (Fla. 1974); *Grand Union Co. v. Rucker*, 454 So. 2d 14 (Fla. 3d Dist. Ct. App. 1984).

The experts in the case *sub judice* did not testify regarding the character of an object but instead presented conflicting opinions as to how the building code should be interpreted.

44. *Id.* In this case the jury was permitted to determine the meaning of the code and then decide whether Mr. Seibert violated the code in his design of the fire exit. This was improper since an expert cannot testify regarding questions of law, as this is the court's function. See *Devin v. Hollywood*, 351 So. 2d 1022 (Fla. 4th Dist. Ct. App. 1976).

45. *Id.* at 892.

46. *Id.*

47. *Id.*

another interpretation may be possible."⁴⁸ This case is a good illustration of the proper and improper use of expert testimony.

In *Holiday Inns, Inc. v. Shelburne*⁴⁹ the Fourth District Court of Appeal decided an interesting issue regarding experts. The *Holiday Inn* case involved a wrongful death and personal injury action against Holiday Inn resulting, in part, from the negligent supervision of an adjacent parking lot next to a bar run by the hotel. Two groups of individuals went to the Rodeo Bar operated by the Holiday Inn. Upon leaving the bar, the two groups exchanged words, which eventually erupted into a fight. During the course of the fight, one of the individuals was shot and killed.⁵⁰

At trial, the judge permitted the plaintiff's expert on grief and bereavement to testify and explain the plaintiff's response to the death of their son.⁵¹ The expert's qualifications indicated that he had obtained a Bachelor's Degree, a Master's Degree and a Ph.D. in sociology, and was working on a post-doctorate at Harvard University in the field of grief and bereavement. The expert testified that he had been researching and studying grief for fifteen years,⁵² and had received federal and state grants in order to do so. The expert was the author of several books and publications on death, dying, and grief and bereavement. The expert had taught at seminars and had provided training as a consultant to hospital staffs, nurses, physicians and social workers. The expert was clearly qualified in the area of grief and bereavement and the trial court correctly found the witness an expert.⁵³

The expert witness testified that his research over a fifteen-year period, and the research of others in the field, indicate that there are patterns of responses to grief, stages of grief, and factors that intensify one's responses to grief. The expert explained to the jury that people can be categorized as falling into either normal patterns of grief or

48. *Siebert*, 573 So. 2d at 892 (citing *Humhosco v. Department of Health and Rehabilitative Servs.*, 476 So. 2d 258 (Fla. 1st Dist. Ct. App. 1985)). Since the city's building inspector's interpretation was entitled to great weight and was not shown to be clearly erroneous, the trial court erred by not accepting the city's interpretation and directing a verdict for Mr. Seibert.

49. 576 So. 2d 322 (Fla. 4th Dist. Ct. App. 1991).

50. *Id.* at 324. The individual who was killed was David Rice. His family brought the wrongful death action.

51. *Id.* at 335.

52. The facts did not indicate if the expert witness received his grief while working as a trial attorney in our court system.

53. *Holiday Inns*, 576 So. 2d at 336.

complicated patterns of grief. He explained both of these patterns to the jury and stated that certain factors affect a person's grief, and the ability of that person to recover from that grief.⁵⁴

The expert testified that he interviewed the plaintiffs before the trial and was able to explain to the jury the plaintiffs' ordeal in working their way through the grief process and where they were in the grief process. The expert testified regarding what factors adversely affected the plaintiffs' response to their son's death and what factors affected their ability or inability to recover from their grief. The expert also indicated the pattern the plaintiffs' grief would take in the future.⁵⁵

In examining the expert testimony in the case, the appellate court stated that the trial court had the discretion to determine whether a witness possessed the necessary expertise, and the range of subjects to which the expert may testify.⁵⁶ The trial court's findings would not be disturbed, unless they were clearly erroneous.⁵⁷ The appellate court found that the trial court did not err in designating the witness an expert in the field of grief and bereavement.

In examining the expert testimony, the Fourth District Court of Appeal determined that three statutory areas must be examined, sections 90.702, 90.704 and 90.403.⁵⁸ The appellate court concluded that from these three statutes there are four requirements for determining the admissibility of expert testimony and stated:

- (1) that the opinion evidence be helpful to the trier of fact;
- (2) that the witness be qualified as an expert;
- (3) that the opinion evidence can be applied to evidence offered at trial; and
- (4) that evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value.⁵⁹

The appellate court stated that in addition to the requirement that the

54. *Id.*

55. *Id.*

56. *Id.* at 335.

57. *Id.*; see *Quinn v. Milard*, 358 So. 2d 1378 (Fla. 3d Dist. Ct. App. 1978).

58. FLA. STAT. § 90.702 (1989) (testimony by experts); FLA. STAT. § 90.704 (1989) (basis of opinion testimony by experts); FLA. STAT. § 90.403 (1989) (exclusion on grounds of prejudice or confusion).

59. *Holiday Inns*, 576 So. 2d at 335 (citing *Kruse v. State*, 483 So. 2d 1383 (Fla. 4th Dist. Ct. App.), *dismissed*, 507 So. 2d 588 (Fla. 1987)).

evidence be helpful to the trier of fact, to be admissible the evidence must also be beyond the ordinary understanding of the jury.⁶⁰

In examining the present case, the appellate court found that the expert witness's testimony clearly assisted the jury, since the subject matter of the testimony was not within the normal, everyday comprehension of the jurors. The appellate court stated that "the subject of grief and bereavement is not an area within the normal every day comprehension of jurors, and the expert testimony was properly admitted to aid the jury in its consideration of the effect of David's death on his parents."⁶¹ The appellate court also rejected the defendant's argument that the expert's testimony should have been excluded because its probative value was outweighed by the danger of unfair prejudice.⁶² The appellate court found that the expert was cross-examined about his reliance on the plaintiffs' statements and that he took the statements at face value.⁶³ The jury was free to reject the expert's testimony based on his reliance of what the plaintiffs told him.⁶⁴ However, the appellate court stated that the objections to this testimony should go solely to the weight of the evidence and not to its admissibility.⁶⁵

In a short but enlightening case, the court in *Brown v. Crane, Phillips, Thomas & Metts, P.A.*⁶⁶ reversed the trial court when opposing counsel cross examined the plaintiffs' expert witness with unfamiliar portions of a book that were not recognized by the expert as being authoritative nor were independently established as being authoritative. In the *Brown* case, the plaintiffs appealed a final judgment entered for the defendants in a medical malpractice action. The plaintiffs' alleged that the doctors were negligent in the delivery of their twins, Matthew and Linsey, which resulted in brain damage and central nervous system damage to the twins.⁶⁷

During the cross-examination of one of the plaintiffs' expert witnesses, the trial court, over objection, permitted defense counsel to read passages from a chapter in a medical textbook in the presence of the jury. The expert indicated that he had not read that chapter, but had

60. *Id.* at 335-36.

61. *Id.* at 336.

62. *Id.*

63. *Id.* at 336-37.

64. *Holiday Inns*, 576 So. 2d at 337.

65. *Id.* See *Botte v. Pomeroy*, 497 So. 2d 1275 (Fla. 4th Dist. Ct. App. 1986), *rev. denied*, 508 So. 2d 15 (Fla. 1987).

66. 585 So. 2d 947 (Fla. 2d Dist. Ct. App. 1991).

67. *Id.* at 948.

authored another section in the book. The Doctor indicated that he did not recognize any entire book as being authoritative.⁶⁸

Section 90.706 of the Florida Statutes specifically states:

Statements of facts or opinions on a subject of science, art, or specialized knowledge contained in a published treatise, periodical, book, dissertation, pamphlet, or other writing may be used in cross-examination of an expert witness if the expert witness recognizes the author or the treatise, periodical, book, dissertation, pamphlet, or other writing to be authoritative, or, notwithstanding nonrecognition by the expert witness, if the trial court finds the author or the treatise, periodical, book dissertation, pamphlet, or other writing to be authoritative and relevant to the subject matter.⁶⁹

The expert witness did not recognize the book in question as being authoritative. In addition, the defense counsel did not attempt to independently establish the authoritativeness of the author or the text. Therefore, the trial court erred in allowing defense counsel to read portions of the medical text in the presence of the jury.⁷⁰

V. HEARSAY

A. *Inconsistent Statements as Substantive Evidence*

The improper use of inconsistent statements as substantive evidence during trial is one of the most abused sections of the evidence code.⁷¹ The misuse generally takes one of two forms. In the first form, the trial attorney impeaches a witness with prior inconsistent statements. He then, improperly, argues the substance (truth) of these inconsistent statements to the jury in closing argument.⁷² In the second

68. *Id.*

69. FLA. STAT. § 90.706 (1989).

70. *Brown*, 585 So. 2d at 948.

71. Attorneys frequently misapprehend the difference in prior inconsistent statements that are used to impeach the credibility of the witness and are, therefore, simply not hearsay under FLA. STAT. § 90.801(1) (1989), and prior inconsistent statements that are used as substantive evidence under FLA. STAT. § 90.801(2)(a) (1989). A distinction between the two is essential to proper courtroom practice and procedure.

72. Prior inconsistent statements cannot be used as substantive evidence. Their use is merely to demonstrate that the witness gave a prior statement different from the one given in court. The issue is one of the witnesses credibility, therefore, the truth of the statement is not in issue. In other words, the prior inconsistent statements are offered to impeach the credibility of the witness and demonstrate to the jury that the

form, the trial attorney desires to use the prior inconsistent statements as substantive evidence—for the truth of the matter asserted—but does not fully comply with Rule 90.801(2)(a) and, consequently, commits error by arguing these statements as substantive evidence to the jury.

The trial attorney should discern the difference between prior inconsistent statements, which are nonhearsay,⁷³ to impeach the credibility of the witness, and prior inconsistent statements that can be used for the truth of the matter asserted therein.⁷⁴ The difference is crucial and an error in judgment can cause a reversal.

The improper use of prior inconsistent statements resulted in reversal in the first degree murder case of *State v. Smith*.⁷⁵ In *Smith*, the defendant was being tried for the murder of John Cascio. The murder arose when the victim made sexual advances to the defendant's girlfriend, Josette Estes. During the investigation of the murder, Ms. Estes, who was seventeen at the time, was brought into a room where a deputy sheriff and a prosecutor took her statement before a court reporter.⁷⁶

During trial, the state had the trial court call Ms. Estes as a court witness, arguing that the State was unable to vouch for her credibility because she had given materially inconsistent statements under oath.⁷⁷

witness has made two inconsistent statements and, therefore, should not be believed. See *United States v. Lay*, 644 F.2d 1087 (5th Cir.), cert. denied, 454 U.S. 869 (1981).

73. FLA. STAT. § 90.801(1)(c) (1989). Prior inconsistent statements which are used to impeach the credibility of a witness do not fall within the definition of hearsay because the statements are not for the truth of the matter asserted but are merely used to demonstrate that the witness made a statement different from the one being made in court and, therefore, should not be believed.

74. FLA. STAT. § 90.801(2)(a) (1989). Under prior evidentiary rules, the witness could not be impeached by the party who called him. However, this restriction was not, and is not, applicable to a statement offered under section 90.801(2)(a). The purpose for offering the evidence under this section is to *prove the truth of the contents of the prior statement* rather than to attack the credibility of the witness.

Two important factors must be considered when using prior inconsistent statements as substantive evidence under section 90.801(2)(a). First, unlike prior inconsistent statements used for impeaching the credibility of a witness, a prior inconsistent statement used as substantive evidence must be under *oath*. Second, in criminal cases it is unlikely that the prosecution can rely solely on a prior inconsistent statement as the *only* evidence available to prove an essential element of a criminal charge. See *United States v. Orrico*, 599 F.2d 113 (6th Cir. 1979).

75. 573 So. 2d 306 (Fla. 1991).

76. *Id.* at 308.

77. *Id.* at 312-13. The outdated argument of vouching for the credibility of your witness has been put to rest by last year's amendment to § 90.608. See 1990 Fla. Sess.

The trial court complied with the State's request and allowed the witness to be called as a court witness.⁷⁸ The defendant argued on appeal that the trial court erred in allowing the State to impeach the witness with prior inconsistent statements and allowing the State to rely on those statements as substantive evidence. The supreme court agreed and reversed the defendant's conviction.⁷⁹

The supreme court stated that the purpose of admitting prior inconsistent statements is to test the credibility of the witness.⁸⁰ This purpose is misused when the State is allowed to use these statements as substantive evidence of guilt. The Florida Supreme Court found that the State had attempted to enter these statements as impeachment and as substantive evidence under section 90.801(2)(a).⁸¹ The defendant relied on *State v. Delgado-Santos*,⁸² and argued that the interrogation of Ms. Estes did not satisfy the requirements of section 90.801(2)(a) since the interrogation was not an "other proceeding" as contemplated by the statute.

The supreme court examined the meaning of "other proceeding" in the *Delgado-Santos* case, affirming and adopting the opinion of the Third District Court of Appeals, and thus found that "an 'other pro-

Law Serv. 174 (West), *amending* FLA. STAT. § 90.608 (1989). This change allows a party to impeach his own witness and brings Florida in line with the Federal Evidence Code. *See* FED. R. EVID. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness.").

Additionally, the supreme court found that Ms. Estes had cooperated with the authorities and that Ms. Estes prior statements were not materially inconsistent such as to render the State unable to vouch for her credibility. The supreme court found no adverse, material inconsistencies in the record that would allow calling Ms. Estes as a court witness.

78. At the time of the trial, a party calling a witness could not impeach the credibility of that witness. *Compare* FLA. STAT. § 90.608 (1987) *with* FLA. STAT. § 90.608 (Supp. 1990). The only way the state could impeach the witness was to have the witness called as a court witness or to have the witness declared adverse. *See* FLA. STAT. § 90.608(2) (1987).

79. *Id.* at 313.

80. *Smith*, 573 So. 2d at 313.

81. *Id.* at 314. *See* FLA. STAT. § 90.801(2)(a) (1985). Prior inconsistent statements can, in fact, be used as substantive evidence and for impeachment. *See* CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* § 801.7 (1984).

82. 497 So. 2d 1199 (Fla. 1986). The supreme court in *Delgado-Santos* held that a police interrogation was not an "other proceeding" as contemplated by section 90.801(2)(a). The analysis of this case laid the basis of the supreme court's determination of whether a prosecutor's investigative interrogation was an "other proceeding" within the rule.

ceeding' must be no less formal than a deposition and no more so than a hearing."⁸³ The supreme court found that a proceeding implies a certain degree of formality, convention, structure and regularity and concluded that a police investigative interrogation is not an "other proceeding" as contemplated by section 90.801(2)(a).⁸⁴

The issue then became whether this analysis applies to a prosecutor's investigative interrogation. The Florida Supreme Court concluded that it did and stated:

When Estes gave the statement at issue, she was brought into a room where a deputy sheriff and a prosecutor were waiting with a court reported to interrogate the seventeen-year-old about a homicide in which she had just been involved. No counsel was present to advise her or to protect Smith's interests; no cross-examination was possible and no judge was present or made available to lend an air of fairness or objectivity. This prosecutorial interrogation was neither regulated nor regularized, it contained none of the safeguards involved in an appearance before a grand jury and did not even remotely resemble that process, nor did it have any quality of formality and convention which could arguably raise the interrogation to a dignity akin to that of a hearing or trial. Prosecutorial interrogations such as the one here provide no degree of formality, convention, structure, regularity and replicability of the process that must be provided pursuant to the statute to allow any resulting statements to be used as substantive evidence to prove the truth of the matter asserted.⁸⁵

The Florida Supreme Court then concluded that the trial court erred by allowing the jury to consider Ms. Estes' prior statements to the prosecutor as substantive evidence and reversed the defendant's conviction.

B. *Prior Consistent Statements*

One of the typical mistakes in using prior consistent statements⁸⁶

83. *Smith*, 573 So. 2d at 314-15 (citing *Delgado-Santos*, 497 So. 2d at 76-77).

84. *Id.*

85. *Id.*

86. FLA. STAT. § 90.801(2)(b) (1989) states 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 . . .

(b) Consistent with his testimony and is offered to rebut an express or

is failing to determine if the prior consistent statement took place after an express or implied charge of improper influence, motive or recent fabrication. Because the out of court statement is consistent does not mean it is admissible under this hearsay exception. Illustrating this point is *McDonald v. State*,⁸⁷ where the First District Court of Appeal examined the use of prior consistent statements. In *McDonald*, the victim testified that the defendant forced his way into her apartment and committed a sexual battery on her.⁸⁸ Immediately after the attack, the victim ran to a next door neighbor's house where she relayed the incident. Approximately one hour later, the victim told the same story to the police. The next door neighbor and the police officer were allowed to testify at trial to the story told them by the victim, over defense objection.⁸⁹

The appellate court examined the witnesses' statements and determined that they clearly constituted prior consistent statements of the victim. However, the appellate court also found that there was no express or implied charge of improper influence, motive or recent fabrication that would justify admitting the statements under section 90.801(2)(b).⁹⁰ While the cross-examination of the victim did point out inconsistencies in the pre-trial and trial versions of the events, there was no indication that the victim was changing her story at trial or of improper influence or a motive to falsify. The appellate court concluded that the prior consistent statements should not have been admitted under section 90.801(2)(b).

The appellate court stated that the statements were admissible under a common law exception to the hearsay rule in sexual battery cases known as the "first complaint" exception,⁹¹ and were admissible

implied charge against him or improper influence, motive, or recent fabrication.

87. 578 So. 2d 371 (Fla. 1st Dist. Ct. App. 1991).

88. *Id.* at 372. The victim's child was asleep.

89. *Id.*

90. FLA. STAT. § 90.801(2)(b) (1989).

91. *McDonald*, 576 So. 2d at 373; *see* *Monarca v. State*, 412 So. 2d 443 (Fla. 5th Dist. Ct. App. 1982) (statements admissible to rebut the inference of consent which might be drawn from the silence of the victim); *see also* *Ellis v. State*, 6 So. 768 (1889) (where the exception was first recognized). The "first complaint" exception has been swallowed up under what was known as the *res gestae* exception to the hearsay rule. *See* *Fitter v. State*, 261 So. 2d 512 (Fla. 3d Dist. Ct. App. 1972); *Gray v. State*, 184 So. 2d 206 (Fla. 2d Dist. Ct. App. 1966).

as a spontaneous statement under section 90.803(1)⁹² or as an excited utterance under section 90.803(2).⁹³ The appellate court, therefore, found the error in admitting the victim's statements under 90.801(2)(b) to be harmless and sustained the defendant's conviction.

C. *Statements Made for the Purpose of Identification*

The use of section 90.803(2)(c)⁹⁴ invariably creates problems in trial which should not occur. Section 90.803 states that "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: (c) One of identification of a person made after perceiving him."⁹⁵ This section is frequently abused when the proponent insists that every out of court identification falls under section 90.803(2)(c). Section 90.803(2)(c) is very specific and allows the use of out of court statements of identification when specific prerequisites are met. First, the *declarant* must testify at the trial or hearing.⁹⁶ Second, the declarant must be subject to *cross-examination* regarding the statement. Third, the statement of identification must be made *after* the declarant perceives the assailant.⁹⁷

The typical tendency at trial is for the attorney to simply leave out one of the above-mentioned steps. This is keenly illustrated in *Stanford v. State*.⁹⁸ In *Stanford*, the victim was attacked at his home by an indi-

92. FLA. STAT. § 90.803(1) (1989).

93. FLA. STAT. § 90.803(2) (1989). The appellate court found that the statement to the police officer may not have been a spontaneous statement or an excited utterance, but that based on the admissibility of the other statements, this testimony was merely cumulative and harmless. *McDonald*, 578 So. 2d at 374.

94. FLA. STAT. § 90.801(2)(c) (1989).

95. *Id.*

96. Section 90.801(2)(c) makes the testimony of a witness who was present at the time of the identification admissible, if the person making the identification testifies at the trial and is subject to cross-examination concerning the identification (emphasis added in text).

97. The statement must come after the declarant *perceives* the identified person. It will be insufficient to merely identify the defendant to a third party without the initially perceiving the presence of the identified individual (emphasis added in text).

Section 90.801(2)(c) is applicable regardless of whether the declarant identifies the individual in court. The failure to repeat the identification in court does not affect the admissibility of evidence of the prior identification. *See Brown v. State*, 413 So. 2d 414 (Fla. 5th Dist. Ct. App. 1982); *Eans v. State*, 366 So. 2d 540 (Fla. 3d Dist Ct. App. 1979).

98. 576 So. 2d 737 (Fla. 4th Dist. Ct. App. 1991).

vidual known to him. During trial, the court allowed, over objection, the testimony of the victim's daughter and a neighbor named Ms. Hayes, identifying Stanford as the victim's assailant. The daughter and Ms. Hayes testified to the identification made by the victim naming the person that he believed committed the crime.⁹⁹ The daughter testified that on the day her father was attacked, her mother called her to come home immediately. Upon finding ambulance attendants treating her father, she asked her father who had beaten him and he responded with the defendant's name. The next door neighbor, Susan Hayes, testified that when she asked the victim who had beaten him, he also responded with the defendant's name.¹⁰⁰

The appellate court found that the testimony did not fit within the ambit of section 90.801(2)(c). Section 90.801(2)(c) specifically refers to a situation where the declarant sees the person after the criminal episode and identifies that person as the offender. The reasoning is simple. The out of court identification occurring shortly after the declarant perceives his assailant allows for a more reliable statement, one that is fresh in the declarant's mind. To merely allow testimony regarding who the declarant believes committed the crime, without the need for perceiving the individual, would circumvent the rule and lead to unreliable and prejudicial statements being placed into evidence.¹⁰¹ In the present case, the appellate court found that although the evidence did not fit within the parameters of section 90.801(2)(c) it was harmless in light of other identification testimony and the overwhelming evidence of the defendant's guilt.¹⁰²

99. *Id.* at 738. The victim lost consciousness after the attack and the next thing he remembered was waking up in a hospital a week later. The victim remembered what the defendant did to him because he opened his eyes during the attack. *Id.*

100. *Id.*

101. If numerous witnesses could be paraded before the court to testify that the declarant said this person did the crime (without complying with the prerequisites of section 90.801(2)(c)), it would lead to a situation where the jury could impermissibly rely on a statement whose reliability is in doubt. The jury could arrive at an erroneous decision. What if the declarant did not get a good look at the individual, but was convinced of the person's identity? Unnecessarily bolstering this unreliable testimony with other out of court statements of identification could lead the jury to improperly weigh the value of this testimony. The perceptions of individuals change dramatically when confronted with a stressful crisis. The jury should not be allowed to rely on inherently unreliable evidence as its probative value would be outweighed by the prejudicial effect this may have on the jury decision making process. This is especially true in close cases.

102. *Stanford*, 576 So.2d at 740-41. The reader should not misperceive the im-

D. *Statements for Purposes of Medical Diagnosis*

Hearsay statements made for the purposes of medical diagnosis¹⁰³ are treated as an exception to the hearsay rule because of the strong motivation for declarants to be truthful when making statements to physicians for the purpose of diagnosis and treatment. Florida law recognizes the admissibility, as substantive evidence, of statements made to treating physicians but this exception only permits testimony relating to causation when it is reasonably pertinent to diagnosis or treatment.¹⁰⁴ Additionally, the statements need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even family members can be included.

Problems in using section 90.803(4) generally arise when the statements being entered are not pertinent to diagnosis or treatment.¹⁰⁵ Although statements which describe the inception or cause of an injury can fall within this hearsay exception, if they are reasonably pertinent to the treatment, pure statements of fault do not qualify.¹⁰⁶

fact of a decision that is affirmed even though an evidentiary error is made during the trial. If the evidence is overwhelming, the evidentiary error will usually be considered harmless. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986) (regarding application of the harmless error standard in Florida). However, in the closer cases, or the cases fraught with numerous errors, harmless error will not be a safe harbor and evidentiary errors will cause reversals.

103. FLA. STAT. § 90.803(4) (1989). This section states:

Statements made for purposes of medical diagnosis or treatment by a person seeking the diagnosis or treatment, or made by an individual who has knowledge of the facts and is legally responsible for the person who is unable to communicate the facts, which statements describe medical history, past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

Id.

104. *See Brown v. Seaboard Airline Co.*, 434 F.2d 1101 (5th Cir. 1970).

105. *See Saul v. MacArthur Found.*, 499 So. 2d 917 (Fla. 4th Dist. Ct. App. 1986) (statement that the patient fell by catching the heel of her toe on the carpet not admissible under section 90.803(4) since the statement was not relevant to treatment or diagnosis); *Torres-Arboledo v. State*, 524 So. 2d 403 (Fla. 1988) (statement by victim to emergency room doctor that he had been shot admissible under section 90.803(4) since it was pertinent to treatment and diagnosis of his wounds, but statement that black people tried to steal his medallion not admissible since it was a fact not pertinent to treatment or diagnosis).

106. In *United States v. Iron Shell*, 633 F.2d 77, 82-85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981), the court stated that a statement regarding the inception or general cause of an injury should be admitted if: 1) the statement is reasonably

In *Visconti v. Hollywood Rental Service*,¹⁰⁷ the plaintiff sustained personal injuries as a result of a 'slip and fall' while on the defendant's property. The plaintiff presented evidence that her fall was caused by the defendant's negligent maintenance of the floor surface. The defendant's response was that the cause of the plaintiff's injury was not the lack of proper maintenance on the floor but the defendant's own negligence. During trial the defense admitted, on cross-examination and over the plaintiff's objections, various hospital and emergency room medical reports which stated that the Plaintiff "fell coming out of the pool."¹⁰⁸ These documents were entered during defendant's cross-examination of the plaintiff as impeachment of her testimony.¹⁰⁹ The appellate court found that the even if a proper foundation had been laid for the admission of these records, statements which relate to the cause of the fall are generally not statements made for the purpose of medical diagnosis or treatment and are, therefore, not admissible under the hearsay exception as statements made for purposes of medical diagnosis or treatment.¹¹⁰

pertinent to diagnosis or treatment; 2) the declarant's motive is to be truthful; and 3) it is reasonable for the physician to rely on the information in the diagnosis or treatment. Part three of the analysis is the area most often overlooked by the trial court, yet, is probably the most important step in determining whether the statement qualifies under 90.803(4).

107. 580 So. 2d 197 (Fla. 4th Dist. Ct. App. 1991).

108. *Id.* at 198.

109. *Id.* The plaintiff denied making the statements reflected in the multitude of hospital records. *Id.*

110. *Id.* The *Visconti* case is very puzzling from a logical standpoint. Though the court was generally correct in its assessment regarding the use of section 90.803(4), based on the limited fact pattern, the dicta in the case was internally inconsistent. If the material was being entered for impeachment purposes then it was not hearsay at all, but merely demonstrates that the plaintiff made a statement, at a different time, inconsistent with the one made in court. The statements of the plaintiff could also have been considered an admission of a party opponent under section 90.803(18). Therefore, if the material could have been properly entered into evidence, but was merely entered under the wrong section of the evidence code, then the error should have been no more than harmless. The court could have considered that all the medical reports, with other notations not pertinent for the impeachment or admission, were prejudicial to the plaintiff, however, the opinion is silent regarding this concern. The failure to authenticate this material could have concerned the court, the plaintiff denied having made any such statements, but, once again, the opinion is silent.

Based on the limited facts it is hard to discern how or why the defense chose to enter this impeaching material in opposing counsel's case-in-chief, as opposed to calling the person who heard the statement and then using that person to impeach the plaintiff

A case illustrating the correct use of section 90.803(4) is *State v. Ochoa*.¹¹¹ In *Ochoa*, the Third District Court of Appeal reversed the trial court's order dismissing the charges of sexual battery against the defendant, based on defense counsel's *ore tenus* motion to dismiss at the completion of an evidentiary hearing on the defendant's motion in limine.¹¹² The appellate court, after omitting the statements of the victims that identified the defendant as the perpetrator of the sexual battery, stated that:

the victims' statements to the physician indicated that they each had been touched in the genitalia by an adult male. The physical examination revealed conditions consistent with digital penetration and inconsistent with an accidental occurrence.¹¹³

The appellate court determined that the statements were made for the purposes of medical diagnosis or treatment, since the reason for the visit was for a physical examination.¹¹⁴ The medical history was, therefore, pertinent to his diagnosis and the statements were appropriate under section 90.803(4).

as suggested by Judge Garrett. *Id.* (Garrett, J., concurring). This would have been more effective than merely attempting to enter documentary evidence in the plaintiff's case-in-chief.

The court also alludes to the fact that the records could have been admissible under the business records exception, 90.803(6), had the proper foundation been laid. However, Judge Garrett, in his concurring opinion, correctly points out that the plaintiff had no business duty to transmit her statement. This would preclude it from being entered as a business record. *Id.* at 198 n.1 (Garrett, J., concurring).

111. 576 So. 2d 854 (Fla. 3d Dist. Ct. App. 1991).

112. *Id.* at 859. It is a matter of utter disbelief that a trial court would rule on an oral motion to dismiss charges on such a serious case, or in any case for that matter, when the case law and the Rules of Criminal Procedure clearly indicate that there must be a pending *written* motion, FLA. R. CRIM. P. 3.190(a) and adequate *notice* to the opposing party. It is no less surprising that some of the poorer judicial decisions come from those judicial circuits that are overburdened with cases. However, this is no excuse for failure to know, understand, and implement basic fundamentals of the law, which is oftentimes just plain common sense. Clearly, the ideals of due process, fundamental fairness, fair play and common sense seem to be lost in the ever present rush to move cases. Though attorneys have been criticized for overzealous advocacy bordering on unethical conduct, poor and unethical lawyering can only be blamed on those judges who tolerate, and thus tacitly approve, poor preparation and unethical conduct to continue in the courtroom without severe sanctions being imposed.

113. *Id.*

114. *Id.*

E. *Records of Regularly Conducted Business Activity*

Business records¹¹⁵ are recognized as a hearsay exception because the reliability of these records are demonstrated by: 1) systematic checking, 2) habits of precision developed by the regular and continuous practices of businesses, 3) the actual experience of businesses in relying upon the accuracy of its records, and 4) the duty to make accurate records as part of a continuing job or occupation. Whenever the business records exception is used, there inevitably seems to be an argument regarding the proper custodian of the records. More and more attorneys continue to harbor the notion that only the records custodian, or the person who made the record, is qualified under section 90.803(6)(a) to introduce business records. This is simply incorrect. Section 90.803(6)(a) specifically states that a "custodian or otherwise qualified witness" who has the necessary knowledge to testify as to how a particular record was made can lay the necessary foundation for the introduction of the record. Any witness who can testify to the method by which a particular record was made is a "qualified witness."

An excellent example demonstrating the role of the business records exception is illustrated in *Stern v. Gad*.¹¹⁶ In *Stern*, two Colombian emerald dealers, Juan Vargas and Jose Stern, transacted various business dealings over a period of years. In 1985, Mr. Vargas died. Mr. Gad, a resident of New York and also a gem dealer, was appointed as the personal representative of Mr. Vargas' estate. The decedent's widow found five undated checks among the decedent's effects. The

115. FLA. STAT. § 90.803(6) (1989). The business record exception states: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances show lack of trustworthiness. The term "business as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(b) No evidence in the form of an opinion or diagnosis is admissible under paragraph (a) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

FLA. STAT. § 90.803(6)(a) (1989).

116. 575 So. 2d 258 (Fla. 3d Dist. Ct. App. 1991).

checks accumulated total was \$805,000. The personal representative, acting on his attorney's advice, deposited the checks. The checks were returned for insufficient funds.¹¹⁷ Upon the checks being returned for insufficient funds, the personal representative brought suit for payment on the five checks. Stern, the defendant in the case, counterclaimed for return of the checks. Mr. Stern claimed that the balance due the estate was \$60,000, not \$805,000. The defense claimed that the checks had been given to the decedent as security for purchases of emeralds, with the specific understanding that the checks would not be dated and deposited without the consent of Mr. Stern. The defense claimed that the account had been paid down to \$60,000 by other checks.¹¹⁸

During trial, the court excluded a ledger sheet recording the dollar transactions of the emerald dealers. The ledger sheet was maintained by Haim, Mr. Stern's son-in-law, to record the purchases from, and payments to, the decedent. Haim was a gem dealer in Miami but did not participate in the transactions between Mr. Stern and Mr. Vargas. Because Haim resided in Miami, he was asked by Mr. Stern to keep track of the gem transactions. The personal representative objected to the introduction of the ledger sheet stating that it did not qualify as a business record.¹¹⁹

The appellate court stated that the personal representative's conclusory allegations were insufficient and found that the ledger was maintained in the regular course of business.¹²⁰ The appellate court based this finding on testimony by Haim that entries in the account were regularly made and were intended to accurately reflect the outstanding balance in that account at any particular time. Haim testified that the data in the ledger came from information provided by Stern and Vargas, and when Haim wrote checks on the account, those entries were from his own personal knowledge.¹²¹ Finally, Haim testified that he, Vargas, and Stern met in February of 1984 and agreed that the outstanding balance shown on the ledger at that time was accurate. Based on this testimony the Third District Court of Appeal found that the ledger sheet qualified as a business record and the trial court erred by excluding this evidence.¹²²

117. *Id.* at 259.

118. *Id.*

119. *Id.* at 261.

120. *Id.* at 260.

121. *Stern*, 575 So. 2d at 260.

122. *Id.* The personal representative also argued that the ledger sheet did not

F. *The Public Records Exception*

Public records are a recognized exception to hearsay.¹²³ This exception recognizes the inconvenience which would result in requiring a public official who made a public document to testify to information contained in the document. The public official's duty to accurately record matters, the public's scrutiny of the public records, the lack of motive to falsify such documents, and the force of habit and routine which goes into recording public documents, provides the necessary assurances of reliability. Consequently, the rule excludes matters observed by police officers and other law enforcement personnel for logical reasons which would impugn the trustworthiness and reliability of public documents. It is a common belief that observations by police officers at the scene of a crime, during investigation, or when a defendant is arrested, are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the alleged defendant.¹²⁴ This exclusion has now been

satisfy the business records exception because Haim did not keep this ledger sheet as a regular practice in his emerald business. The appellate court found that this particular ledger sheet was kept at the specific request of, and as an agent for, Mr. Stern, as a part of Mr. Stern's business. The appellate court correctly pointed out that Mr. Stern could just have easily hired an independent bookkeeping service or accountant in Miami to maintain these records and they would have been no less admissible. The fact that Mr. Stern chose someone familiar with the emerald business should not affect the admissibility of the ledger as a business record under section 90.803(6) since all the prerequisites had been met.

The appellate court also refuted the personal representatives allegations that the business record was not admissible because Haim was not an employee of Stern. A business record does not cease to be admissible because an independent business contractor acting on behalf of the business prepares the document. *Id.*

123. FLA. STAT. § 90.803(8) (Supp. 1991), *as amended*, 1991 Fla. Sess. Law Serv. 255 (West). This section states:

Records, reports, statements reduced to writing, or data compilations, in any form, or public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matter which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934(5).

Id.

124. See CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 803.8 (2d ed. 1984). The committee notes to section 90.803(8) state that:

The provision that the exception applies to matters observed pursuant to a

modified.

The only legislative change in the rules of evidence came in section 90.803(8).¹²⁵ The legislature amended section 90.803(8) to add a final sentence which provides that the criminal case exclusion for records and reports of matters observed by a law enforcement officer do not apply to an "affidavit otherwise admissible under s. 316.1934(5)."¹²⁶ An affidavit which contains the results of an individual's breath or blood test, as authorized by section 316.1932 or section 316.1933, is admissible under the public records exception by section 316.1934(5), if the statutory requirements are demonstrated in the affidavit. The requirements the affidavit must disclose are:

- (a) The type of test administered and the procedures followed;
- (b) The time of the collection of the blood or breath sample analyzed;
- (c) The numerical results of the test indicating the alcohol content of the blood or breath;
- (d) The type and status of any permit issued by the Department of Health and Rehabilitative Services that was held by the person who performed the test; and
- (e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.¹²⁷

This modification belies the logic and purpose behind the public records exception and cuts against the trustworthiness and reliability of this exception. The affidavit is prepared in anticipation of litigation, presumably in an adversarial atmosphere. The reliability of this exception is emasculated, since the lack of motive to falsify no longer applies in situations of an adversarial nature. The underlying basis for the public records exception, which makes this hearsay statement trustworthy

duty imposed by law "as to matters there was a duty to report; excluding in criminal cases matters observed by police officers or other law enforcement personnel", was added by the Senate Judiciary-Criminal Committee to make certain that a defendant's right to confrontation could not be abridged in a criminal case. The committee adopted the view of the Federal Rules of Evidence.

FLA. STAT. ANN. § 90.803(8) (West 1979) (committee notes).

125. FLA. STAT. § 90.803(8) (Supp. 1991), *as amended*, 1991 Fla. Sess. Law Serv. 255 (West).

126. FLA. STAT. § 90.803(8) (1989).

127. FLA. STAT. § 316.1934(5) (1989).

and reliable, is weakened by the legislative grafting of the rule, which is, once again, a legislative overreaction to the problem of drunk driving.¹²⁸

The fate of this amendment will ultimately be decided in our court system in the years to come. It will, in all likelihood, not resolve the evidentiary problems associated with the presentation of this type of proof but will ultimately only spin off more unnecessary litigation for our appellate courts to decide. There will be an obvious problem of whether an affidavit introduced in a *criminal trial* will violate the defendant's right of confrontation. An affidavit such as this is not firmly rooted in our jurisprudence and the reliability of these affidavits must meet the test set out by the United States Supreme Court in *Idaho v. Wright*.¹²⁹

G. *Statements of a Child Victim*

Section 90.803(23)¹³⁰ creates a limited exception for hearsay

128. Drunk driving is a serious problem plaguing our nation. However, legislative amendments which are enacted to lessen the state's burden in a criminal case, will not solve the problem, only add to it. Once again, the legislature's attempt to respond to the public outcry of drunk driving could backfire on the wrongly accused defendant by unfairly preventing him from properly confronting the witnesses against him and thoroughly cross-examining the witnesses and evidence before the jury.

129. 110 S. Ct. 3139 (1990).

130. FLA. STAT. § 90.803(23) (1991). This section states:

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statements made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or

b. is unavailable as a witness, provided that there is other corroborative

statements of children eleven years of age or less, if the statement describes an act of child abuse, or sexual abuse, as described by the child victim. The use of section 90.803(23) is limited to children with a physical, mental, emotional, or developmental age of eleven or less. The exception should not apply to statements of children who are witnesses but not victims.¹³¹ The exception is applicable to both criminal and civil cases.

The trial court must hold a hearing outside of the presence of the jury before a statement may be admitted under section 90.803(23). This hearing is to determine whether the circumstances surrounding the making of the statement demonstrates that the statement is reliable.¹³² The child does not have to be testimonially competent for the child's out-of-court statement to be admitted in evidence.¹³³

During the survey period, the Fifth District Court of Appeal decided an important case concerning out of court statements of a child victim under section 90.803(23). In *Kopko v. State*,¹³⁴ the district court of appeal examined the issue of repetitive hearsay testimony recounting the child victim's out-of-court statements describing the criminal sexual acts.

evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to section 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Id.

131. The language of the statute clearly indicates its application is only for the child victim and not a witness. *Contra Russell v. State*, 572 So. 2d 940 (Fla. 5th Dist. Ct. App. 1990) (statements of a child *witness*, not victim, admissible under section 90.803(23)).

132. See *Perez v. State*, 536 So. 2d 206 (Fla. 1988), *cert. denied*, 492 U.S. 923 (1989); *State v. Townsend*, 556 So. 2d 817 (Fla. 5th Dist. Ct. App. 1990); *Distefano v. State*, 526 So. 2d 110 (Fla. 1st Dist. Ct. App. 1988).

133. See *Perez v. State*, 536 So. 2d 206 (Fla. 1988), *cert. denied*, 492 U.S. 923 (1989); *State v. Townsend*, 556 So. 2d 817 (Fla. 5th Dist. Ct. App. 1990).

134. 577 So. 2d 956 (Fla. 5th Dist. Ct. App. 1991).

The child victim in this case was nine years old when she reported sexual abuse allegedly perpetrated by her stepfather, David Kopko. The defendant, David Kopko, had been married to the child's mother for approximately three years. Mrs. Kopko also had one son from a previous marriage and had one daughter with the defendant. Shortly after Mrs. Kopko told her oldest daughter, the victim, that she had decided to leave the defendant, the daughter described various sexual abuse by the defendant.¹³⁵

Mrs. Kopko left the marital home taking all three children. A few days afterwards she met with a police officer and described the sexual abuse of her daughter. Afterwards the child victim made a videotaped statement concerning the incidents of sexual abuse by the defendant. The statement was taken in the form of an interview with a counselor for the Child Protection Team (CPT). The child victim was also examined by a CPT physician but no signs of abuse were discovered. The defendant eventually sued his wife for divorce and custody of his natural daughter. The defendant was later charged with sexual battery and lewd assault on the step-daughter.¹³⁶

At trial, the state called: the child victim; Mrs. Kopko, the child's mother; the CPT counselor; and, the CPT physician who examined the child. The child victim's testimony was clear and concise and very similar to the statements she made to her mother, the CPT counselor, and the physician. The defense objected to the hearsay testimony of the CPT counselor and the physician, who related the child victim's statements.¹³⁷ The trial court overruled these objections.

The defendant testified at trial and denied all the charges. The defendant described the family situation and testified that he and his wife fought regularly during their marriage regarding discipline, the children, and money. The defendant testified that his ex-wife would do anything to prevent him from obtaining custody of their youngest daughter.¹³⁸ The jury found the defendant guilty of sexual battery and lewd assault on a child. The defendant, who had no prior record, was sentenced to life in prison, with a minimum mandatory sentence of

135. *Id.* at 957.

136. *Id.*

137. *Id.* at 958. The videotape of the child was originally excluded as evidence in the trial. However, on cross-examination the defense "opened the door" to this evidence and the trial court allowed the state to play portions of the videotaped interview for the jury.

138. *Kopko*, 577 So. 2d at 959.

twenty-five years.¹³⁹

The appellate court quickly dispatched the issues regarding the sufficiency of the notice and the trustworthiness of the hearsay statements. The district court found that the lack of notice did not create reversible error¹⁴⁰ and found that the trial court did not abuse its discretion in admitting the hearsay statements.¹⁴¹ The appellate court then turned its attention to what it perceived as the "real problem in this case . . . why the CPT counselor or doctor should have testified at all about what the child had said out-of-court, or why the tape was played."¹⁴² The district court's concern centered upon the unnecessary bolstering of the child victim's statements through a parade of professional witnesses in a case with no physical evidence to corroborate these statements:

By having the child testify and then by routing the child's words through respected adult witnesses, such as doctors, psychologists, CPT specialists, police and the like, with the attendant sophistication of vocabulary and description, there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony. It is worrying to see, in a case such as this one, with virtually no evidence to corroborate the testimony of either the alleged victim or the alleged abuser, that only the victim's version of events is allowed to be repeated through different (professional) witnesses.¹⁴³

The district court examined other cases where a "parade" of witnesses unnecessarily bolstered the child victim's credibility¹⁴⁴ and examined how these district courts analyzed the problem. The district court con-

139. *Id.*

140. *Id.* The State's notice requirement was defective because the State did not set out what factors the State would argue to establish trustworthiness of the statements. The appellate court did not find reversible error due to the untimely notice because the arguments actually made by the state were discernible from viewing the tape and did not catch the defense by surprise. *Id.*

141. *Id.* The appellate court found that the admissibility of the statements was a judgment call for the trial court and stated that the trial court did not abuse its discretion in concluding that the hearsay statements were reliable enough to be admitted. *Id.* at 960.

142. *Kopko*, 577 So. 2d at 960.

143. *Id.* at 960-61.

144. *Id.* at 961; see *Griffin v. State*, 526 So. 2d 752 (Fla. 1st Dist. Ct. App. 1988); *Lazarowicz v. State*, 561 So. 2d 392 (Fla. 3d Dist Ct. App. 1990).

cluded that even though the trial court did not err in ruling that the hearsay statements of the child victim were admissible under section 90.803(23), "it was reversible error to utilize this hearsay exception as a device to admit prior consistent statements."¹⁴⁵

The district court stated that neither the statute nor the legislative history discuss the problem of prior consistent statements bolstering the victim's in-court testimony.¹⁴⁶ Additionally, the district court noted that if section 90.803(23) were meant to abrogate prior case law forbidding the repetitious use of prior statements to bolster in-court testimony, then such legislative intent should have been made clear. Absent a clear expression of such intent the district court held that:

where a child victim is able at trial to fully and accurately recount the crime perpetrated on him or her, it is error to allow the introduction of prior consistent statements made by the child. Where the child's out-of-court statements are needed to provide evidence of any aspect of the crime or related events which the testifying or unavailable child cannot adequately supply, such out-of-court statements are available pursuant to section 90.803(23).¹⁴⁷

Applying this standard to the present case the district court found that the testimony of the CPT counselor and the CPT physician was merely an adult's reiteration of the child's prior statements consistent with her trial testimony and the admission of this evidence constituted reversible error.¹⁴⁸

Though the district court may have reached the correct result, the analysis may be flawed. In many instances admitted hearsay statements will bolster the credibility of the hearsay declarant, in addition to being entirely consistent with prior testimony and evidence. Hearsay testimony is admissible when subject to a hearsay exception because the statement is considered reliable and trustworthy and, hopefully, relevant to some point in issue. Under the district court's analysis, even though the testimony is admissible pursuant to 90.803(23) and relevant, it must be excluded if any of the prior statements are consistent with the child's previous testimony. This decision will not give the

145. *Id.* at 962.

146. *Id.*; see *Glendening v. State*, 536 So. 2d 212 (Fla. 1988) (where the court discusses the impropriety of having a witness vouch for the credibility of a hearsay declarant).

147. *Kopko*, 577 So. 2d at 962.

148. *Id.*

lower courts the guidance necessary to come to an appropriate evidentiary resolution when confronted with a child-victim's hearsay statements. Grafting an exception onto an evidentiary rule such as 90.803(23) is unnecessary and inappropriate.

The proper analysis should not lie with an exception grafted onto section 90.803(23), but instead should simply lie with the proper evidentiary analysis of relevant evidence. The court should simply determine if the hearsay statements of the child are logically relevant. In other words, do the statements prove or disprove a material fact? If the statements are logically relevant, then are the statements legally relevant? Does some statutory or evidentiary rule, such as section 90.403, exclude these logically relevant hearsay statements? By simply analyzing the hearsay statements pursuant to section 90.403, the proper analysis can be arrived at by determining if the probative value of the hearsay statements are substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or *needless presentation of cumulative evidence*. By applying this analysis, and determining whether the repetitious, cumulative testimony is substantially outweighed by one of the enumerated vices stated in section 90.403, the need to graft exceptions onto the hearsay rules will be needless.

H. *Dying Declarations*

Statements made by an unavailable declarant are admissible under section 90.804(2)(b)¹⁴⁹ if they are made while the declarant believed that death was imminent and the statements concern the cause of what the declarant believed to be his or her impending death or the circumstances of the impending death. The exception is rooted in the belief that there is a powerful psychological pressure to be truthful when death is imminent which transcends all other motivations which a declarant may have to fabricate false statements.

149. FLA. STAT. § 90.804(2)(b) (1989). The section is commonly known as the hearsay exception for dying declarations:

(2) Hearsay Exceptions. The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:

(b) Statement under belief of impending death. In a civil or criminal trial, a statement made by a declarant while reasonably believing that his death was imminent, concerning the physical cause or instrumentalities of what he believed to be his impending death or the circumstances surrounding his impending death.

Id.

An interesting case was decided by the Fourth District Court of Appeal during the survey period. In *State v. Weir*,¹⁵⁰ the trial court declared section 90.804(2)(b) unconstitutional. In declaring the statute unconstitutional the trial court found that (1) the dying declaration statute contains an unconstitutional presumption that the dying declarant was speaking the truth; (2) the statute is based on religious beliefs that a declarant would not want to die with a lie on his lips, a *per se* judicial establishment of religion based on life after death; (3) the statute denies an accused the right to confront his accuser, a confrontation clause violation and; (4) the evidentiary section impermissibly shifts the burden of proof to the accused.¹⁵¹ The district court examined each section and reversed the trial court's ruling.

Examining the claim that the dying declaration contains an unconstitutional presumption, the district court stated that the "admission of dying declarations is justified on the grounds of public necessity, manifest justice and the sense that impending death makes a false statement by the decedent improbable."¹⁵² The district court disagreed that the dying declaration created an irrebuttable presumption of truth. The district court felt that the hearsay declarant, and the hearsay statement, can be impeached or discredited by other statements contrary to it.¹⁵³ This would preserve the necessary requirement that the court determine if the proper predicate for the dying declaration has been laid and after the evidence is admitted it is for the jury to decide how much weight and credibility the evidence deserves. Additionally, evidence which demonstrates that the declarant did not accurately observe the

150. 569 So. 2d 897 (Fla. 4th Dist. Ct. App. 1990).

151. *Id.* at 899.

152. *Id.* at 900.

153. FLA. STAT. § 90.806 (1989) specifically allows for a hearsay declarant to be impeached as if he were a witness:

(1) When a hearsay statement has been admitted in evidence, credibility of the declarant may be attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

(2) If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Id.

facts recounted may be grounds for excluding the dying declaration.¹⁵⁴ Therefore, since the dying declaration can be attacked and demonstrated to be untruthful as illustrated above, the district court felt it does not create an *irrebuttable* presumption of truth.

The district court next examined the claim that the dying declaration constitutes a judicial establishment of religion. The district court acknowledged that the underpinnings and early use of the dying declaration was premised in part on prevailing religious values in place centuries ago. However, the district court felt that there is a tremendous psychological pressure to be truthful when death is imminent which does not spring from purely religious motives.¹⁵⁵

The district court examined the confrontation clause issue and stated that "[t]his proposition has been soundly defeated by case law and authorities."¹⁵⁶ If the statement falls within a firmly rooted hearsay exception the confrontation clause will not be violated.

Finally, the district court addressed the issue that the dying declaration shifts the burden of proof to the accused. The district court noted that the dying declaration does not impose any affirmative defense of innocence on the defendant but merely allows evidence to be admitted because of the public necessity and manifest injustice which would result in excluding evidence which meets the statutory prerequisites. Ultimately, the burden of proof remains with the State to prove the accused guilty beyond a reasonable doubt. The dying declaration does not shift the burden of proof to the accused to prove his innocence.¹⁵⁷

VI. CONCLUSION

Though few dramatic changes occurred during the survey period, the legislative change in the public records exception will probably begin to generate new case law in the coming year. The change will surely cause numerous dilemmas as the trial courts are left to deal with the various evidentiary problems brought on by the legislature's at-

154. *Weir*, 569 So. 2d at 900 (citing *Jones v. State*, 12 S.W. 704 (1889)); see also MCCORMICK ON EVIDENCE § 285 (3d ed. 1984).

155. *Id.* at 901. The court noted that many criminal statutes can be traced back to Biblical times. The prohibition against murder, or theft, can be traced directly to the ten commandments. Even so, the district court felt that such a challenge to these statutes on this ground would be absurd. *Id.*

156. *Id.*

157. *Id.* at 902.

tempt to devise needless short cuts to evidentiary proof. The long range burden of unraveling these problems will be thrust upon the appellate courts as more and more attorneys begin to utilize the new evidentiary changes. If any one thing is certain, it's that the appellate courts will continue to be busy with more evidentiary issues as the legislature continues to attempt to fine tune the evidence code and the trial courts continue to contend with these changes.

Juvenile Law: 1991 Survey of Florida Law

Michael J. Dale*

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I. INTRODUCTION

In the early spring of 1990, the state legislature dramatically changed the juvenile delinquency provisions of The Florida Children's Code.¹ The legislature also made changes, albeit more modest ones, in the child welfare section of the Code.² Florida's revenue shortfall, which became apparent in the summer of 1990, produced an equally

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1. Juvenile Justice Reform Act of 1990, codified at FLA. STAT. §§ 39.001-.516 (1989 & Supp. 1990). The legislature also passed the Street Terrorism Enforcement and Prevention Act of 1990, codified at FLA. STAT. § 874 (Supp. 1990), and the Juvenile Delinquency and Gang Prevention Act of 1990, codified at FLA. STAT. § 39.025 (Supp. 1990).

2. See William and Budd Bell Prevention and Protection Act, codified at FLA. STAT. § 39.002 (Supp. 1990).

dramatic reduction in appropriations of state funds central to the success of these two amendments to the Code.³ The changes in Chapter 39 only have been in effect for a year⁴ and the appellate courts are now starting to interpret them. There is some evidence from these opinions that the failure to provide programs and services to complement the new juvenile delinquency and the child welfare laws is not lost on the appellate courts.⁵ At the same time, they continue to admonish the trial courts to pay attention to seemingly rudimentary statutory obligations such as compliance with the Chapter 39 provisions concerning the length of secure detention for alleged delinquents and articulation of grounds for dependency findings.

As in past years, nearly all of the appellate decisions come from the district courts of appeal. Some are pro forma opinions, but others involve significant issues. In addition, this year the Florida Supreme Court decided an extremely important case, *Padgett v. HRS*,⁶ which cleared up a major conflict among the district courts of appeal concerning the definition and application of prospective neglect.

This article will review the case law in both the child welfare and juvenile justice areas of juvenile law since October, 1990.⁷ Appellate decisions lacking significant issues will not be discussed. This survey is again divided into two sections: juvenile delinquency and dependency.⁸

3. Avido D. Khahaifa, *Juvenile Law System Assailed*, FT. LAUDERDALE SUN-SENTINEL, Aug. 2, 1991, at 7B.

4. The statute was enacted effective October 1, 1990.

5. See *Interest of M.C.*, 567 So. 2d 1038 (Fla. 4th Dist. Ct. App. 1990) (writ of habeas corpus will issue where juvenile is confined for more than statutory five-day maximum while awaiting placement in commitment program).

6. 577 So. 2d 565 (Fla. 1991).

7. See Michael J. Dale, *Juvenile Law: 1990 Survey of Florida Law*, 15 NOVA L. REV. 1169 (1991) [hereinafter *1990 Survey*] (discussing cases decided through September 30, 1990).

8. Chapter 39 of the Florida statutes is divided into six sections. The provisions relevant to the discussion here are Part II, governing juvenile delinquency, Part III, governing dependency, and Part VI, governing termination of parental rights. Part VI of Chapter 39 governs families in need of services and children in need of services. Although the law was passed three years ago, research discloses no reported opinions since that time on that section of the law.

II. JUVENILE DELINQUENCY

A. *Issues of Right to Counsel and Confessions*

The United States Supreme Court ruled in 1966 in *Miranda v. Arizona*⁹ that persons apprehended by police officers are entitled to certain warnings with regard to constitutionally protected rights and, in 1967, in *In re Gault*¹⁰ that juveniles have the right to counsel in delinquency proceedings. By statute, Florida has specified that a child is entitled to representation by legal counsel at all stages of a delinquency proceeding.¹¹ Two cases decided in the district courts of appeal this past year involve application of *Miranda* standards in the context of waiver of counsel and confessions by children.

The more significant of the two cases is *W.M. v. State*.¹² In a *per curiam* decision with a vigorous dissent by Judge Farmer, the Fourth District affirmed the delinquency adjudication of the child over his contention that the trial court committed error by denying a motion to suppress a statement the child gave to the police. The confession was made by a ten-year-old boy with an IQ of sixty-nine or seventy who had a learning disability and was placed in a special education program. He had no prior record with the police and was held in police custody for approximately six hours prior to confessing to a series of burglaries.

The majority explained that it had difficulty with the concept that a ten-year-old could ever understand, in the sense that an adult could, the consequences of waiving his constitutional rights to both silence and counsel and thereafter give a confession.¹³ However, the majority did not substitute its own conclusions for those of the trial court, which had made substantial findings of fact.¹⁴ With all of the factual information

9. 384 U.S. 436 (1966).

10. 387 U.S. 1 (1967).

11. FLA. STAT. § 39.041 (Supp. 1990); see *W.M. v. State*, 585 So. 2d 979 (Fla. 4th Dist. Ct. App. 1991); see also Michael J. Dale, *Juvenile Law: 1989 Survey of Florida Law*, 14 NOVA L. REV. 859, 861-64 (1990) [hereinafter *1989 Survey*] (discussing earlier cases on these subjects); Michael J. Dale, *Juvenile Law: 1988 Survey of Florida Law*, 13 NOVA L. REV. 1159, 1165-66 (1989) [hereinafter *1988 Survey*] (same).

12. 585 So. 2d 979 (Fla. 4th Dist. Ct. App. 1991).

13. *Id.*

14. The appeals court described the trial court's findings in the following manner. The police originally went to the child's home where they spoke with the grandmother. They asked to take the child to the police station and asked if the grandmother wanted to go. She declined. The child was advised of his constitutional rights in the police car by officers who were described as experienced in dealing with juveniles. The

from below, the appellate court concluded it was not free, under the applicable legal standards, to substitute its own conclusions for those of the trial court. First, it noted that a confession is not involuntary merely because the individual making it is a juvenile.¹⁶ Second, the appellate court reasoned that the trial court must resolve the conflicts of facts and make a decision based upon the totality of the circumstances which includes the child's age, intelligence, education, experience and ability to comprehend the meaning and effect of his statement. Both of these propositions are correct statements of the law. Then, without explanation, the majority decided that it could not overturn the "thoroughly reasoned" decision of the trial court.¹⁶ Although never stated, it appears the majority was refusing to conclude that the factual determinations by the trial court were clearly erroneous.¹⁷ The dissent, on the other hand, would have done so. The dissent noted, for example, that the facts showed one of the officers testified that he, the

police had told the grandmother the youngster would not be arrested that day. They took him to the station and then advised him again of his rights without handcuffing him. The youngster never asked for a lawyer. He was taken into the detective's office where he was given a Coke and some candy. He was interviewed by one officer for approximately a half hour with a second officer present. One of the officers had previously investigated a shop lifting charge involving the child and had advised the youngster of his rights at that time. The child then went with the detectives to the area where the homes were allegedly broken into by the youngster. The child pointed out where the burglaries were committed. After he was read his rights, the youngster confessed to having committed the burglaries and was taken back to the station and ultimately released to his home. He was arrested the next day. On the way to the station, his rights were again read to him and the child pointed out locations of other burglaries. Then another detective spoke with the youngster on the second day and the child was given his rights again. He said he understood, and they then talked further about the burglary. The child never signed a waiver of rights card nor was any tape recording or tape recording of any kind made of any of the interviews. Witnesses were then called at the suppression hearing including the youngster's specific learning disability (SLD) teacher, the child's guardian/grandmother who suffered from high blood pressure and heart problems, the principal of the child's school, the officers and the youngster. The child testified that the officers threatened to hang the child by his neck if he did not show them the houses involved in the burglary and that he was frightened. The police denied making the statement, although one officer could not remember.

Id. at 981-82.

15. *Id.* at 983 (citing *T.B. v. State*, 306 So. 2d 183, 185 (Fla. 2d Dist. Ct. App. 1975) and *Gallegos v. Colorado*, 370 U.S. 49 (1962)).

16. *Id.*

17. *Id.* (for example, the trial court chose to believe the police officers who testified that they did not threaten the child by hanging him by his neck if he refused to confess).

officer, *could not remember* making a threatening statement to hang the boy by his neck, as alleged by the child, rather than denying the statement was made. There was no explanation by the trial court why it chose to believe the police officers rather than the child.

The dissent would have held, in the alternative, that under *Fare v. Michael C.*¹⁸ and *Arizona v. Fulminante*,¹⁹ whether rights are knowingly and voluntarily waived, based upon the totality of the circumstances, is a legal question which the appeals court can answer. According to Judge Farmer, these cases allow him to add together the factual information to determine as a matter of law whether the waiver was voluntary. He would have concluded that even though there was no single objective factor which suggested voluntariness, given that the burden was on the state, the waiver was involuntary.

The dissent may have the better of the argument both legally and factually. Both sides are correct in saying that the United States Supreme Court has unequivocally held in determining whether a waiver is voluntary, that the court must decide whether the child understood based upon the totality of the circumstances. However, that is a question of law. Thus, the majority should have reviewed the trial court's decision based upon the totality of circumstances test. Had it done so, it would have found no facts that demonstrated the child understood what a lawyer does, how he might go about obtaining a lawyer, that if he were indigent he understood what a public defender would do, that a public defender is also a lawyer, or that he had the mental acuity to read and comprehend. To the extent there was any evidence showing that the child understood, it involved the police officers' conclusory evaluation. But even there they did not comment on the child's understanding.

The second case, *Z.F.B. v. State*,²⁰ contains a more narrow holding. The Third District Court of Appeal, in a per curiam opinion with a dissent by Chief Judge Schwartz, upheld the voluntariness of a child's confession after being advised of his *Miranda* rights. In *Z.F.B.*, the youngster was suspected of being involved in a series of burglaries. The police went to the child's home and asked permission from his mother to speak with him. The mother, who was terminally ill, gave permission for the officers to talk with the boy outside her presence, also advising the police that the child had a legal guardian. Before questioning him,

18. 442 U.S. 707 (1979).

19. 111 S. Ct. 1246 (1991).

20. 573 So. 2d 1031 (Fla. 3d Dist. Ct. App. 1991).

the officers advised the boy of his *Miranda* rights.²¹ The officers obtained a statement from him in the home, but the statement was suppressed by the trial court because of possible coercion when the police officers offered to help the youngster.²² The child was then taken to the police station where he was given written *Miranda* warnings. The youngster then asked for a lawyer. While the child was in a holding cell, the police officers telephoned the individual whom the mother indicated was the child's legal guardian. That person arrived at the police station, spoke with the child, and told an officer that the child wanted to talk. It turned out this person was not the child's legal guardian. The child again was given the written *Miranda* form which he read and signed. He then gave a statement admitting participation in the crimes. The trial court denied the child's motion to suppress the confession. The appellate court upheld the trial court by finding sufficient evidence of the child's ability to comprehend the meaning of the *Miranda* warnings and to waive his rights and also that the waiver was knowingly and voluntarily made.²³ Judge Schwartz, in dissent, disagreed with the majority's conclusion that the child instituted contact with the police after the request for the lawyer.²⁴ In his view, unless the child himself initiated further communication, the police could not reinstitute the interrogation.²⁵

A separate counsel-related issue that, oddly, continues to create problems, concerns application of the Florida Supreme Court rule requiring written consent by a child to employment of a certified law student intern as a defense lawyer in a delinquency proceeding.²⁶ Such a document must be filed and brought to the attention of the trial judge.²⁷ In the case of *Interest of J.H.*,²⁸ the issue was whether the child intelligently waived the right to have counsel present at certain relevant hearings by executing an acknowledgement that a certified law

21. *Id.* at 1032.

22. *Id.*

23. *Id.*

24. *Id.* at 1033 (Schwartz, J., dissenting).

25. *Z.F.B.*, 573 So. 2d at 1033 (citing *Minnick v. Mississippi*, 111 S. Ct. 486 (1990)).

26. *See also 1989 Survey*, *supra* note 11, at 863; *1990 Survey*, *supra* note 7, at 1179-80 (discussing earlier cases).

27. RULES REGULATING THE FLORIDA BAR Rule 11-1.2(d) (1987) (Rules Governing the Law School Civil and Criminal Practice Program).

28. 580 So. 2d 162 (Fla. 4th Dist. Ct. App. 1991).

student would represent him.²⁹ The court found problems with the written form and the procedure. First, the document did not state that the child had the right to have a supervising attorney personally present even when required by the trial judge who determines the extent of the intern's participation.³⁰ Second, the child was not advised of the right to assistance of a supervising attorney at the time she entered her plea. Thus, according to the court, the child could not intelligently waive the right to be represented by a lawyer.³¹

B. Detention Issues

Florida's approach to the use of secure detention to hold children taken into custody has fluctuated over the past decade.³² With the passage of the Juvenile Justice Reform Act of 1990, the grounds for holding a child in secure detention have been narrowed somewhat to moderately limit the grounds for initially holding a child.

However, the 1990 amendments made no change in the part of the statute which provides that a child may only be held in detention for twenty-one days unless an adjudicatory hearing has started.³³ Over the last three years, the appellate courts have regularly granted writs of habeas corpus based upon the trial courts' violation of this rule.³⁴ The appellate courts' anger continued unabated most recently in *B.G. v. Fryer*.³⁵ That case involved a series of four petitions claiming that children had been held beyond twenty-one days prior to adjudicatory hearings.³⁶ The defense raised by the Attorney General on behalf of the

29. *Id.* at 163.

30. *Id.* (citing RULES REGULATING THE FLORIDA BAR Rule 11-1.2(a))(governing the Law School Civil and Criminal Practice Program).

31. *Id.*

32. See 1990 Survey, *supra* note 7; Bennett A. Brummer & Steven D. Levine, *Incarcerating Children for Their Own Good: Florida's Pre-Trial Detention Practices Revisited*, 60 FLA. B.J. 17 (1986); Jack Levine, *Juvenile Justice in Florida: Bringing Rehabilitation Back in Style*, 8 NOVA L.J. 255, 260 (1984).

33. See FLA. STAT. § 39.044(5)(b) (Supp. 1990). It provides that "[n]o child shall be held in secure, or nonsecure, or home detention under a special detention order for more than 21 days unless an adjudicatory hearing for the case has been commenced by the court."

34. See 1990 Survey, *supra* note 7, at 1171-72.

35. 570 So. 2d 430 (Fla. 4th Dist. Ct. App. 1990) (the individual respondent in so many of these cases, Ron Fryer, is the superintendent of the Broward County Regional Juvenile Detention Center).

36. *Id.* at 431.

respondent judge in each case was that there was "good cause" to continue the child in detention. Good cause, according to the Attorney General, was the court's thorough review of several documents including the child's arrest report, a criminal information file, detention screening form and an HRS computer printout showing the child's prior involvement in the court system.³⁷ The Fourth District Court of Appeals rejected this argument as merely parroting the law. Citing a lack of any competent evidence to support the conclusory claims of incomplete investigation or unavailability of unidentified witnesses, the appellate court granted the writs. The language of the court's decision in *B.G.* demonstrates once again its frustration with the trial bench. The appellate court described the trial court as having "clearly and consistently misconstrued" the relevant portions of the Florida Juvenile Justice Act and that to fail to grant the writ would constitute an "evisceration" of the state's detention limitations statute.³⁸

The court's anger may have peaked in *P.H. v. Fryer*.³⁹ In that case, also involving a writ of habeas corpus in which the child was held in excess of twenty-one days, the state sought by motion to extend secure detention on good cause grounds asserting that it was unable to locate a witness. The appellate court found that the state did not show that the victim or any witnesses were actually unavailable and, therefore, there was no good cause to extend the time of the child in secure detention. The appellate court then granted the writ of habeas corpus. It also relied upon the earlier holding in *E.W. v. Brown*,⁴⁰ to the effect that the good cause requirement for an extension beyond twenty-one days is not related to the original basis for detaining the child, but relates to the explanation for the delay in commencement of the adjudicatory hearing. Finally, and perhaps most significantly, Judge Letts, concurring in *P.H.*, noted the following:

As a spate of decisions (in excess of 40) from this court over the last year will confirm, Judge Lawrence L. Korda does not like the statutory provisions on juvenile detention. Neither do I. However, as Gertrude Stein might put it, 'the law is the law, is the law.'

37. *Id.* at 432.

38. *Id.* (citing FLA. STAT. §§ 39.032(6)(b), (d) (1989) recodified at FLA. STAT. § 39.047(4)(e)7 (1991)).

39. 570 So. 2d 1096 (Fla. 4th Dist. Ct. App. 1990).

40. 559 So. 2d 712 (Fla. 1st Dist. Ct. App. 1990); see also 1990 Survey, *supra* note 7, at 1173 (discussing *E.W.*).

Surely, of all people, judges must have respect for it.⁴¹

A separate issue concerning pre-trial secure detention was raised in *W.N. v. Fryer*.⁴² In that case, a child sought relief on the grounds that the court continued his placement in secure detention in violation of the 1990 amendment of Chapter 39 prescribing grounds for placement in secure detention. The youngster had failed to appear in court and was later taken into custody pursuant to "a court pick up order."⁴³ When he appeared in court the next day, the judge continued him in secure detention although no new evidence was presented other than the fact he had been arrested on the court order for failure to appear at a prior hearing. Chapter 39.037 of the Florida Statutes provides that a child may be taken into custody for failure to appear at a court hearing after proper notification. However, under these circumstances, the child may not be detained unless he meets the criteria of chapter 39.044.⁴⁴ That statutory section contains two provisions, one providing for initial detention and the second for continued detention.⁴⁵ If it is determined that a child will be continued in detention then the provisions of chapter 39.044(2) apply. In the instant case, the trial court made no finding at the detention hearing that the child met the provisions for continued detention, which contain standards that are narrower than those for initial detention. Thus, the appellate court granted the writ.⁴⁶

The appellate courts have labored over a number of years to define how and under what circumstances a child before the juvenile court may be held in contempt and incarcerated. In two cases decided in the mid 1980s, *A.O. v. State*⁴⁷ and *R.M.P. v. Jones*,⁴⁸ the supreme court held that the trial court had no power to find contempt under Chapter 39, but retained inherent authority to punish a child for contempt including placement in secure detention for a reasonable period of time.⁴⁹

41. *P.H.*, 570 So. 2d at 1098 (Letts, J., specially concurring).

42. 572 So. 2d 24 (Fla. 4th Dist. Ct. App. 1990).

43. *Id.* at 25.

44. *Id.* (citing FLA. STAT. § 39.037-.044 (Supp. 1990)).

45. *Id.* at 25 n.1 (citing Fla. Stat. § 39.044(d)(4) (Supp. 1990). The initial decision is made by HRS intake personnel when the child is brought to the detention center. The continued detention decision is made by the court at a detention hearing.

46. *Id.* at 25-26.

47. 456 So. 2d 1173 (Fla. 1984).

48. 419 So. 2d 618 (Fla. 1982).

49. *A.O.*, 456 So. 2d at 1175; *R.M.P.*, 456 So. 2d at 620 (holding that the authority existed outside Chapter 39).

In 1990, in *T.D.L. v. Chinault*,⁵⁰ the Second District Court of Appeals held that under the 1988 statute a child could not be placed in secure detention, but with appropriate findings could be punished by incarceration in county jail.⁵¹

As part of its 1990 changes to the Florida Juvenile Justice Act, the legislature added a new section⁵² which set forth procedural rules for representation by counsel, and notice and an opportunity to be heard and confront witnesses when a child is subject to contempt of court.⁵³ If the procedures are complied with, it would appear a child could then be held in secure detention. In *A.A. v. Rolle*,⁵⁴ a child sought a writ of habeas corpus on the ground that he could not be held in the local juvenile detention center for contempt under the 1990 law. The child argued that chapter 39.042 defines detention criteria in such a way that punishment was eliminated as a grounds for incarceration.⁵⁵

50. 570 So. 2d 1335 (Fla. 2d Dist. Ct. App. 1990).

51. *Id.* at 1336; *see also* 1990 Survey, *supra* note 7, at 1186.

52. FLA. STAT. § 39.044(10) (Supp. 1990).

53. *See* FLA. STAT. § 39.044(10) (Supp. 1990) which provides:

(10) Any child placed into detention for contempt of court shall be represented by legal counsel as provided in s. 30.041. The following due process rights must be provided during all stages of any proceeding under this chapter:

- (a) The right to have the charges against the child in writing served a reasonable time before the hearing.
- (b) The right to a hearing before a court.
- (c) The right to an explanation of the nature and consequences of the proceeding.
- (d) The right to confront witnesses.
- (e) The right to present witnesses.
- (f) The right to have a transcript or record of the proceedings.
- (g) The right to appeal to an appropriate court.

A child shall not be placed in a jail or other facility intended for the detention of adults pursuant to this subsection.

54. 580 So. 2d 282 (Fla. 3d Dist. Ct. App. 1991).

55. *Id.* at 283; *see* FLA. STAT. § 39.042 (Supp. 1990) which provides:

(1) All determinations and court orders regarding the use of secure, non secure, or home detention shall be based primarily upon findings that the child:

- (a) Presents a substantial risk of not appearing at a subsequent hearing;
- (b) Presents a substantial risk of inflicting bodily harm on others as evidenced by recent behavior;
- (c) Presents a history of committing a serious property offense prior to adjudication, disposition, or placement; or

The appellate court upheld the trial court's contempt power. It reconciled the definitional language of chapter 39.042 with chapter 39.044(10), explaining that the detention criteria which prohibit punishment apply only to a child who is alleged to have committed a delinquent act. Because a child held in contempt has not committed a delinquent act, the detention criteria do not apply.⁵⁶ Reading the provisions *in pari materia*, the court held the child could be securely detained.⁵⁷

The dangers of inappropriate use of contempt in a delinquency case were made evident in a Fourth District Court of Appeal case, *Interest of R.A.*⁵⁸ This was a per curiam denial of a petition for writ of habeas corpus with an extensive dissent by Judge Glickstein. Apparently, the trial judge ordered the child into secure detention for ninety days based upon contempt but where the child would be moved to a residential program where the child would "burn off," to use the trial court's words, the ninety days of contempt after placement.⁵⁹ However, because there was no space in the residential program, the trial court ordered secure detention until the child could be placed.⁶⁰ Judge Glickstein was not concerned with whether the court had the authority to hold the child in contempt, but with two other issues. First, the trial court was obligated to comply with proper procedures to find contempt.⁶¹ In Judge Glickstein's view, the record was incomplete in this regard. Second, the intent of the legislature was not to allow a child to remain in secure detention because of contempt as an alternative to placement in an HRS program.⁶²

(d) Requests protection from imminent bodily harm.

56. *Id.* at 283-84.

57. The court distinguished the *T.D.L. v. Chinault* case on grounds that it was no longer good law because of the 1990 legislative changes which state that a juvenile detention center may be used as a sanction for contempt and that the new section 39.044(10) provides that "[a] child shall not be placed in a jail or other facility intended for the detention of adults pursuant to the subsection." *Id.* at 284 n.4.

58. 575 So. 2d 807 (Fla. 4th Dist. Ct. App. 1991) (Glickstein, J., dissenting).

59. *Id.*

60. *Id.* at 808.

61. Failure to comply with due process procedural rights in juvenile contempt proceedings is common nationwide. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL COMMITTEES (Non-criminal Juvenile Detention Has Been Reduced But Better Monitoring is Needed in Court) (April 19, 1991). *See also* GARY CRIPPEN, VALID COURT ORDER EXCEPTION: YES OR NO? (1990) (arguing against the use of contempt on public policy grounds).

62. 575 So. 2d at 807.

C. *Adjudicatory Issues*

The procedural device known as *nolle prosequi* or *nol pros*⁶³ has recently been held to apply in juvenile delinquency cases in the same manner as in adult criminal cases. Relying on two earlier adult cases,⁶⁴ the Fifth District Court of Appeals held that the decision to file the *nol pros* rests in the sole discretion of the prosecutor. Permission of the trial court is not necessary. In *State v. M.J.B.*, the prosecution asked for a trial continuance. When the request was denied, the prosecution announced that it would *nol pros* the case.⁶⁵ The defense attorney asked that the case be dismissed for failure to present evidence and the court granted the motion. When the state re-filed the petition and the child moved to dismiss alleging double jeopardy, the trial court dismissed and the state appealed.⁶⁶ As the appellate court put it, "even though the practice of entertaining a *nolle prosequi* in re-filing the petition after a continuance has been denied may seem underhanded, the state has the discretion to act in this manner."⁶⁷

Although Florida's Rules of Juvenile Procedure contain detailed discovery provisions, issues in this area continue to appear in appellate decisions.⁶⁸ In *Z.B. v. State*,⁶⁹ a child appealed an adjudication of delinquency for two counts of battery on a school official. The discovery issue involved the trial court's order excluding a defense witness from testifying. Holding that the trial court failed to conduct an adequate inquiry as defined in the Florida Supreme Court case of *Richardson v.*

63. *Nolle prosequi* is defined as a formal entry on the record by the prosecuting officer in a criminal case in which he or she declares that he or she will not prosecute the case. BLACK'S LAW DICTIONARY 1048 (6th ed. 1990); see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 568-69 (1985) (suggesting that unbridled discretion in the prosecutor to *nol pros* has resulted in legislation or rules of court in a number of jurisdictions the purpose of which is to restrain the use of the power. The most common method is to require the prosecutor to explain the reasons for so doing in writing).

64. See *State v. Padron*, 506 So. 2d 462 (Fla. 2d Dist. Ct. App. 1987); *State v. Kahmke*, 468 So. 2d 284 (Fla. 1st Dist. Ct. App. 1985).

65. 576 So. 2d 966 (Fla. 5th Dist. Ct. App. 1991).

66. *Id.*

67. *Id.* at 967 (both the majority and concurrence suggested that if there was other alleged misconduct or if the purpose had been to harass or gain some other unfair advantage against the accused then it might be possible for the trial court judge to dismiss the re-filed charges).

68. See FLA. R. JUV. P. 8.060 (newly renumbered in 1991 from FLA. R. JUV. P. 8.070).

69. 576 So. 2d 1356 (Fla. 3d Dist. Ct. App. 1991).

State,⁷⁰ the appellate court reversed the adjudication and remanded for a new trial.⁷¹ The court found that the child had been guilty of a discovery violation in not advising the state of the identity of a defense witness until the day of trial. However, the trial court failed to find out what the witness was prepared to testify about, and then made no inquiry or finding as to whether the discovery violation resulted in prejudice to the state. This, according to the appellate court, was reversible error.⁷² Furthermore, the trial court had imposed the extreme sanction of exclusion without exploring other remedies such as a recess or deposition and whether those alternatives would have cured the prejudice. This also was reversible error.⁷³

Under Florida law, a delinquency petition must be filed within forty-five days of the time the child is taken into custody, the juvenile law analogue to arrest.⁷⁴ Interpreting the forty-five day rule has been an ongoing matter in the appellate courts.⁷⁵ In *B.T. v. State*,⁷⁶ the First District Court of Appeals faced the question of whether it was proper for the court to allow the state to file a second amended petition outside the statutory forty-five day time frame. The amended petition changed a sexual battery charge from one involving lack of consent to one involving lack of intelligent voluntary consent.⁷⁷ The prosecution changed the charge when it was determined that the twenty-two year old mentally handicapped cousin, who was the victim of the alleged sexual battery, was not able to give legal consent.⁷⁸ The appellate court suggested that under the facts there was no harm to the child because he was aware that the state would have to prove either that the victim had not agreed to the battery or that the consent was not intelligent, knowing, and voluntary. Further, counsel admitted knowledge and notice of the original arrest report which said that the victim was mentally disabled.

70. 246 So. 2d 771 (Fla. 1971) (known as a *Richardson* inquiry).

71. *Z.B.*, 576 So. 2d at 1356.

72. *Id.* at 1357.

73. *Id.*

74. See FLA. STAT. § 39.05(6) (1989) (recodified at FLA. STAT. § 39.048(6) (Supp. 1990)).

75. See 1990 Survey, *supra* note 7, at 1173-76 (discussing other cases on this subject).

76. 573 So. 2d 101 (Fla. 1st Dist. Ct. App. 1991).

77. See FLA. STAT. § 794.011(5) (1989) (a second degree felony); FLA. STAT. § 794.011(4) (1989) (a first degree felony).

78. *Id.*; *B.T.*, 573 So. 2d at 103-04.

Thus, there was no claim of surprise.⁷⁹ However, because of an apparent conflict among the districts on the issue of what magnitude of change is necessary to constitute the filing of a new petition, as opposed to an amendment to the original, the court certified the question as one of great public importance to the Florida Supreme Court.⁸⁰

In a second case *State v. F.T.H.*,⁸¹ the state appealed from an order dismissing a delinquency petition for failure to comply with the forty-five day speedy trial rule. The trial court had ruled that the child was taken into custody when a police officer approached the youngster, told him he matched the description of the robbery suspect, asked him his name, address and phone number, and then took his photograph. The juvenile and the police officer then went their separate ways and no arrest was made at that time.⁸² The appellate court disagreed with the trial court's conclusion that the youngster had been taken into custody at that point. Holding that taking a child into custody under Chapter 39 was akin to arrest of an adult, the court ruled that the encounter rose to the level of a temporary detention but was not equivalent to arrest. Thus, the child was not taken into custody.⁸³ The court further ruled that physical control as defined in Florida Statute section 39.01(51) does not include police encounters or temporary investigatory detention. This conclusion is without citation.

A third case is *V.C.F. v. State*.⁸⁴ In that case, the child appealed from a judgment of the circuit court which withheld an adjudication of

79. *B.T.*, 573 So. 2d at 104.

80. *Id.*; see FLA. R. APP. P. 9.030(a)(2)(A)(v). The specific question presented was:

Under the circumstances of this case, does Rule 8.110, F.R.C.J.P. permit amendment of an original timely petition for delinquency more than 45 days after arrest to correct the specified subsection of a sexual battery charge under section [chapter] 794.011, Florida statutes, from subsection (5) to subsection (4), both involving lack of intelligent voluntary consent as there defined?

B.T., 573 So. 2d at 104.

81. 579 So. 2d 911 (Fla. 5th Dist. Ct. App. 1991).

82. *Id.* at 912. The encounter lasted 10 to 30 minutes and the delinquency petition was filed 47 days after the encounter.

83. *Id.* The term "taken into custody" is found at FLA. STAT. § 39.01(51) (Supp. 1990) which states: "'Taken into custody' means the status of a child immediately when temporary physical control over the child is attained by a person authorized by law, pending the child's release, detention, placement, or other disposition as authorized by law."

84. 569 So. 2d 1364 (Fla. 1st Dist. Ct. App. 1990).

delinquency and placement on community control, claiming the trial court incorrectly denied a motion to dismiss because the state failed to file within forty-five days of the youngster's arrest in the state of Kansas. The appellate court concluded that because the State of Florida filed the petition within forty-five days of the date the youngster returned to Florida and was placed in custody of the Florida officials, there was no violation of the Florida statute.⁸⁵ The appellate court rejected the state's argument that the juvenile speedy trial rule should be construed in comparison to the Florida rule of criminal procedure on speedy trial.⁸⁶ Finding no Florida case on point,⁸⁷ however, the court held that in order for the forty-five day rule to make sense, all provisions of Chapter 39 had to be read and interpreted *in pari materia*.⁸⁸ First, the Interstate Compact on Juveniles, to which Florida is a signatory,⁸⁹ provides that a youngster is subject to the laws of the foreign state when initially taken into custody and remains there until he returns to Florida. Second, Chapter 39 contains sections providing for the processing of the youngster upon return to Florida.⁹⁰ These provisions for processing take time, and if the speedy trial rule were to commence upon taking the child into custody in a foreign state, the time frames within which to carry them out might be impossible to meet. The court concluded that the statute could not be read to interfere with these two sections of the law.⁹¹

In Florida, trial court jurisdiction in a delinquency case ceases when a child reaches nineteen years of age.⁹² A jurisdictional question arose in *D.M. v. State*, where the trial court failed to adjudicate the child delinquent or withhold adjudication, but set the case for a dispositional hearing five days after the juvenile was to reach the age of nineteen.⁹³ When the child filed a motion to terminate jurisdiction after his nineteenth birthday, the court entered a *nunc pro tunc* order adjudicating the child delinquent as of the date of the trial.⁹⁴ The First District Court of Appeals reversed finding that the purpose of a *nunc pro*

85. *Id.*

86. *See* FLA. R. CRIM. P. 3.191.

87. *V.C.F.*, 569 So. 2d at 1365.

88. *Id.*

89. FLA. STAT. §§ 39.51-.516 (1989).

90. *See* FLA. STAT. §§ 39.01, .05 (1989).

91. *V.C.F.*, 569 So. 2d at 1367.

92. FLA. STAT. § 39.022(4) (Supp. 1990).

93. 580 So. 2d 634, 635 (Fla. 1st Dist. Ct. App. 1991).

94. *Id.*

tunc order is to correct a clerical mistake or refer to judicial acts which memorialize a previously-taken judicial act. The purpose is not to make a new or de novo decision, or supply an omitted action by the court which occurred here.⁹⁵

D. *Dispositional Issues*

Once adjudicatory and dispositional hearings have been held and the child is awaiting placement in an HRS facility, Florida statutes limit the length of time the child can be held in secure detention. Until the passage of the 1990 law, the period was five days.⁹⁶ The five-day rule produced a number of appellate decisions admonishing the trial courts to comply with that provision.⁹⁷ Perhaps recognizing that the time constraints were difficult to meet, the legislature amended the law in 1990 to provide that in addition to the five-day period in secure detention, HRS is allowed an additional ten days from the date of commitment to transfer the child from secure detention to non-secure or home detention if HRS timely seeks an order for continued detention.⁹⁸

Regretfully, HRS seems unable to comply with the new rule as evidenced by the First District Court of Appeals decision in *R.L. v. State*.⁹⁹ HRS exceeded both the initial five-day secure detention limit and the total fifteen-day transfer time limit. HRS argued that because the child was ultimately released to home detention the case was moot.

95. *Id.*

96. See FLA. STAT. § 959.12 (1989).

97. See 1990 Survey, *supra* note 7, at 1182-83 (citing cases decided in 1989); 1989 Survey, *supra* note 11, at 873-74 (discussing a 1989 case).

98. FLA. STAT. § 39.044(11) (Supp. 1990) provides:

When a child is committed to the department awaiting dispositional placement, removal of the child from detention care shall occur within 5 days, excluding Saturdays, Sundays, and legal holidays. A child placed into secure detention care and committed to the department who is awaiting dispositional placement in a commitment program shall be transferred by the department into non secure or home detention care if placement does not occur within 5 days after commitment, excluding Saturdays, Sundays, and legal holidays. If the child is committed to a residential program, the department may seek an order from the court authorizing continued detention for a specific period of time necessary for the appropriate residential placement of the child. However, such continued detention in secure detention care or transfer to non secure or home detention care shall not exceed 15 days after commitment, excluding Saturdays, Sundays, and legal holidays.

99. 578 So. 2d 862 (Fla. 5th Dist. Ct. App. 1991).

The court disagreed, holding simply that the time frames were violated and that the writ of habeas corpus on behalf of the child should be granted.¹⁰⁰

Further evidence of HRS' problems can be found in *Interest of M.C.*¹⁰¹ There the youngster was waiting for placement in a facility for mentally disturbed children. HRS could not immediately place the child because of lack of space in appropriate programs. The child remained in secure detention beyond the statutory period. The Court granted the writ. Then, recognizing that this problem was on-going for some time, the court opined that "what this shows us is that all of the legislative changes will mean nothing unless the legislature has committed resources to expand the treatment programs for juveniles."¹⁰² It remains to be seen whether the necessary appropriations will be forthcoming from the legislature. If they are not, the appellate courts will be forced to continue ordering the release of children who need services on writs of habeas corpus for lack of compliance with statutory time frames.

A technical but not insignificant issue of appellate practice was recently presented to the First District Court of Appeals in *K.K.P. v. State*.¹⁰³ In that case, a child was charged with escape from a juvenile facility in Duval County. The trial court found the appellant had committed the escape and transferred the matter to the Circuit Court of Pinellas County, the youngster's county of residence. That circuit court adjudicated the child delinquent and ordered commitment to HRS. The child appealed to the First District Court of Appeals which hears appeals from the Judicial Circuit in Duval County. The child's argument, in response to an order to show cause at the trial level why the case should not be transferred to the Second District Court of Appeals, was that the youngster did not intend to contest the order of disposition but rather the adjudicatory order. The First District Court of Appeals, on its own motion, transferred the case to the Second District Court of Appeals for the following reasons. First, the only order entered by a circuit court in the First District was the finding that the child had

100. *Id.* at 863. The court noted that although no placement was available to HRS and would not be available for months, the statute is mandatory and there must be compliance. This case demonstrates the on-going problem produced by the lack of funding for delinquency commitment programs.

101. 567 So. 2d 1038 (Fla. 4th Dist. Ct. App. 1990).

102. *Id.* at 1039.

103. 580 So. 2d 307 (Fla. 1st Dist. Ct. App. 1991).

committed the escape and that order was not an adjudicatory order. Second, even if it was an adjudicatory order, the case was then transferred to a court in the Second Appellate District for all purposes. Third, even if the Second District Court of Appeals would agree with the child's argument that there was insufficient evidence to adjudicate him, the only relief available would be to discharge the child, an order which should be directed to the judicial circuit over which the First District Court of Appeals had no power.¹⁰⁴

Various provisions of the delinquency law governing dispositional alternatives continue to raise problems as evidenced by recent appellate court decisions.¹⁰⁵ For example, in *M.L. v. State*,¹⁰⁶ the First District Court of Appeal was asked to decide whether the trial court could place a child on community control, Florida's term for probation, after release from commitment when such disposition was not ordered in the original commitment proceeding.¹⁰⁷ The child had been adjudicated to have escaped from an HRS facility and was committed to HRS' custody for an indeterminate term not to exceed the child's nineteenth birthday or the maximum allowed by law.¹⁰⁸ When the particular commitment program did not work out, a hearing was held on the issue of imposition of community control following the child's discharge from the commitment. The child raised the issue of whether the placement on community control would constitute an improper increase in punishment. A modification of the original disposition order allowing the change in status was made over the child's objection.

In a technical decision interpreting several provisions, the appellate court in *M.L.* concluded that the modification order was appropriate under the Florida statute. First, the court concluded that the law allowed the trial court to make an order placing the child on community control following discharge from commitment in the initial order.¹⁰⁹ Second, under the court's general dispositional powers, the court

104. *Id.* at 308.

105. FLA. STAT. § 39.054 (Supp. 1990).

106. 578 So. 2d 464 (Fla. 1st Dist. Ct. App. 1991).

107. *Id.* at 465.

108. *Id.*

109. FLA. STAT. § 39.09(3)(e) (1989) (recodified at FLA. STAT. § 39.047(3)(e)1-5 (1991)) provides in relevant part:

The court may also require the child be placed in a community control program following the child's discharge from commitment. Community-based sanctions may be imposed by the court at the disposition hearing or at any time prior to the child's release from commitment.

only retains authority to discharge a child from commitment if in the original commitment order it retained authority to do so.¹¹⁰ The appellate court concluded that the trial court could require that a child be placed in a community control program following the child's discharge from commitment and that the provision holding that the court had no authority over the discharge of the child from commitment, unless the court in its commitment order had stated that it retained jurisdiction, did not apply. It found the order in this case was a modification which did not purport to discharge the child from HRS commitment status.¹¹¹

There are two problems with the court's decision. First, the very statute the court sought to avoid, chapter 39.11(4), Florida Statutes, states that a subsequent modification of a dispositional order is permitted *only* where the trial court retained authority to do so in its original order.¹¹² The trial court failed to do this in its commitment order. There is no exception to the statute. Second, apparently in an effort to avoid chapter 39.11(4) which is absolute on its face in precluding further court authority over discharge of the child in absence of the tension of jurisdiction in the commitment order, the appellate court argued that chapter 39.09(3)(e) actually gave it continuing authority.¹¹³ This section allows the court to add community-based sanctions prior to the child's release from commitment and after the initial commitment order. The problem with the court's reasoning is that community-based sanctions are not the same as community control. Community-based sanctions may be a part of community control but community control is far more extensive. Community-based sanctions include restitution, curfew and revocation of the child's driver's license and they *may* be

110. See FLA. STAT. § 39.054 (Supp. 1990).

111. *M.L.*, 578 So. 2d at 466.

112. FLA. STAT. § 39.11(4) (1989) (recodified FLA. STAT. § 39.054(4) (1991)) states:

(4) Any commitment of a delinquent child to the department shall be for an indeterminate period of time, but the time shall not exceed the maximum term of imprisonment which an adult may serve for the same offense Under no circumstances shall the court have authority over the discharge of a child from commitment provided in this subsection unless the court, in its commitment order, states that it retains such authority.

113. *Id.* at 465-66; FLA. STAT. § 39.09(3)(e) (1989) (recodified at FLA. STAT. § 39.047(3)(e)1-5 (1991)) states in relevant part:

If the court decides to commit a child to the department, the department shall furnish the court, in order of the preference of the department, a list of not less than three options for programs in which the child may be placed.

considered as part of community control. To read the statute as the court has is to avoid the language of chapter 39.11(4).¹¹⁴

May a court prohibit a child from wearing certain clothing or jewelry as a condition of community control? The issue was raised in *L.S. v. State*¹¹⁵ where the trial court, on recommendation of HRS, imposed a condition that the child not wear any jewelry. The child had been adjudicated delinquent for possession of marijuana and sale of cocaine. The case was a *per curiam* affirmance upholding the condition with a dissent by Judge Griffin who argued that the case fit within the test of *Grubbs v. State*.¹¹⁶ Judge Griffin reasoned that a condition of community control must be related to the offense and that the standard of conduct imposed be essential to rehabilitation as well as protection of the public. He believed that there was nothing in the record to indicate that jewelry was in any way connected with the child or the crimes committed by the youngster. Nor was there any showing that the use of jewelry was more typical of drug dealers than law-abiding citizens, or that prohibiting its use would impair the ability to sell drugs.¹¹⁷ Finally, Judge Griffin noted that selection of apparel is a basic means of personal expression, concluding that "there is not a great difference between forcing a probationer to wear certain clothing or symbols as a badge of shame and prohibiting the wearing of certain items."¹¹⁸

E. *Transfer Issues*

Appeals involving issues related to the transfer and handling of juveniles in adult court continued this past year. In certain situations, a child may be tried in adult court under Florida law.¹¹⁹ One of the requirements calls for the court to decide whether a child should receive adult or juvenile sanctions when a child has been tried as an adult and convicted, irrespective of whether the child was waived to adult court

114. In a sense, all of this begs the more significant public policy question of whether dispositional orders under Florida law should be viewed as rehabilitative in nature or punitive in nature. If they are punitive in nature, then to modify them to require the child to suffer a greater penalty smacks of double jeopardy. On the other hand, if the goal is rehabilitation, then modifications to help the child are appropriate.

115. 575 So. 2d 331 (Fla. 5th Dist. Ct. App. 1991).

116. 373 So. 2d 905, 909 (Fla. 1979).

117. *L.S.*, 575 So. 2d at 331.

118. *Id.* at 332.

119. See FLA. STAT. §§ 39.02(4), .04(5) (1989) (recodified at FLA. STAT. § 39.059 (Supp. 1990)).

or the proceeding began in the adult court under the direct file provisions.¹²⁰ The court must consider six criteria.¹²¹ Yet, the trial courts continue to violate the written binding provisions of the statute which states that:

Suitability for adult sanctions is determined by reference to the six criteria and any decisions shall be in writing and in conformity with those criteria with the court making a specific finding of fact and reasons for the decision.¹²²

In *Tighe v. State*,¹²³ a child who had been sentenced as an adult on a series of offenses argued on appeal that the trial court had failed to enter adequate written findings to support the imposition of adult sanctions. The appellate court found that the record did not reveal that the trial court made *any* written findings of fact. The appellate court explained that even a transcript which is made a part of the appellate record might satisfy the statute if it contained oral findings of fact and reasons for the decision, as opposed to being part of the written record.¹²⁴

In *Taylor v. State*,¹²⁵ the Fifth District Court of Appeal remanded for findings to support the imposition of adult sanctions in the case where a youngster, nearly seventeen years old, had been convicted of attempted first degree murder of a police officer. There, the closest item to a separate written order containing findings supporting the decision to impose adult sanctions was a two-part commentary on the sentencing score sheet stating that the court had made findings as provided by

120. FLA. STAT. §§ 39.052(2), .022(5)(a) (Supp. 1990).

121. FLA. STAT. § 39.111(6) (1989) (recodified at FLA. STAT. § 39.059(6) (Supp. 1990)).

122. FLA. STAT. § 39.111(7)(c) (1989) (recodified at FLA. STAT. § 39.059(7)(c) (1991)); *see also* 1990 Survey, *supra* note 7, at 1187-88 (describing prior cases in which the lower courts failed to comply with the statute).

123. 571 So. 2d 83 (Fla. 5th Dist. Ct. App. 1990).

124. *Id.* at 84. In a significant concurrence, Judge Dauksch argued that the 1990 Supreme Court opinion in *Pope v. State*, 561 So. 2d 554 (Fla. 1990) should apply to juveniles. *Pope* held that where an appellate court reverses an adult departure sentence because there were no written reasons, the appellate court must remand for resentencing with no possibility of departure from the guideline. According to Judge Dauksch, the effect in a juvenile context is a remand with instructions to impose juvenile sanctions. 573 So. 2d at 84.

125. 573 So. 2d 173 (Fla. 5th Dist. Ct. App. 1991).

Chapter 39 that the juvenile sanctions were not appropriate.¹²⁶ The appellate court noted that the state had not asserted on appeal that the requisite findings were made on the record at the sentencing hearing which the court of appeal would have accepted had they been made.¹²⁷ Thus, the court remanded.

A separate adult sentencing guideline issue arose in *Lang v. State*,¹²⁸ where a child charged as an adult with armed robbery entered into a plea agreement to reduce the charge to robbery with a weapon along with a recommendation from the state for a guideline sentence. The court rejected the defense counsel's plea that it impose juvenile sanctions or, if it imposed adult sanctions, to withhold adjudication and place the child on probation or community control. The appellate court first ruled that a negotiated plea of guilty to a reduced charge and recommended guideline sentence does not by itself act as a waiver of the court's obligation to address the six specified criteria for the imposition of adult sanctions under chapter 39.111(7)(c). Relying on the supreme court decision in *State v. Rohden*,¹²⁹ the court stated that, had the child waived or bargained away his right to have the court consider adult sanctions under the Florida Juvenile Justice Act, it would have upheld the adult sentence. However, it could find no such waiver in the *Lang* case. And thus, the trial court was obligated to comply with chapter 39.111. The appellate court then found like so many appellate courts before it, that the trial court had failed to make proper findings for sentencing the child as an adult. For example, a check list used by the trial court was found not to satisfy the requirements of Chapter 39 because the court is required to render specific findings of fact with the reasons for the decision to impose adult sanctions using all six criteria.¹³⁰

The problems in Florida's Juvenile Justice System also manifest themselves in cases involving the lack of dispositional alternatives in juvenile delinquency cases. Chapter 39 provides that when a court decides that it shall commit a child to HRS, the department shall furnish a list of not less than three placement alternatives to the court and rank

126. *Id.* at 174.

127. *Id.* at 175.

128. 566 So. 2d 1354 (Fla. 5th Dist. Ct. App. 1990).

129. 448 So. 2d 1013 (Fla. 1984).

130. *Lang*, 566 So. 2d at 1357 (citing *Keith v. State*, 542 So.2d 440, 441 (Fla. 5th Dist. Ct. App. 1989)); see also *1989 Survey*, *supra* note 11, at 881-83 (discussing *Keith* and other cases).

them in order of preference.¹³¹ In *Interest of C.S.*,¹³² the Fourth District Court of Appeals reversed the trial court's substitution of another program option for one of the three furnished by HRS, finding that the trial court cannot do so on the basis of prior case law and the statute.¹³³ It can be expected that if the state's financial difficulties continue, the appeals courts will continue to be upset with the placement alternatives provided by HRS.

III. DEPENDENCY

A. *Right to Counsel Issues*

Appellate cases involving questions of the role of counsel in the dependency field regularly come before Florida's courts of appeal.¹³⁴ They demonstrate the ongoing inability of trial courts to properly address the right to and role of counsel in dependency proceedings. By statute in Florida, the parents are entitled to representation by counsel in a dependency proceeding. However, Florida's law does not provide for the absolute right to appointment of counsel free of charge for an indigent parent.¹³⁵ Any decision to appoint a lawyer is made on an individual basis.¹³⁶

Two cases decided this past year exemplify the continuing problem. In *Interest of G.L.O.*,¹³⁷ the appellate court reversed and re-

131. FLA. STAT. § 39.052(3)(e)1 (Supp. 1990).

132. 573 So. 2d 168 (Fla. 4th Dist. Ct. App. 1991).

133. *Id.* at 169 (citing *M.M. v. Korda*, 544 So. 2d 318 (Fla. 4th Dist. Ct. App. 1989); see 1989 Survey, *supra* note 11, at 873 (discussing *Korda*); 1990 Survey, *supra* note 7, at 1185-86 (discussing other recent cases); see also *HRS v. R.S.*, 567 So. 2d 533 (Fla. 5th Dist. Ct. App. 1990) (commenting on trial court exceeding its statutory authority by specifying, in dicta, the facility in which HRS might place the child).

134. See 1988 Survey, *supra* note 11, at 1171-74; 1989 Survey, *supra* note 11, at 885; 1990 Survey, *supra* note 7, at 1188-91 (discussing cases decided in past years and briefly discussing the analytic framework for the right to counsel for parties in dependency proceedings); Michael J. Dale, *The Right to Counsel in Dependency Proceedings*, Florida Continuing Legal Education Chapter (available currently through the Nova Law Review and forthcoming from CLE).

135. See FLA. STAT. § 39.406 (1989); FLA. R. JUV. P. 8.560. See generally *Interest of D.B.*, and *D.S.*, 385 So. 2d 83 (Fla. 1980).

136. See *Davis v. Page*, 714 F.2d 512 (5th Cir. 1983), *cert. denied*, 464 U.S. 1052 (1984); *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975) (setting certain criteria pursuant to the Ninth Circuit opinion in *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974) (to determine whether appointed counsel is required)).

137. 573 So. 2d 442 (Fla. 2d Dist. Ct. App. 1991) (interestingly, the appellant

manded an order adjudicating the appellant's son dependent because the trial court failed to advise the mother of the right to counsel at any point during the dependency proceeding. In *Interest of J.G.*,¹³⁸ the appellate court affirmed a trial court order refusing to terminate parental rights and resetting the case for a new dispositional hearing because of the delay by the state in advising the indigent parents of their right to counsel in the earlier dependency proceeding.¹³⁹ Under Florida law, HRS is also obligated to advise the parent of his or her right to counsel.¹⁴⁰

Where parents retain counsel themselves in dependency proceedings, they may, in only very limited situations, seek payment of the attorney's fees from the state. This issue arose in *Interest of A.C., K.C., & J.B., Jr.*¹⁴¹ HRS commenced a dependency proceeding which resulted in a court declaration that one child was dependent based upon the parents' stipulation to that fact and that the other two children should return to their parents. Subsequently, the court held HRS and the child's protective investigator jointly and severally liable for the parents' attorney's fees.¹⁴² The Second District Court of Appeals held that the statutory provision governing the award of attorney's fees required that "the suit must be so clearly devoid of merit based on the facts or the law as to be completely untenable."¹⁴³ The court held that merit is determined at the point the claim is initially presented, and that there must be a showing that the party made a reasonable effort to investigate the claims before filing suit.¹⁴⁴ Applying this test, the court held that the award of fees could not be sustained because initially there was a meritorious claim and HRS had made a reasonable investigation.

Nor does a child possess an absolute constitutional right to counsel in a dependency proceeding.¹⁴⁵ However, because of its participation in the Federal Child Abuse Prevention Act of 1974, Florida provides for a

mother appeared pro se).

138. 577 So. 2d 695 (Fla. 3d Dist. Ct. App. 1991).

139. *Id.* at 696. The appellate court described the delay as "outrageous."

140. See FLA. STAT. § 39.406 (1989).

141. 580 So. 2d 884 (Fla. 1st Dist. Ct. App. 1991).

142. *Id.* at 884.

143. *Id.* at 885 (citing FLA. STAT. § 57.105(1) (Supp. 1990); *Whitten v. Progressive Casualty Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982)).

144. *Id.*

145. See *Interest of D.B. and D.S.*, 385 So. 2d 83 (Fla. 1980); *1989 Survey*, *supra* note 11, at 888-889.

guardian ad litem program to act on behalf of children in dependency proceedings.¹⁴⁶ A combination of Florida statutes, Florida Rules of Juvenile Procedure and an unreported Florida Supreme Court order define the role of the guardian ad litem and lawyer if appointed as attorney guardian ad litem.¹⁴⁷

The cases of *HRS v. Cole*¹⁴⁸ and *Brevard County v. Hammel*,¹⁴⁹ involved issues of payment of guardian ad litem attorney's fees. *HRS v. Cole* was a dependency proceeding which emanated from an underlying divorce. When a custody dispute was consolidated with dependency proceedings, the juvenile court entered an order appointing the district guardian ad litem program on behalf of the child. It then asked the program to appoint a specific guardian ad litem which was done. Thereafter, apparently because the mother defied a visitation order, the juvenile court on its own motion appointed a lawyer as attorney guardian ad litem for the child and ordered him to locate the youngster.¹⁵⁰ Then, the director of the local guardian ad litem program filed a petition stating that the program itself had appointed a lawyer as "pro bono attorney" for the guardian ad litem program and asked that this lawyer be allowed to attend depositions and that his fees to attend them be paid by the court. Later both the attorney guardian ad litem for the child and the attorney for the guardian ad litem program filed motions for payment of attorney's fees.¹⁵¹ The trial court ordered the county to pay the attorney guardian ad litem's fees and HRS to compensate the guardian ad litem program's attorney. HRS appealed.¹⁵²

After discussing the history of Florida's guardian ad litem program, the appellate court found, first, that the court could not appoint the guardian ad litem program and ask it to choose a specific guardian. Rather, the court should receive a list of qualified persons from the program from which the court shall appoint a guardian ad litem.¹⁵³ Second, the appellate court could find no authority for obligating HRS

146. 42 U.S.C. § 5101 (1988); FLA. STAT. § 415.508 (Supp. 1990); FLA. R. JUV. P. 8.590(c).

147. See Standard 4.0, State of Florida Guardian Ad Litem Program Minimal Standards of Operation (Fla. S. Ct. Admin. Order, Feb. 7, 1985); FLA. STAT. § 415.508 (Supp. 1990); FLA. R. JUV. P. 8.215(a).

148. 574 So. 2d 160 (Fla. 5th Dist. Ct. App. 1990).

149. 575 So. 2d 772 (Fla. 5th Dist. Ct. App. 1991).

150. *Cole*, 574 So. 2d at 161.

151. *Id.* at 162.

152. *Id.*

153. *Id.* at 163.

to pay the attorney's fees for the guardian ad litem program's counsel because HRS has no statutory responsibility for operating the guardian ad litem program. The court distinguished earlier decisions which held that HRS could be responsible for payment of attorney's fees to a guardian ad litem attorney appointed pursuant to the Florida statute.¹⁵⁴ In fact, the guardian ad litem program is operated through the Office of the State Administrator, a part of the supreme court and not by HRS.

Brevard County v. Hammel concerned a far simpler matter. The trial court had entered an order granting an attorney guardian ad litem's motion for an order compensating him the day after his motion was filed and without providing an opportunity to the county to be heard in opposition. The court granted the county's writ of certiorari, quashed the order and remanded the case for further proceedings.¹⁵⁵ Significantly, the court did not reach the issue of whether HRS or Brevard County was the appropriate entity to pay the attorney's fees assuming the county had been given adequate notice and opportunity to be heard.

More important than the issue of who pays the attorney guardian ad litem is the question of the proper role of the guardian ad litem in a dependency proceeding.¹⁵⁶ There is a growing body of case law on the subject.¹⁵⁷ The most recent case is *In re J.M. and R.M.*¹⁵⁸ There the guardian ad litem appealed from an order denying the guardian's petition for dependency and alternative motion for rehearing. The case began when an HRS child protection investigator filed an affidavit requesting detention of the children and thereafter filed a dependency petition on the basis of information from a physician that one of the children had experienced significant physical trauma. The court then appointed a guardian ad litem nominated by the local guardian ad litem program to represent the child's interests.¹⁵⁹ At the adjudicatory

154. *Id.* (citing *In re M.P.*, 453 So. 2d 85 (Fla. 5th Dist. Ct. App. 1984), *rev. denied*, 472 So. 2d 732 (1985); *Interest of R.W.*, 409 So. 2d 1069 (Fla. 2d Dist. Ct. App. 1981), *rev. denied*, 418 So. 2d 1279 (1982); FLA. STAT. § 415.508 (Supp. 1990)).

155. *Hammel*, 575 So.2d at 773.

156. The guardian ad litem also plays an important role in termination of parental rights proceedings. See footnotes 148-65 and accompanying text in this article.

157. See 1989 Survey, *supra* note 11, at 888-89; Dale, 1990 Survey, *supra* note 7, at 1201 (discussing prior decisions).

158. 579 So. 2d 820 (Fla. 1st Dist. Ct. App. 1991).

159. *Id.* at 821. It is interesting to note that at the adjudicatory hearing HRS, the parents, and the *guardian ad litem* were represented by separate counsel.

hearing, the court found that HRS had failed by a preponderance of the evidence to prove dependency.

Approximately two weeks later, the guardian ad litem filed a petition for dependency and, in the alternative, a motion for new hearing¹⁶⁰ on the basis of a statement made by one of the children to an adult care-giver at a residential facility. The guardian ad litem argued that HRS had been aware of this statement, but had not advised the guardian ad litem of it. The guardian argued that a separate party's notice to HRS or its agents does not constitute notice to the guardian. The trial court rejected both arguments by finding that the evidence was not newly-discovered and attributed HRS' knowledge to the guardian. Treating the motion for a new hearing as a motion for rehearing, the trial court denied it as not timely filed. It then dismissed the guardian's petition for dependency.

The appellate court found that the guardian ad litem functions independent of, and has separate party status from, HRS in a dependency proceeding.¹⁶¹ The appeals court also noted that the guardian ad litem program is administered by the Office of the State Administrator under the supervision of the supreme court, whereas HRS is a separate administrative agency.¹⁶² The court then held that pursuant to Florida Statute section 39.404(1), the guardian ad litem is a person who may commence a dependency proceeding.¹⁶³ Pursuant to discovery rules, the guardian also was entitled to learn from HRS the names and addresses of all persons who might have relevant information as well as obtain statements given to HRS by these persons.¹⁶⁴ Because HRS failed to provide discovery, the information constituted newly-discovered evidence upon which the guardian, as an independent party, was entitled to file either a petition for dependency or a motion for a new hearing. The appellate court reversed and remanded to consider the newly-dis-

160. *Id.*

161. *Id.* (citing FLA. STAT. §§ .503(a), .508 (Supp. 1990); FLA. R. JUV. P. 8.540, 8.590; HRS v. Cole, 574 So. 2d 160, 162-63 (Fla. 5th Dist. Ct. App. 1990)).

162. *Id.* This case raises the interesting issue of who then should be paying guardians ad litem. Some of the older case law suggests that HRS can be made to pay apparently because of Florida's funding under the Federal Adoption Assistance Act the flow of which funds passes through HRS.

163. FLA. STAT. § 39.404(1) (Supp. 1990) provides in relevant part that "any . . . person who has knowledge of the facts alleged or is informed of them and believe that they are true, may file a dependency petition."

164. *In re J.M. and R.M.*, 579 So. 2d at 822 (citing FLA. R. JUV. P. 8.770(a)(2)(i)-(iii)).

covered evidence and such other evidence as deemed necessary to decide the dependency issue.¹⁶⁵

B. *Procedural Issues*

Confidentiality in dependency proceedings and the public's right to know raises thorny constitutional problems. Two cases decided recently elucidate the issues. In *Florida Publishing Co. v. Brooke*,¹⁶⁶ a Jacksonville newspaper's reporter asked the First District Court of Appeal to review an order of the circuit court in Duval County which prohibited them from publishing the contents of a letter from a licensed psychologist in a dependency proceeding.¹⁶⁷ The appellate court granted the petition and quashed the order for three reasons. First, it interpreted chapter 39.408(2)(c) which allows a trial court to close a dependency proceeding in the court's discretion and in certain proceedings mandates that they be closed.¹⁶⁸ It held that this confidential proceedings section could not reach the letter which was no longer part of the proceedings. Second, it held that Florida's statutory provision governing the maintenance of court records by the clerk did not provide authority for the trial judge to restrain publication because the letter was not a court record as defined in the relevant statute.¹⁶⁹ Third, it found that the judge's order constituted prior restraint in violation of the newspaper's rights under the First Amendment to the United States Constitu-

165. *Id.* at 823.

166. 576 So. 2d 842 (Fla. 1st Dist. Ct. App. 1991).

167. *Id.* at 844. The letter which the newspaper wished to publish came from a psychologist, was sent to an HRS official and was sharply critical of HRS actions and its employees. Copies of the letter were forwarded to the court, the attorney-guardian ad litem for the child and through the court to other counsel as record. Ultimately, the child's mother gave a copy of the letter to the newspaper reporter.

168. *Id.* at 845 citing FLA. STAT. § 39.408(2)(c) (Supp. 1990) which provides in relevant part:

(c) All hearings, except as hereinafter provided, shall be open to the public, and no person shall be excluded therefrom except on special order of the judge, who, in his discretion, may close any hearing to the public when the public interest or the welfare of the child, in his opinion, is best served by so doing. All hearings involving unwed mothers, custody, sexual abuse, or permanent placement of children shall remain confidential and closed to the public. Hearings involving more than one child may be held simultaneously when the several children involved are related to each other or were involved in the same case. The child and the parents or legal custodians of the child may be examined separately and apart from each other.

169. *Id.* at 845 (citing FLA. STAT. § 39.411 (Supp. 1990)).

tion and article I, section 4, of the Florida Constitution. The court could find no facts which would overcome the presumptive unconstitutionality of prior restraint.¹⁷⁰

The issue of confidentiality came up in an entirely different context in *Brown v. Pate*.¹⁷¹ In that case, a parent moved to disqualify the judge on grounds which included a claim that the judge had opened the dependency proceedings to members of the news media contrary to chapter 39.408(2)(c), the same confidentiality provision which was involved in the *Brooke* case. The father argued that trying the case in the media was not in the best interests of the children, that the court's order making the matter public was received by the media prior to the father's counsel, that the court had made comments about its concern about allowing the children to have access to their father, and that the court had made comments implicating the father in the homicide of his wife, for which homicide he later had been found not guilty in a criminal case.¹⁷² The appeals court rejected all of the grounds for recusal and specifically found that the court's decision to open the hearing to the media was not a basis for disqualification.¹⁷³

A procedural case with significant overtones is *HRS v. D.H.*¹⁷⁴ A boy had been found dependent because the mother was hospitalized and comatose, the father was in jail, and a legal guardian turned the child over to HRS because that person could no longer care for him.¹⁷⁵ In a dependency proceeding, the court ordered the care, custody and control of D.H. to be placed in HRS. Six months later, when HRS filed its standard petition for review and the court learned that, in the interim, the child had been charged with homicide and jailed, the court vacated the order of dependency and left the child in the total care of the jailers.¹⁷⁶

The appellate court noted that Florida law gives the court the option to terminate jurisdiction over the child after the statutory six-

170. *Id.* at 846 (citing *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 558 (1976); *Landmark Communication, Inc. v. Virginia*, 435 U.S. 829, 849 (1978) (Stewart, J., concurring); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979)).

171. 577 So. 2d 645 (Fla. 1st Dist. Ct. App. 1991).

172. *Id.* at 646-47.

173. *Id.* at 647. Whether the ruling was correct as a matter of law was not before the court.

174. 575 So. 2d 1382 (Fla. 5th Dist. Ct. App. 1991).

175. *Id.*

176. *Id.* at 1382-83.

month period of review.¹⁷⁷ It held that the court also had authority to continue jurisdiction and keep the child in the care of HRS.¹⁷⁸ Then, in pointed language, it said:

All children need someone to look after their welfare and to be concerned for them. That need does not end upon, nor is it diminished by, incarceration. A good argument could be made that this child now needs someone to look after him more than ever; someone other than just a lawyer, who will only look after his legal needs.¹⁷⁹

Finding that the trial court had abused its discretion in refusing to accede to the wishes of HRS, which would have continued to care for the child, the appellate court reversed the order terminating jurisdiction and remanded for further proceedings.¹⁸⁰

C. *Adjudicatory Issues*

Challenges to the trial court's findings of fact are regularly litigated in the appellate courts.¹⁸¹ A rather frustrated appellate bench continues to see cases in which the trial court fails to state the facts upon which a dependency finding is made as required by Florida statute.¹⁸² As in the case of delinquency proceedings, where the trial court fails to articulate the basis for a transfer to adult court or sentence as an adult, the failure to state the facts upon which a dependency finding is made is reversible error.¹⁸³ However, recent appellate cases also suggest that the courts of appeals may go beyond the statutory mandate and decide whether, irrespective of the failure to make factual findings, evidence exists in the record to support the determination of dependency.¹⁸⁴ *Luszczuk v. HRS*¹⁸⁵ is a typical case. The trial court removed

177. *See id.* at 1383 (citing FLA. STAT. § 39.453(1)(b) (Supp. 1990)).

178. *Id.* (citing FLA. STAT. § 39.02(7) (1989) (recodified at FLA. STAT. § 39.072(7) (1991)) which states that an indictment for murder does not remove the court's jurisdiction over the child).

179. *D.H.*, 575 So. 2d at 1383.

180. *Id.*

181. *See 1988 Survey, supra* note 11, at 1175-78; Dale, *1989 Survey, supra* note 11, at 893; Dale, *1990 Survey, supra* note 7, at 1192-93.

182. FLA. STAT. § 39.409(3) (1989); FLA. R. JUV. P. 8.650.

183. *See 1989 Survey, supra* note 11, at 1173-74; Dale, *1990 Survey, supra* note 7, at 1191-93.

184. *See Interest of T.S.*, 557 So. 2d 676, 677 (Fla. 2d Dist. Ct. App. 1990);

a youngster from the mother's home and placed the child in the temporary custody of the paternal grandparents without making written findings of fact. The appeals court simply found that the failure to make the findings was reversible error, there being no record.¹⁸⁶

In *Interest of D.H. and M.H.*,¹⁸⁷ the issue was whether the Florida Rules of Juvenile Procedure required findings of fact in addition to the conclusion that the child was *not* dependent in a trial court order which denies a dependency petition - the opposite of the usual issue on appeal which involves the failure to make written findings of dependency. The Fourth District Court of Appeal affirmed the trial court's order denying the petition for an adjudication of dependency, but certified the question to the Florida Supreme Court in light of its finding that Rule of Juvenile Procedure 8.650 only speaks to findings of fact in the case of the determination of dependency.¹⁸⁸

In *Williams v. HRS*,¹⁸⁹ the court was also faced with an order of adjudication of dependency which failed to contain the statutory-mandated findings. Similarly, the order of disposition failed to comply with requirements related to the "reasonable efforts" that HRS must make to prevent or eliminate the need for removal of a child from his home.¹⁹⁰ The court found that the failure to comply with the statutory requirements was reversible error.¹⁹¹ It also commented that the dispositional order could not be salvaged because it neither tracked the facts of the dependency petition nor referred to a previous order which contained the proper findings.¹⁹² The court's explanation of the need for

1990 Survey, *supra* note 7, at 1193 (criticizing this approach).

185. 576 So. 2d 431 (Fla. 5th Dist. Ct. App. 1991).

186. *Id.* at 432. The opinion is silent as to why the court did not look to the record for factual findings. Perhaps the answer is that the court also found other reasons to reverse. The court noted the failure to hold a hearing on the evidentiary issue of the trustworthiness of the child's out of court statement to two psychologists pursuant to Florida Statute § 90.803(23). The appellate court also reversed on the basis that the trial court committed error by allowing a psychologist, HRS caseworkers and the guardian ad litem to testify as to their opinions that the child was telling the truth.

187. 575 So. 2d 761 (Fla. 4th Dist. Ct. App. 1991).

188. *Id.* at 762.

189. 568 So. 2d 995, 997 (Fla. 5th Dist. Ct. App. 1990).

190. *Id.*; see FLA. STAT. § 39.41(4) (Supp. 1990).

191. *William*, 568 So. 2d at 997. In this particular case, the question was whether the parents had abused their child through excessive use of corporal punishment.

192. *Id.* (relying upon the holdings in *Castellanos v. HRS*, 545 So. 2d 455 (Fla. 3d Dist. Ct. App. 1989)).

finding of facts is particularly illuminating and contains reasoning similar to that expressed by this writer in the past.¹⁹³ The court commented that irrespective of the statutory obligation to make findings, "it is difficult, if not impossible, to review the basis upon which the trial court arrived at its determination of dependency in the absence of those findings."¹⁹⁴ The court recognized that the legislative mandate to make specific findings "can be overdone and are burdensome."¹⁹⁵ But, as the court added, the requirement seems logical, and the findings are useful to assist the parties and others to understand the court's reasoning for finding dependency and its plan for remedial action.¹⁹⁶ It also creates a record for the court to look back to in subsequent proceedings, aids a successor judge, and allows the court to make later decisions without having to review the entire record.¹⁹⁷

In *Hardy v. HRS*,¹⁹⁸ Florida's Fifth District Court of Appeals also was faced with an appeal from an adjudication and disposition of dependency in which the trial court failed to restate the factual basis for the court's finding of dependency in its dispositional order. The appellate court in *Hardy* rejected this argument as not violative of chapter 39.409(3) because the trial court had made the proper factual findings when it entered its initial order after the adjudicatory hearing. Judge Peterson, concurring, distinguished the facts from *Williams v. HRS*¹⁹⁹ and added that he believed the better practice would be to place the findings in order of the court or incorporate them by reference in later orders.²⁰⁰

In *Interest of D.G. and P.G.*,²⁰¹ the court did not find dependency after a two-day hearing but withheld adjudication. The parent appealed by arguing that a finding of no dependency and a withholding of adjudication of dependency are mutually exclusive. The appellate court agreed relying upon Florida Statute chapter 39.409 which governs orders of adjudication.²⁰² If the trial court wished to order the parents'

193. See 1990 Survey, *supra* note 7, at 1193.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. 568 So. 2d 1314 (Fla. 5th Dist. Ct. App. 1990).

199. 568 So. 2d 995 (Fla. 5th Dist. Ct. App. 1990).

200. *Hardy*, 568 So. 2d at 1316.

201. 568 So. 2d 1000 (Fla. 1st Dist. Ct. App. 1990).

202. *Id.* FLA. STAT. § 39.405 (1989) provides:

(1) If the court finds that the child named in a petition is not dependent, it

home placed under the supervision of HRS as a disposition, there must have been a dependency finding with a decision that no other action than home supervision was required. In this case, the finding of the trial court was inconsistent with this order. Therefore, the appellate court remanded.²⁰³

Finally, in *Interest of S.W., E.J. and L.M.*,²⁰⁴ the issue was whether a "single" incident allegation that on one day a mother repeatedly hit one of her children with a belt constituted abuse.²⁰⁵ The evidence showed that the mother repeatedly hit the child with the belt, that the child was taken to the Child Protection Team doctor under contract with HRS later the same day, and that the physician found evidence of recent bruises including some to the face which were consistent with belt marks. The appellate court noted that the marks on the face also might have been consistent with a fall which the mother claimed the child suffered when the youngster ran away after the incident.²⁰⁶ Significantly, no treatment was required for any of the child's injuries. The appellate court reversed the finding of dependency as to the child who was struck and two other siblings who, on the basis of the language of the Florida statute, were at risk. The statute states that "abuse means any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause a child's physical, mental, or emotional health to be *significantly* appear impaired."²⁰⁷ The appellate court, after finding that the facts did not match the statutory definition, commented on the underlying events. Apparently, the mother awoke to find one child attempting to feed a younger child a mixture of bleach and baby oil. The mother then spanked the daughter for the behavior.²⁰⁸ The court recognized that the reaction may have been excessive and that the mother may have been agitated. It found that while it did not condone the reaction, the actions of the mother were

shall enter an order so finding and dismissing a case.

(2) If the court finds that the child named in a petition is dependent, but finds that no action other than supervision in his own home is required, it may enter an order briefly stating the facts upon which its finding is based, but withholding an order of adjudication and placing the child's home under supervision of the Department

203. *D.G.*, 568 So. 2d at 1001.

204. 581 So. 2d 234 (Fla. 4th Dist. Ct. App. 1991).

205. *Id.* at 235; see FLA. STAT. § 39.01(2) (Supp. 1990).

206. *S.W.*, 581 So. 2d at 235.

207. FLA. STAT. § 39.01(2) (1989) (emphasis added).

208. *S.W.*, 581 So. 2d at 235.

not sufficient to warrant a finding of dependency.²⁰⁹

D. *Child Abuse Reporting Issues*

Mandatory reporting of child abuse and neglect is governed by Florida Statute chapter 415.054.²¹⁰ In addition to listing the persons who must report suspected abuse or neglect, establishing a central abuse registry and tracking system, establishing a procedure to investigate the reports, the statute sets up certain due process procedures whereby the alleged perpetrator may challenge the report.²¹¹ Two recent cases involved such efforts.

In *D.J. v. HRS*,²¹² a parent appealed from a final order by HRS denying a request to have her name expunged from the child abuse registry. HRS investigated a report of child abuse involving appellant's four-year-old son. An HRS investigator had seen a scratch on the child's face and a bruise on the child's neck. The mother told the investigators two days earlier she had slapped the child for throwing objects and not minding her. The appellate court overruled the hearing officer's conclusions for several reasons. First, the officer did not make any specific findings of excessive corporal punishment as required by the law.²¹³ Second, the court rejected the hearing officer's finding that the evidence created a rebuttable presumption of abuse. The court viewed that standard as inconsistent with its own prior decision in *B.R. v. HRS*.²¹⁴ The court took the position that whether corporal punishment is excessive must be shown in each instance by "competent, substantial evidence", and all relevant issues presented must be considered "with-

209. *Id.*

210. Child abuse reporting systems are required in states such as Florida that receive funding under the Child Abuse Prevention and Treatment Act of 1974 (codified at 42 U.S.C. § 5106 (1988)). See Bessarov, *Recognizing Child Abuse: A Guide for the Concern* (1990) (critically analyzing the child abuse reporting system in the United States).

211. FLA. STAT. §§ 415.504(4)(c)1.a-j (1991).

212. 565 So. 2d 863 (Fla. 2d Dist. Ct. App. 1990).

213. *Id.* at 863 (citing FLA. STAT. § 415.503(9)(a)1 (Supp. 1990)).

214. *Id.* (citing *B.R. v. HRS*, 558 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1989); *B.L. v. HRS*, 545 So. 2d 289 (Fla. 1st Dist. Ct. App. 1989)). Significantly, the *B.R.* case is contrary to a First District Court of Appeals opinion in *B.L.*. The court in *B.R.* adopted the dissent in *B.L.* In *B.L.*, the court held that there was no rational connection between the length of time that a bruise remained visible and the ultimate fact of excessive punishment.

out resort to arbitrary presumptions fixed by the passage of time.”²¹⁵

Finally, in *M.O. Mc.C. v. HRS*,²¹⁶ a stepmother of a child also sought review of an HRS order which denied a request to expunge her name from the child abuse registry. The court reversed because it also found that there was no competent, substantial evidence to support the hearing officer’s conclusion that there was excessive corporal punishment. However, in this case, the appellate court’s reversal was based solely on the fact it viewed the facts as not constituting excessive punishment. At issue was paddling of a step child pursuant to a code of discipline which had been set up for the youngster by his father and step mother with the aid of an outside professional. The court rejected the significance of the fact that the paddle broke during the incident. It had previously broken and had been repaired with common glue. The court found no evidence of extraordinary force. The court disagreed with the conclusion that the parent did not exercise sound judgment and found no deviation by the parent from the code of discipline nor that an inordinate number of hits were used.²¹⁷

While the appellate cases in the dependency field often involve horrific physical and psychological injury to children, occasionally a case appears which demonstrates that not all claims are as they appear. One such case is *Interest of C.G. and C.B.*²¹⁸ C.G. complained of vaginal irritation and her mother bought and applied an over-the-counter ointment. Although the treatment appeared at first to be working, when the irritation persisted for two weeks the mother took the child to the doctor. The physician diagnosed trichomonas which is usually, but not always, sexually transmitted.²¹⁹ The family cooperated with the physician in reporting the diagnosis to HRS. Because the family was

215. *B.R.*, 558 So. 2d at 1027, 1029.

216. 575 So. 2d 1352 (Fla. 2d Dist. Ct. App. 1991).

217. *Id.* at 1355. For a detailed summary of the legislative scheme for prevention of abuse and neglect employing the state abuse registry, see *B.R. v. HRS*, 558 So. 2d 1027 (Fla. 2d Dist. Ct. App. 1989).

218. 570 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1990).

219. Trichomonal vaginitis is an infection of the vagina caused by *Trichomonas*, a tiny one-celled organism. Symptoms of the infection are similar to those of yeast infections . . . , and the two infections can occur together. However, the discharge of trichomonas vaginitis is usually heavy, unpleasant smelling and greenish-yellow in color. Trichomonal vaginitis is common and not thought to be dangerous, but it can be irritating and painful. And because the disease is usually transmitted through sexual intercourse, it is likely that the sexual partner also has it. *THE AMERICAN ASSOCIATION FAMILY MEDICAL GUIDE* 602 (1982).

anxious to learn what caused the infection, family members were tested voluntarily with negative results. Then, they sought a second opinion by taking the child to a board certified gynecologist, who disputed the diagnosis of trichomonas. HRS commenced a dependency proceeding based on medical neglect. There were no allegations of sexual abuse. The basis for the petition appeared to be the fourteen-day treatment with an over-the-counter medication. Describing the evidence as bureaucratic overkill, the Fourth District explained that the trial court removed both children from their home including a child who was never alleged to have been neglected. They were placed in foster care for a long period of time. Upon returning the children to their home, the juvenile court withheld adjudication of dependency and ordered protective supervision of both children with a guardian ad litem and a direction for family therapy.²²⁰ In what may best be described as an understatement, the appellate court concluded, "surely seeking medical attention when it appears that an over-the-counter medication is not curing" without more "does not support a finding of child neglect and the separation of children from their parents."²²¹

IV. TERMINATION OF PARENTAL RIGHTS

*Padgett v. HRS*²²² is a major decision by the Florida Supreme Court. It holds that the prior termination of a parents' rights in one child can support the severing of the parents' rights in another child. *Padgett* was an appeal from a Fifth District Court of Appeal decision which had initially certified the question of prospective abuse, neglect or abandonment.²²³ The Florida Supreme Court rephrased the question to determine whether a prior termination as to one child could be used to sever the parental rights to a different child.²²⁴

A review of the facts helps place the court's detailed legal analysis and decision in context. The mother and father appealed from an order terminating their parental rights to their child, W.L.P. Two years before W.L.P. was born, five children born to the father during a previous marriage were committed to HRS for adoption. These children had been found to be dependent based upon extreme neglect by the father

220. *C.G.*, 570 So. 2d at 1137.

221. *Id.*

222. 577 So. 2d 565 (Fla. 1991).

223. *See Padgett v. HRS*, 543 So. 2d 1317, 1318 (Fla. 5th Dist. Ct. App. 1989).

224. 577 So. 2d at 566.

and his prior wife.²²⁵ The year before the birth of W.L.P., the mother gave birth to a child that was promptly placed in HRS custody and was permanently committed for adoption. It is unclear from the opinion whether a finding of dependency was ever made as to this child. Two days after W.L.P. was born, HRS filed a petition for detention of W.L.P. and the court subsequently entered an order of dependency finding both parents unfit.²²⁶ The parents and HRS signed a performance agreement which authorized the return of W.L.P. if the parents could demonstrate sufficient parenting ability after undergoing psychotherapy and taking parenting classes.²²⁷ Although the opinion does not say so, it would appear that the return of the children to the parents became impossible and the agency then sought to terminate their parental rights. While the termination proceeding was pending, two additional events occurred. The mother staged a bizarre fake rape of herself and sexually abused a four-year-old girl who was in her care.²²⁸ The circuit court entered an order permanently terminating parental rights and freeing W.L.P. for adoption. The parents appealed claiming that the statute did not allow for termination of parental rights based upon prospective mistreatment, that such a test was speculative, that it involved a fundamental liberty interest decision which must be left to the legislature, and that under the facts the evidence was insufficient to make a finding of prospective neglect.²²⁹

The Florida Supreme Court refocused the issue on whether the prior termination of parental rights in other children could serve as grounds for permanently severing rights in the present child. It correctly sought to answer the question based both on statutory and constitutional grounds. First, it held that the Florida Juvenile Justice Act provides statutory authority for this kind of decision. The court pointed to chapter 39.464 which, until it was amended in 1990, provided that termination of parental rights could be based upon severe or continuous abuse or neglect of the child before the court "or other children."²³⁰

225. *Id.*

226. *Id.* at 567.

227. *Id.*

228. *Id.* at 568.

229. *Padgett*, 577 So. 2d at 568.

230. *Id.* at 569 (citing FLA. STAT. § 39.464 (1987)). Entitled Elements of Procedure for Termination, this section provides in relevant part:

(2) Extraordinary Procedures.

(a) Whenever it appears that the manifest best interests of the child demand it, the state may petition for termination of parental rights without

The court next held that prior case law employed public policy grounds to uphold the practice of terminating parental rights based upon evidence of neglect of children other than the one before the court.²³¹ The public policy rationale rejects the requirement that a child suffer actual abuse or neglect before it can be permanently removed from a caretaker who has seriously mistreated others and cannot be rehabilitated.²³²

Finally, the Florida Supreme Court held that the practice does not violate the constitutionally protected liberty interests of the natural parents. The court was clear, however, in its assertion that the parents' familial interest, which includes raising children free from control by the state, is both long-standing and fundamental.²³³ The balance to be struck, according to the Florida Supreme Court, is in favor of the child's "entitlement to an environment free of physical and emotional violence at the hands of his or her most trusted caretaker."²³⁴ The court found that the state has a compelling interest in protecting the

offering a performance agreement or permanent placement plan to the parents

(b) The state may petition under this subsection only under the following circumstances:

2. Severe or continuous abuse or neglect of the child or *other children* by the parent that demonstrates that the parent's conduct threatens the life or well-being of the child regardless of the provision of services as evidenced by having had services provided through a previous performance agreement or permanent placement plan.

This statutory section has since been amended but still includes the provision for terminating parental rights based upon abuse or neglect of other children. That section reads as follows:

(3) Severe or Continuing Abuse or Neglect.

The parent or parents have engaged in conduct towards the child or towards other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life or well-being of the child regardless of the provisions of services. Provision of services is evidenced by having had services provided through a previous performance agreement, permanent placement plan, or offer of services in the nature of a case plan from a child welfare agency. A current performance agreement or placement plan need not be offered to the parent or parents, and the petition may be filed at any time before a performance agreement or permanent placement plan has been accepted by the court.

231. *Id.* at 569-70.

232. *Id.* at 570.

233. *Id.*

234. *Padgett*, 577 So. 2d at 570.

children against clear threats of abuse, neglect or death. The court then set up a multi-part test for termination based upon evidence of abuse or neglect of other children. First, the state must make a showing by clear and convincing evidence. Second, it must show that reunification with the parent "poses a substantial risk of significant harm to the child."²³⁵ Third, the evidence may be abuse or neglect of a different child. Fourth, termination of parents' liberty based rights to their children must be the least restrictive means of protecting the child from serious harm. Fifth, in most cases HRS must show its good faith effort to rehabilitate the parents and reunite the family through a performance agreement or other plan for the present child.²³⁶ Sixth, lack of financial resources cannot support permanent termination of parental rights.²³⁷ Finally, the parent's intelligence is ordinarily not relevant to the inquiry.²³⁸

Padgett is defensible as a matter of statutory analysis, public policy, and constitutional law. The termination statute can properly be read to allow for a transfer of neglect such that the neglect of one child will serve as the basis for neglect of a second. Public policy historically obligates the state, as *parens patriae*, to protect the interests of children. That protection, when balanced against constitutional rights of familial integrity, weighs in the favor of protecting the rights of children over those of parents, but only when there is compelling need to do so.²³⁹ Thus, the Florida Supreme Court's test for the grounds under which the termination can occur, strikes a proper balance between the interests of parents and children.

There are, however, two problems with the opinion. One is more significant than the other. First, by reframing the question to be whether neglect of one child can form the basis for termination of parental rights to another, the court fails to fully acknowledge and defend the fact that it is still upholding the right of the trial court to predict that neglect will occur in the future. Of course, *Padgett* is not a case where there is evidence of either present or past neglect of the child before the court and the court is faced with deciding whether it will occur in the future. Rather, the court is allowing the fact finder to decide whether a particular child will be abused and neglected in the

235. *Id.* at 571.

236. *Id.*

237. *Id.* (citing FLA. STAT. § 39.464(5) (Supp. 1990)).

238. *Id.*

239. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

future based upon evidence of abuse of another child in the past. That is still clearly a predictive process. The supreme court should acknowledge it as such and justify it.²⁴⁰ Second, on a more technical level, the supreme court might have employed different phraseology describing this kind of decision-making as involving "transferred neglect." Such language more precisely defines what the supreme court was holding.

Padgett demonstrates the serious nature of termination proceedings. Among the other elements necessary to be proven at a termination of parental rights hearing is that the parent was informed of his or her right to counsel in the dependency proceedings.²⁴¹ In *Belflower v. HRS*,²⁴² the appellate court reversed the finding of termination of parental rights based upon the clear failure of proof as to advising the parents of their right to counsel at the dependency proceeding. However, *Belflower* is significant because it also held that, even when a petition for termination of parental rights is denied, the court may still decide whether the child shall remain in foster care or be returned to the parent with or without protective supervision.²⁴³ The justification for such consideration is the best interest of the child.²⁴⁴ Furthermore, in that particular case, because the parent failed to appeal from the adjudication of dependency within thirty days as provided by Florida law,²⁴⁵ the adjudication of dependency remained standing although it was not a valid basis for termination of parental rights.²⁴⁶ Thus, the trial court also had continuing jurisdiction in light of the outstanding dependency adjudication to decide whether the youngster required further supervision or foster care or might be safely returned home.²⁴⁷

In dicta which seems at odds with the Florida statute, the appellate court commented that because there was no fundamental constitutional right to counsel at a dependency proceeding, the underlying dependency adjudication is not void ab initio for failure to advise the

240. See *Schall v. Martin*, 467 U.S. 253 (1984); (upholding the right to predict future behavior in the context of pre-trial detention of juveniles and adults as not violative of the individual's constitutionally based liberty interests).

241. FLA. STAT. § 39.467(3)(c)1 (Supp. 1990).

242. 578 So. 2d 827 (Fla. 5th Dist. Ct. App. 1991).

243. *Id.* at 828 (citing FLA. STAT. § 39.468(2) (Supp. 1990)).

244. *Id.*

245. See FLA. STAT. § 39.413 (Supp. 1990); *In re D.M.S.*, 528 So. 2d 505 (Fla. 2d Dist. Ct. App. 1988).

246. *Belflower*, 578 So. 2d at 829.

247. *Id.* at 828.

parents of their right to counsel.²⁴⁸ The problem with the court's assertion is that the second proposition does not follow from the first. Florida, by statute, requires that the parents be advised of the right to counsel in a dependency proceeding.²⁴⁹ What the Florida law does not provide is the appointment of counsel if the parent is indigent. Thus, if the court and HRS fail to advise the parent of his or her right to counsel in a dependency proceeding, even though the parent may have to pay for the lawyer, if the parent appeals in a timely fashion, the adjudication of dependency will fall. This is not a matter of constitutional law but a matter of compliance with the Florida statute. Although the dicta is suspect, the court in *Belflower* was correct in holding that a dependency proceeding is not void ab initio when a parent is not advised of the right to counsel in a dependency proceeding. It remains up to the parent to challenge that failure on appeal. Finally, the right to counsel free of charge for a parent in a dependency proceeding under Florida law is to be determined on a case by case basis employing the test the Supreme Court set out in *Potvin v. Keller*.²⁵⁰

The important question of what individual may commence a proceeding to terminate parental rights was raised recently in *Norris v. Spencer*.²⁵¹ A child had been placed in the care of the appellant caretakers by the child's natural mother. The child was subsequently declared dependent and the caretakers were appointed custodians of the child. The natural mother entered into a case plan with HRS and then asked the court to return custody of the child. The parents' motion was denied and thereafter, the custodians filed a petition for severance of parental rights. The mother moved to dismiss²⁵² on grounds that the custodians lacked standing to commence termination of parental rights proceedings. The motion was granted and the custodians appealed. The appellate court held that HRS is not the only party entitled to bring a petition for termination of parental rights. In fact, the court stated that the ability to protect a child from unreasonable action or inaction by

248. *Id.* at 829.

249. FLA. STAT. § 39.465(1)(a) (Supp. 1990).

250. 313 So. 2d 703 (Fla. 1975). In *Potvin*, the Florida Supreme Court set up a five-part test to determine whether a parent should be provided with counsel in a dependency proceeding. They are: (1) the potential length of the parent/child separation; (2) the degree of parental restriction on visitation; (3) the presence or absence of parental consent; (4) the presence or absence of disputed facts; (5) and the complexity of the proceedings in terms of witnesses and documents.

251. 568 So. 2d 1316 (Fla. 5th Dist. Ct. App. 1990).

252. *Id.* at 1317.

HRS is facilitated by the ability of third parties to commence petitions to terminate parental rights. It therefore reversed.²⁵³

V. CONCLUSION

The appellate courts seem to have had little difficulty in interpreting the Juvenile Justice Reform Act of 1990 in the cases that have come before them. The appellate courts continue to express concern about the legislature's failure to properly fund delinquency programs. And the appellate courts continue to upbraid the trial courts for their failure to comply with basic statutory applications, both in the delinquency and dependency areas. It remains to be seen whether the trial courts will at long last listen to appellate judges. *Padgett* is a major decision by the Florida Supreme Court in the dependency field, having finally answered the question of what constitutes prospective or transferred neglect and how it should be tested. While the decision may not be quite as precise as it could be, it does resolve the issue in this jurisdiction.

253. *Id.*; see also *Interest of C.B.*, 561 So. 2d 663 (Fla. 5th Dist. Ct. App. 1990); *Interest of J.M.*, 569 So. 2d 1287 (Fla. 4th Dist. Ct. App. 1990); *Interest of J.R.T.*, 427 So. 2d 251 (Fla. 5th Dist. Ct. App. 1983).

Local Government: 1991 Survey of Florida Law

Joel A. Mintz*

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I. INTRODUCTION

In its last two terms, the Supreme Court of Florida handed down fifteen opinions regarding diverse aspects of local government law. This article surveys that body of decisional law. In particular, it reviews pertinent Florida Supreme Court decisions with regard to election law, sovereign immunity, local government liability under section 1983, municipal finance, preemption of local legislation, impact fees, county responsibility for indigent criminal defendants' appeals costs and municipal liability for the attorneys' fees of public officials.¹

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1. This article considers decisions of the Supreme Court of Florida handed down between October 1, 1989 and July 15, 1991. It does *not* attempt to treat the local government law decisions of the United States District Courts for Florida, of the United States Court of Appeals for the Eleventh Circuit or of Florida courts other than the Supreme Court. Similarly, it does not discuss Florida Supreme Court decisions in non-local government areas that are substantively related to local government law *only*

II. ELECTIONS

During the period of this survey, local election law received more attention from the Florida Supreme Court than any other single aspect of local government law. The court decided five cases in this field, on matters ranging from the validity of referenda to special laws concerning school board elections to the recall of municipal governing officials.

*People Against Tax Revenue Mismanagement, Inc. v. County of Leon*² concerned the validity of a local referendum that created a local-option sales tax as the revenue source for a \$60 million bond issue for construction of a new jail and other capital improvements. Leon County named People Against Tax Revenue Mismanagement (PATRM), a political action committee which had previously brought two unsuccessful suits to set aside the result of the referendum, as defendant in a bond validation proceeding. In that context, several challenges were raised to the referendum. One of these was based on the contention that local government agencies had used public resources and funds to mount an informational campaign in favor of the referendum, thereby violating the "neutral forum" of the election.³ The supreme court soundly rejected this claim and stated that local governments are "not bound to keep silent in the face of a controversial vote that will have profound consequences for the community."⁴ Rather, in the court's view: "Leaders have both a duty and a right to say which course of action they think best, and to make fair use of their offices for this purpose."⁵ Any rule to the contrary would "render government feckless" and would absolve democratic government of its "duty" to "lead the people to make informed choices through fair persuasion."⁶

The supreme court also refused to credit an argument that by including the campaign slogan "Take Charge . . . It's Your Future," and by describing planned capital improvements contemplated by the referendum as "critical," the wording of the ballot language had unfairly biased the electorate.⁷ The supreme court indicated that the language in question did reflect "a slight lack of neutrality that should not

insofar as one of the parties happened to be a political subdivision of the State of Florida.

2. 583 So. 2d 1373 (Fla. 1991).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Leon*, 583 So. 2d at 1376.

be encouraged.”⁸ It concluded, however, that inasmuch as the remainder of the ballot plainly stated that a “yes” vote meant that new taxes would be imposed, the referendum was not so confusing to the voters as to be “clearly and conclusively defective.”⁹

Finally, the supreme court gave short shrift to PATRM’s notion that the procedure established by section 102.168 of the Florida Statutes, which requires that county canvassing boards be named defendants in taxpayer lawsuits challenging elections, is the only proper method of resolving challenges to local referenda. The court noted that section 75.02 of the Florida Statutes authorizes counties to litigate the validity of tax assessments levied in connection with bond issues.¹⁰ It also observed that section 100.321, Florida Statutes, plainly states that the opportunity for taxpayers to file a lawsuit challenging a referendum is closed as soon as a bond validation proceeding is filed in the same matter.¹¹ Thus, once taxpayers are joined as defendants in bond validation proceedings, they are obligated to raise all of their objections to the validity of tax assessment referenda in the context of those proceedings, or be “forever barred from raising them again.”¹²

The supreme court considered the validity of another county referendum election in *Wadhams v. Board of County Commissioners*.¹³ There a majority of the voters of Sarasota County had approved an amendment to the county charter providing that the county’s Charter Review Board shall conduct its business “only during the year, and prior to that time, in which a general election is held in 1988, and every four years thereafter.”¹⁴ This charter amendment appeared on the ballot unaccompanied by any statement summarizing and explaining it. Reversing rulings of the trial court and the Second District Court of Appeal, the Florida Supreme Court invalidated the results of the referendum. It held that the proposed amendment had failed to comply with section 101.161(1) of the Florida Statutes, which requires that public measures submitted to votes of the people contain “an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure.”¹⁵ Citing the leading case of *Askew v. Firestone*,¹⁶

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Leon*, 583 So. 2d at 1378.

13. 567 So. 2d 414 (Fla. 1990).

14. *Id.*

15. *Id.* (quoting FLA. STAT. § 101.161(1) (1991)).

the supreme court opined that the purpose of section 101.161(1) is to assure that the electorate is advised of the true meaning and ramifications of a proposed amendment.¹⁷ By failing to contain an explanatory statement of the amendment, the ballot at issue in *Wadhams* had failed to inform the public that there was presently no restriction on Charter Review Board meetings and that the chief purpose of the amendment was to curtail the Charter Review Board's right to meet.¹⁸ This was not apparent from the face of the ballot.¹⁹

The supreme court disagreed with the Sarasota County Board of County Commissioners' argument that public hearings, advance publication of the proposed amendment, and media publicity had afforded the voters of Sarasota County an "ample opportunity" to become informed on the amendment's effect. Instead, the court indicated, the ballot summary must bear the burden of informing the public—a burden that should not fall only on the press and opponents of the proposal.²⁰

Similarly, the court rejected the county commissioners' contention that approval by the voters cures any defects in the form of the submission. It reasoned the defect in the referendum at issue "went to the very heart of what section 101.161(1) seeks to preclude" and that "no one can say with any certainty what the vote of the electorate would have been if the voting public had been given the whole truth."²¹

Finally, the court refused to credit the proposition that challenges to allegedly defective referenda are barred if they are instituted subsequent to a special election. It indicated that, in effect, that argument asserts that "hoodwinking the public is permissible unless the action is challenged prior to the election" and stated "although there would come a point where laches would preclude an attack on the ordinance, such is not the situation in the present case where the suit was filed only a few weeks after the election."²²

Justice Kogan dissented. In his opinion, the language of the ballot in question did advise the electorate of the meaning and ramifications of the amendment, particularly in light of the advance publicity that

16. 420 So. 2d 151 (Fla. 1982).

17. *Wadhams*, 567 So. 2d at 416.

18. *Id.* at 416-17.

19. *Id.* at 417.

20. *Id.*

21. *Id.*

22. *Wadhams*, 567 So. 2d at 417.

the referendum had received.²³ In this case, Justice Kogan believed, the election was properly conducted and the petitioners had received sufficient advance notice of the proposed ballot to allow them to challenge its form before the election. Their failure to do so should bar their claim.²⁴

*In re Koretsky*²⁵ involved the issue of whether section 100.361 of the Florida Statutes applies to a municipality that has adopted no provisions for recall elections. The statutory section contains a comprehensive scheme for the recall of governing officials of municipalities and charter counties. Inter alia, it states: "the provisions of this act shall apply to cities and charter counties which have adopted recall provisions."²⁶

After briefly reviewing pertinent legislative history, the supreme court gave this statutory language a narrow reading. It stated that "the only conclusion we can draw from this inclusion is that the legislature was limiting the recall procedure to those governing bodies that provided for recall and declined to impose it on such bodies which have no such provisions."²⁷

Justice Grimes dissented on the view that the legislation at issue should be read more broadly. Grimes pointed out that other subsections of the same statute provide that "it is the intent of the Legislature that the recall procedures . . . shall be uniform statewide" and that the act authorizes and provides for voter recall of "any member of the governing body of a municipality."²⁸ In view of these sub-sections, he concluded that the statute was clearly intended to operate, in and of itself, as authorization for the removal of members of municipal governing bodies.²⁹

Justice Grimes' dissent stated one additional concern. He believed that the majority's reading of section 100.361 would permit cities that presently have municipal recall procedures to repeal those procedures at any time, simply to escape the potential for a recall of their governing officials. In Grimes' opinion, that scenario would be contrary to the public interest. Thus, he viewed the majority's approach as incon-

23. *Id.* at 423 (Kogan, J., dissenting).

24. *Id.*

25. 557 So. 2d 24 (Fla. 1990).

26. *Id.* (quoting FLA. STAT. § 100.361(9) (1987)).

27. *Koretsky*, 557 So. 2d at 25.

28. *Id.* (Grimes, J., dissenting).

29. *Id.*

sistent with the maxim that statutory ambiguities should be resolved by interpretations that best serve the public interest.³⁰

In *Kane v. Robbins*,³¹ the Florida Supreme Court declined to overturn its earlier holding, in the same case, that non-chartered county school board members may not be elected in a non-partisan election authorized by special law.³² The incumbent Martin County School Board moved for rehearing or clarification of the supreme court's original decision in the case, arguing that opinion would invalidate all acts and decisions of the School Board since 1976, and would impair the delivery of educational services to Martin County children until a new school board election is held.³³ The supreme court dismissed these concerns as unfounded. It pointed out that the official acts of a de facto officer are as valid and binding upon the public and third persons as are the acts of an officer de jure. Thus, the lawfulness of the acts of Martin County School Board members who had been elected in invalid non-partisan elections could not be doubted. Moreover, the court concluded, official acts of the incumbent school board members would continue to be valid until such time as new school board members are duly appointed.³⁴

The 1989 *Kane v. Robbins* decision was also considered in another case involving the validity of a non-partisan election of county school board members, *School Board of Palm Beach County v. Winchester*.³⁵ In that situation, Palm Beach County had been electing school board members in non-partisan elections since 1971, pursuant to a special act of the Florida legislature. In 1985, the County adopted a charter providing that the validity of any pre-existing county ordinances shall continue as if the charter had not been passed. Following the *Kane* decision, Palm Beach County sought a declaratory judgment that its method of electing school board members was valid. The county contended that because it had become a charter county, it was subject to the exception contained in article III, section 11(a)(1) of the Florida Constitution which exempts, inter alia, chartered counties from the prohibition on special laws pertaining to the election of officers.³⁶ The

30. *Id.*

31. 556 So. 2d 1381 (Fla. 1990).

32. *Id.* at 1385. This original *Kane v. Robbins* decision is summarized in Joel A. Mintz, *Local Government Law*, 14 NOVA L. REV. 919, 930 (1990).

33. *Id.* at 1381.

34. *Id.*

35. 565 So. 2d 1350 (Fla. 1990).

36. *Id.*

Florida Supreme Court agreed, noting that it was obligated to construe statutes as constitutional wherever such a construction was reasonably possible. Consequently, the court found that it was reasonable to uphold Palm Beach County's school board election system because it was not challenged prior to Palm Beach County's becoming a chartered county, and because its provisions are presently constitutional under article III, section 11(a). The *Kane* case was distinguished because it had not involved a chartered county.³⁷

Justices Ehrlich and Grimes dissented in separate opinions. Justice Ehrlich reasoned that the statute that authorized non-partisan county school board elections in Palm Beach County was unconstitutional at its inception and that the adoption of a charter "does not in some mysterious, mystical manner make it constitutional."³⁸ Referring to the majority's opinion as "judicial legerdemain" and "bad law," Ehrlich stated,

the travesty of the whole scenario is that now that the county is chartered it no longer needs to rely on special acts of the legislature to bring about non-partisan elections of the school board. The county itself has the authority to enact such a provision as the one at issue. Yet it has never done so.³⁹

Justice Grimes indicated that even though he could sympathize with the majority's "unspoken desire" to avoid disrupting an impending school board election in Palm Beach County, he saw no rational basis for doing so.⁴⁰ He wrote: "I know of no legal theory by which it could be said that the adoption of the home rule charter breathed life into the constitutionally invalid special law."⁴¹

III. SOVEREIGN IMMUNITY

In its last two terms, the Supreme Court of Florida decided two cases with regard to the doctrine of sovereign immunity. Its first decision concerned the pre-judgment interest liability of local governments and its second involved their post-judgment liability for interest payments.

37. *Id.* at 1351.

38. *Id.* at 1352 (Ehrlich, J., dissenting).

39. *Id.*

40. *Winchester*, 565 So. 2d at 1353 (Grimes, J., dissenting).

41. *Id.*

In *Broward County v. Finlayson*,⁴² the sovereign immunity issue arose in the context of a labor contract dispute between the county and its emergency medical technician (EMT) employees. These employees had entered into a contract that provided for a regular work week of fifty-six hours, with overtime rates to be paid for all hours worked in excess of scheduled shifts. At the same time, the county's civil service rules, written for all county employees, stated in pertinent part that "Overtime is work beyond the normal hours of any scheduled work week. After forty (40) hours actually worked employee[s] will be paid at the rate of time and one-half."⁴³

After an unsuccessful grievance proceeding, the plaintiff filed a class action on behalf of herself and other EMT's seeking overtime pay for work done in excess of forty hours per week.⁴⁴ At trial, a jury found that the EMT's annual salary was payment for only forty hours per week and judgment was entered providing that each class member was owed retroactive overtime pay for the entire period of the labor contract in question.⁴⁵

On appeal, Broward County argued that sovereign immunity prohibits an award of pre-judgment interest against a subdivision of the state in a contract dispute.⁴⁶ The supreme court was not persuaded. Affirming, in part, a decision of the district court, the court relied on *Pan-Am Tobacco Corp. v. Department of Corrections*⁴⁷ for the principle that the defense of sovereign immunity will not protect the state from action for breach of a contract it has entered into, so long as that contract is fairly authorized by the powers granted by general law.⁴⁸

The supreme court then considered whether Broward County should be required to pay the plaintiff pre-judgment interest from the date that the contract was entered into or the date of the plaintiff's first claim for overtime wages. Noting that the County had been unaware that the EMT's believed themselves entitled to sixteen hours of overtime per week until the date of the plaintiff's first demand for overtime compensation, the court ruled that it would be inequitable to allow the plaintiff to recover pre-judgment interest for any period prior to that

42. 555 So. 2d 1211 (Fla. 1990).

43. *Id.*

44. *Id.* at 1211-12.

45. *Id.* at 1212.

46. *Id.*

47. 471 So. 2d 4 (Fla. 1984).

48. *Finlayson*, 555 So. 2d at 1213.

date.⁴⁹

In dissent, Justice McDonald took the view that under the doctrine of sovereign immunity, the state and its political subdivisions should not be liable for interest on its debts unless that liability is called for specifically by a statute or a contract.⁵⁰ Finding no statutory authorization for suits against the state for breach of employment contracts, McDonald concluded that no interest on the unpaid overtime was due the plaintiff.⁵¹

*Palm Beach County v. Town of Palm Beach*⁵² concerned a dispute over the sufficiency of county property tax levies for roads and bridges. After winning a judgment that the county's levies were insufficient, the Town appealed a trial court remedial order that made no allowance for post judgment interest.⁵³ It relied on section 55.03 of the Florida Statutes which provides that, in general, judgments or decrees entered on or after October 1, 1981 shall bear interest at the rate of twelve percent a year.⁵⁴ The supreme court agreed with the Town. Rejecting an argument that section 55.03 was inapplicable because interest may only be awarded when the right to interest can be implied from the language of a statutory waiver of sovereign immunity, the court held that the county's immunity from suit had been established in an early phase of the suit and could not be relitigated.⁵⁵

Justice Overton dissented. He opined that, when the legislature passed section 55.03, it had not intended to apply post-judgment interest to disputes of this type between governmental entities.⁵⁶ In Justice Overton's view, Palm Beach County had been exercising a governmental function, and acting in a legislative capacity, when it levied tax assessments in the manner it did.⁵⁷ Thus, even if it had been wrong, the county was not properly subject to a claim of postjudgment interest. Such a result, he believed, is punitive to taxpayers, who must pay the county's interest costs along with any assessments levied for road and bridge purposes.⁵⁸

49. *Id.*

50. *Id.* (McDonald, J., dissenting).

51. *Id.* at 1214.

52. 579 So. 2d 719 (Fla. 1991).

53. *Id.*

54. FLA. STAT. § 55.03(1) (1991).

55. *Palm Beach*, 579 So. 2d at 720.

56. *Id.* at 721.

57. *Id.*

58. *Id.*

IV. SECTION 1983 LIABILITY

During the period covered by this survey, the Supreme Court of Florida handed down two opinions regarding the liability of municipalities under 42 U.S.C. § 1983. One of these cases concerned state trial courts' subject matter jurisdiction over section 1983 suits against municipalities. The other case focused on the circumstances in which subordinate municipal officials may be held to have been delegated final municipal policy-making authority.

In *Town of Lake Clarke Shores v. Page*,⁵⁹ a former police officer with the Lake Clarke Shores Police Department brought a section 1983 action against the town. He alleged that his civil rights had been violated because town officials had terminated his employment in response to a letter, published in the *Palm Beach Post*, in which Page had expressed his opinion about the effect of stress upon police officers.⁶⁰

The trial court dismissed the action, holding that it lacked subject matter jurisdiction over section 1983 actions. The Fourth District Court of Appeals reversed and the Florida Supreme Court unanimously agreed with the Court of Appeals.⁶¹ Quoting extensively from a recent United States Supreme Court decision, *Howlett v. Rose*,⁶² the Florida Supreme Court held that state trial courts do, in fact, have subject matter jurisdiction over section 1983 actions against municipalities. The court noted that the United States Supreme Court has held that municipal corporations and similar governmental entities are "persons" within the meaning of section 1983.⁶³ Furthermore, state courts which entertain section 1983 suits against such entities are bound to accept Congress' abrogation of municipal sovereign immunity in those actions.⁶⁴

In *Raben-Pastal v. City of Coconut Creek*,⁶⁵ the plaintiffs brought a section 1983 action against the city based upon the failure of its chief building official to lift a stop-work order he had issued as to plaintiff's residential construction project. The plaintiffs had eliminated a number of cracks in newly constructed structures, as they had been ordered to do by the building official, and an engineering firm retained by the City

59. 569 So.2d 1256 (Fla. 1990).

60. *Id.* at 1257.

61. *Id.* at 1256.

62. 110 S. Ct. 2430 (1990).

63. *Id.* at 2432.

64. *Page*, 569 So. 2d at 1257.

65. 573 So. 2d 298 (Fla. 1990).

had certified that the necessary repairs were completed. Despite this, the building official refused to rescind his stop-work order for another five months.⁶⁶

Following a trial in which a jury had returned a sizeable verdict in favor of the plaintiffs, the trial court set aside the jury verdict and dismissed the suit. The Fourth District Court of Appeals affirmed the trial court's action and the Florida Supreme Court agreed.⁶⁷

In a unanimous opinion, the supreme court considered whether the building officials' actions had established official city policies. It discussed two leading United States Supreme Court opinions, *Pembaur v. City of Cincinnati*,⁶⁸ and *City of St. Louis v. Prapotnik*⁶⁹ and cited *Prapotnik* for the principle that, in a section 1983 action, the discretionary actions of a subordinate local official will not be deemed to constitute an official municipal policy unless it is clear that the subordinate's discretionary decision was not constrained by official policies and was not subject to review.⁷⁰

Applying that rule to the facts, the court noted that the South Florida Building Code, which governs the regulation of construction projects in Broward County, vests building officials with the power to impose stop-work orders on particular projects. However, the same Code also provides that any decision made by the building official on matters regulated by the Code was subject to review by a Board of Rules and Appeals, upon written application to the Secretary of the Board. For this reason, a decision by a building official affecting a stop-work order was not "final," and the building official whose actions were challenged in this case could not be considered a "final policy-maker" for the City of Coconut Creek.⁷¹

V. MUNICIPAL FINANCE

In its last two terms, the Supreme Court of Florida considered two appeals from judicial validations of municipal bond financing agreements.

*State v. School Board of Sarasota County*⁷² concerned the valid-

66. *Id.* at 299.

67. *Id.* at 298.

68. 475 U.S. 469 (1986).

69. 485 U.S. 112 (1988).

70. *Coconut Creek*, 573 So. 2d at 301.

71. *Id.* at 302.

72. 561 So. 2d 549 (Fla. 1990).

ity of nearly identical agreements supporting bond issues that had been entered into by the school boards of Sarasota, Collier and Orange Counties. The court summarized the agreements in question as follows:

These agreements provide for the lease of public lands owned by the [school] boards to not-for-profit entities (by way of ground leases), the construction of improvement of public educational facilities upon the leased lands, the annual leaseback of the facilities to the school boards (by way of facilities leases), and the conveyance of the lease rights of the not-for-profit entities to trustees (by way of trust agreements). The trustees are to market the bonds and disburse funds to finance construction of the facilities. Title to the public lands remains in the respective school boards. Title to the facilities constructed with the proceeds of the bonds passes to the respective school boards at the end of the term of the ground lease

. . . .
 Money from several sources, including ad valorem taxation, will be used to make the annual facilities' lease payments. If, in any year, a board does not appropriate money to pay the lease, the board's obligations terminate without penalty and it cannot be compelled to make payments. The board then has two options. It may purchase the facilities and terminate the ground lease. Alternatively, it may surrender possession of the facilities and lands for the remainder of the ground lease and is free to substitute other facilities for those surrendered. The trustee may relet the facilities for the remainder of the lease's term or sell its interest in the leases to generate revenue to pay bondholders.⁷³

Challenging the validity of these agreements, the State of Florida asserted that the trustees and not-for-profit entities that they refer to were not authorized to seek validation of the agreements in proceedings pursuant to section 75.02 of the Florida statutes.⁷⁴ The state contended that while the benefits of chapter 75 validation proceedings are properly conferred on political subdivisions of the state, in this case it was really the not-for-profit entities and the trustees, rather than the school boards, who were employing chapter 75 procedures to obtain judicial approval of the bond financing arrangements. Citing its decision in *State v. Brevard County*,⁷⁵ the supreme court disagreed.⁷⁶ The court

73. *Id.* at 550-51.

74. *Id.* at 552.

75. *Id.*

76. 539 So. 2d 461 (Fla. 1989).

summarily found that the boards were, in fact, proper plaintiffs in a section 75.02 action.⁷⁷

The supreme court then considered whether a voter referendum was required with respect to the agreements at issue. It ruled that even though the agreements were partially supported by ad valorem revenues, a referendum was not mandated by article VII, section 12 of the Florida Constitution because the agreements specified that "neither the bondholders nor anyone else could compel use of the ad valorem taxing power to service the bonds."⁷⁸

Similarly, the court rejected the contention that a referendum was mandated by section 230.23(9)(b)(5) of the Florida Statutes which requires an approving referendum where a school board pays rental fees, for necessary grounds and educational facilities, from funds received from ad valorem taxation pursuant to an agreement for a period greater than twelve months.⁷⁹ As interpreted by the supreme court, this section amounts to "no more than a codification of the referendum requirement set forth in the constitution."⁸⁰

Finally, the court declined to apply other cases in which it had reversed bond validations by lower courts. It distinguished *County of Volusia v. State*⁸¹ on the basis that the obligations at issue in *Volusia*—supported as they were by a pledge of all legally available unencumbered revenues other than ad valorem taxation, along with a promise to maintain fully the programs and services that generated the non-ad valorem revenue—constituted, in effect, a promise to levy ad valorem taxes.⁸² The supreme court also distinguished *Nohrr v. Brevard County Educational Facilities Authority*,⁸³ in which it held that the predecessor to article VIII, section 12 required an approving referendum for a bond-supporting agreement which granted a mortgage with a right of foreclosure. In contrast, the court reasoned, the present case did not involve a mortgage with right of foreclosure. Moreover, in this case, the bondholders were "limited to lease remedies; and the annual renewal option preserved the school board's full budgetary flexibility."⁸⁴

77. *Id.*

78. *Id.*

79. FLA. STAT. § 230.23(9)(b)(5) (1989).

80. *School Bd.*, 561 So. 2d at 553.

81. 417 So. 2d 968 (Fla. 1982).

82. *School Bd.*, 561 So. 2d at 553.

83. 247 So. 2d 304 (Fla. 1971).

84. *School Bd.*, 561 So. 2d at 553.

In his dissenting opinion, Justice McDonald labeled the majority's conclusion that the financial scheme in question was not supported by a pledge of ad valorem taxation as "pure sophistry" and an approval of "form over substance."⁸⁵ McDonald noted that "if ad valorem taxes are not levied and paid each year for the duration of the agreements, the school boards default not only all interest acquired under the agreement for the remainder of the agreement, but they also lose the right to use the preowned property for the remainder of the agreement."⁸⁶ In practice, he reasoned, no school board would do that. Thus, for all practical purposes, the school boards in this case bound themselves to levy, collect and pay ad valorem taxes to finance new school construction—an arrangement which requires approval by referendum under the Florida Constitution.⁸⁷

In *State v. City of Orlando*,⁸⁸ the Florida Supreme Court considered an entirely different municipal bond financing scheme. There, the state challenged the validity of a \$500 million bond issue, the proceeds from which would be used to make loans to, or buy the debt instruments of, other local governmental units in the State of Florida.⁸⁹ Under the arrangement in question, bond revenues could be lent by the City of Orlando to finance a variety of local agency projects, including the purchase of liability coverage contracts, the funding of self-insurance reserves and the building of roads, water systems, jails, utility facilities, and sports facilities.⁹⁰ While local agencies were to be liable to the extent of their respective obligations under the loan agreements, the bonds themselves were not to be deemed "a debt liability or obligation of the state or any political subdivision or municipality."⁹¹

The Florida Supreme Court found this municipal financing arrangement to be flawed in two critical respects. First, the proposed bond issue "failed to provide enough details by which its legality could be measured."⁹² It did not identify the particular governmental entities to whom bond revenues would be lent, the revenues from which those entities would repay their loans or the specific projects or uses to which

85. *Id.* at 554.

86. *Id.*

87. *Id.*

88. 576 So. 2d 1315 (Fla. 1991).

89. *Id.* at 1316.

90. *Id.*

91. *Id.*

92. *Id.* at 1317.

bond funds would be put.⁹³ In addition, the proposed financing arrangement neglected to estimate the amount of profits that the City of Orlando might expect.⁹⁴ Also, it failed to mention what “paramount public purpose” those profits would be used for.⁹⁵

Beyond this lack of specificity—which the supreme court conceded could probably be corrected by amendment of the documents that controlled issuance of the bonds—the court noted a second and “deeper” problem. The primary purpose of the bond issue in question “was to obtain proceeds that would be used to invest for a profit.”⁹⁶ In the court’s opinion, this purpose contravened article VIII, section 2(b) of the Florida Constitution, which limits municipalities to the conduct of municipal government, the performance of municipal functions and the rendering of municipal services.⁹⁷ In the court’s view, “making a profit on an investment is an aspect of commerce more properly left to commercial banking and business entities.”⁹⁸ For this reason, the supreme court invalidated the City of Orlando’s proposed bond issue.⁹⁹ The court held, however, that its ruling was prospective only, and that “it did not prohibit the investment of bond proceeds pending later expenditures on the project contemplated by a bond issue.”¹⁰⁰ The court also indicated that its opinion should not be construed to limit the ability of municipalities to invest any previously borrowed funds used for valid municipal projects.¹⁰¹

VI. STATE PREEMPTION OF LOCAL LEGISLATION

*Florida Power Corporation v. Seminole County*¹⁰² concerned the validity of county and city ordinances that required Florida Power Corporation (FPC) to relocate underground a set of overhead power lines that FPC maintained along a two lane county road. The city’s ordinance required FPC to bear the entire cost of the undergrounding pro-

93. *City of Orlando*, 576 So. 2d at 1317.

94. *Id.*

95. *Id.*

96. *Id.*

97. FLA. CONST. art. VIII, § 2(b).

98. *City of Orlando*, 576 So. 2d at 1317 (quoting *State v. Panama City Beach*, 529 So. 2d 250, 257 (Fla. 1988) (McDonald, C.J., dissenting)).

99. *See City of Orlando*, 576 So. 2d at 1317.

100. *Id.* at 1310.

101. *Id.*

102. 579 So. 2d 105 (Fla. 1991).

ject. The county's ordinance was nominally silent as to who would bear that cost. However, it unequivocally declared that the county would not do so.¹⁰³

FPC sued the city and county for declaratory judgment and injunctive relief against enforcement of the ordinance, contending that the ordinances invade the exclusive authority of the state Public Service Commission to regulate rates and service. The utility company was unsuccessful at the trial court level, but the Florida Supreme Court reversed.¹⁰⁴ Noting that the Florida Statutes grant the state Public Service Commission broad power "to prescribe fair and reasonable rates and charges,"¹⁰⁵ and that requiring FPC to place its power lines underground clearly affects its rates, if not its service, the court held that "the jurisdiction of the Public Service Commission . . . preempts the authority of the city and county to require FPC to place its lines underground."¹⁰⁶

The supreme court gave a narrow construction to section 337.403(1) of the Florida Statutes. That section provides that utility equipment placed along public roads that is found to interfere unreasonably with "the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public road," shall be "removed or relocated" by the utility at its own expense.¹⁰⁷ The court held that this provision "does not grant localities the power to mandate the type of system to be used by a utility, or to determine who should pay for such a system."¹⁰⁸ However, it does allow "for the removal or relocation of utility facilities when necessary to accommodate expansion or maintenance."¹⁰⁹ In addition, the court opined that the statutory words "removed or relocated" do not suggest conversion of an overhead electric system to an underground system as a condition of use of the right of way—a requirement which the court described as "extraordinary."¹¹⁰

Finally, the supreme court observed that the legislature had vested the Public Service Commission with the authority to require conversion

103. *Id.*

104. *Id.* at 106.

105. *Florida Power Corp.*, 579 So. 2d at 106 (quoting FLA. STAT. ANN. § 366.05(1) (West Supp. 1991)).

106. *Id.* at 107.

107. *Id.* at 108 (quoting FLA. STAT. ANN. § 337.403(1) (1991)).

108. *Id.*

109. *Id.*

110. *Florida Power Corp.*, 579 So. 2d at 108.

of overhead distribution lines to underground lines if the Commission believes that such a conversion would be "feasible" and "cost effective."¹¹¹ In view of this, the court reasoned, permitting cities to mandate unilaterally the conversion of overhead lines would run "contrary to the legislative intent that the Public Service Commission have exclusive regulatory authority over this subject."¹¹²

VII. IMPACT FEES

*St. Johns County v. Northeast Florida Builders Association*¹¹³ concerned the validity of an impact fee on new residential construction to be used for new school construction.¹¹⁴ The impact fee ordinance was immediately applicable in unincorporated areas of St. Johns County. However, it was ineffective within the boundaries of any municipality in the county until that municipality entered into an interlocal agreement with the county to collect the impact fees from applicants for new building permits.

In reviewing the constitutionality of this ordinance, the supreme court applied a "dual rational nexus test," which it explained as follows:

[T]he local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.¹¹⁵

The court had little difficulty concluding that the ordinance in question satisfied the first prong of this test.¹¹⁶ The court rejected as "simplistic" a contention the "impact fee [was] nothing more than a tax" insofar as it concerned the many new residences that would have no impact on the public school system. During the useful life of the new dwelling units subject to the fees, the court noted, school age children would

111. *Id.*; see FLA. STAT. ANN. § 366.04(7)(a) (Supp. 1991).

112. *Id.*

113. 583 So. 2d 635 (Fla. 1991).

114. *Id.* at 636.

115. *Id.* at 637.

116. *Id.* at 638.

come and go.¹¹⁷ The St. Johns County impact fee, which was based upon a comprehensive study of projected growth and educational demands, was rationally designed to provide the capacity to serve the educational needs of all new dwelling units.¹¹⁸

The supreme court then turned to the second prong of the dual rational nexus test. It observed that, as written, the impact fee "ordinance permitted the St. Johns County School Board to spend the funds to build a new school that would serve only the increased needs of a municipality caused by growth within that municipality."¹¹⁹ However, unless the municipality had signed an interlocal agreement with the county to collect impact fees, the funds to build that school would come from impact fees paid by development in unincorporated areas. This arrangement ran afoul of the requirement that the expenditure of collected impact fees be reasonably connected to the benefits that accrue to the units those fees are collected from. For this reason, the court mandated that no impact fee be collected under the ordinance until such time that municipalities containing "substantially all" of the municipal population of St. Johns County have entered into interlocal agreements with the county.¹²⁰

Since the propriety of imposing impact fees to finance new schools was an issue of first impression in Florida, the supreme court went on to examine other issues raised by the St. Johns County impact fee ordinance in *dicta*. It ruled that a subsection of the ordinance that created an alternative method of fee calculation collided with the requirement of the Florida Constitution that there be a uniform system of "free public schools."¹²¹ As construed by the county, this provision created the potential that impact fees would in fact become user fees to be paid primarily by those households that actually contain public school children. However, the court severed the offending subsection under a severability clause of the ordinance, since its severance did not impair the operation or effectiveness of the remainder of the ordinance.¹²²

The supreme court rejected an argument that the ordinance conflicts with the requirement of a "uniform system" of public schools con-

117. *Id.* at 637-38.

118. *Northeast Fla. Builders Ass'n*, 583 So. 2d at 638.

119. *Id.*

120. *Id.* at 639.

121. *Id.* at 638.

122. *Id.* at 640.

tained in article IX, section 1 of the Florida Constitution.¹²³ It opined that the Constitution mandates neither uniform sources of school funding among the several counties nor equal funding and equivalent educational programs in every school district. "Inherent inequities, such as varying revenues because of higher or lower property values or differences in millage assessments, will always favor or disfavor some districts."¹²⁴ The Constitution only requires that every student be provided an equal chance to achieve basic educational goals prescribed by the legislature.¹²⁵

Similarly, the supreme court rejected claims that the impact fee ordinance interjected the county into an area in which school boards have been given exclusive authority. It stated that article IX, section 4(b) of the Florida Constitution, that gives school boards the authority to tax, does not limit county involvement in school financing. Furthermore, section 230.23 of the Florida Statutes, which implements article IX, section 4(b), does not place upon school boards the exclusive duty to secure adequate public school financing. Moreover, several other enactments make clear that the legislature contemplated that counties be involved in educational funding, rather than preempted from such involvement.¹²⁶

Finally, the court concluded that the ordinance in question does not create an unlawful delegation of power. In its view, the ordinance properly calls for the county to make the fundamental policy decisions, including determinations as to the amount of the fees and how they are to be collected, at the same time as it limits the school board's discretion in expending funds for new educational facilities.¹²⁷

VIII. COUNTY RESPONSIBILITY FOR INDIGENT CRIMINAL DEFENDANTS' APPEALS COSTS

*In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*¹²⁸ was a consolidation of five cases in which six Florida counties challenged an order of the Second District Court of Appeal regarding the prosecution of criminal appeals by the

123. *Northeast Fla. Builders Ass'n*, 583 So. 2d at 640.

124. *Id.* at 641.

125. *Id.*

126. *Id.* at 642.

127. *Id.*

128. 561 So. 2d 1130 (Fla. 1990).

Public Defender for the Tenth Judicial Circuit. This order was issued *sua sponte* by the Second District Court in response to a tremendous backlog of appeals to that court by indigent defendants in which briefs were substantially overdue.¹²⁹ The principal requirements of the order in question were summarized by the supreme court in this way:

The court's order prohibits Mr. Moorman, [the Public Defender for the Tenth Judicial District], from accepting appeals from any judicial circuit other than the Tenth in which the notice of appeal was filed after May 22, 1989. The order further mandates that circuit judges within each circuit appoint that circuit's public defender to handle appeals from that circuit. If a public defender from one of those circuits has a conflict, the order requires that they [sic] file motions to withdraw so that the circuit judge may appoint other counsel to represent those clients at the expense of the local government.¹³⁰

The counties challenged this order on several grounds. First, they argued that the order abridged their due process rights because the counties were not afforded notice or an opportunity to be heard before the order was issued, even though it will have a substantial financial impact on them. The supreme court was unpersuaded. It noted that the order under review was "merely the most recent in a series of efforts" by the same court to deal with the same problem.¹³¹ "All interested parties, including the counties, [had] been given an opportunity to respond" in connection with at least two of these prior efforts.¹³² The issues remained the same, as did the counties' response. Beyond this, the court reaffirmed and reiterated its decision, in *Escambia County v. Behr*,¹³³ that counties are not entitled to respond to motions to withdraw by public defenders merely because of their financial interest in the outcome of those motions.¹³⁴

The counties also contended that the state should compensate private attorneys who must be appointed as a result of conflicts of interest created by state's underfunding of public defenders.¹³⁵ They suggested

129. *Id.* at 1131.

130. *Id.* at 1132-33.

131. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1133.

132. *Id.*

133. 384 So. 2d 147 (Fla. 1980).

134. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1135-36.

135. *Id.* at 1135.

that the state had, in fact, assumed that burden in 1981, when the legislature deleted language from section 27.53(2) of the Florida Statutes that tied the payment of court-appointed attorneys in non-capital cases to a statute addressing payment of such attorneys in capital cases.¹³⁶ Once again, the supreme court disagreed. It stated that even though the amendment to section 27.53(2) had indeed removed language explicitly placing the burden of compensating court-appointed attorneys on the counties in non-capital cases, no language was added assigning that responsibility to the state. As a result, the remaining statute left an ambiguity to be resolved by examination of the legislative history of the 1981 amendment to section 27.53(2).¹³⁷

The court performed such an examination, including an analysis of the jurisdiction of the legislative committees which considered the bill that amended section 27.53(2), and a review of a staff analysis of that bill prepared for the Senate Judiciary—Civil Committee. It revealed that the bill was not intended to shift the responsibility for compensating court appointed attorneys from the counties to the state. Therefore, the supreme court reasoned, that obligation remains on the counties.¹³⁸

In support of this conclusion, the court cited section 925.037 of the Florida Statutes,¹³⁹ which created a pilot program to reimburse the counties for fees paid to court-appointed counsel in capital and non-capital conflict of interest cases. It stated:

This new statute is good evidence that the legislature views the primary responsibility for compensating court-appointed attorneys as being on the counties, that the 1981 amendment to subsection 27.53(2) did not alter that scheme, and that the legislature is only now beginning to address the tremendous financial burden the scheme places on the counties.¹⁴⁰

The supreme court further observed that appropriation of funds of the operation of government is a legislative function and that the judiciary cannot compel the legislature to exercise a purely legislative prerogative.¹⁴¹ Thus, even though the counties may well be correct in asserting that the state should accept complete financial responsibility for

136. *Id.* at 1135-36.

137. *Id.* at 1137.

138. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1135-36.

139. *Id.*

140. *Id.* at 1137-38.

141. *Id.* at 1138.

the public defenders, the legislature is the proper forum to address that concern.¹⁴²

IX. ATTORNEY'S FEES FOR REPRESENTATION OF CITY OFFICIALS

*Thornber v. City of Fort Walton Beach*¹⁴³ involved claims by three members of the Fort Walton Beach City Council for reimbursement of attorney's fees expended for their private representation in matters arising from their actions as council members. The officials had successfully brought an action to enjoin a recall petition calling for their removal from office. They had also defended against a federal civil rights claim which had been dismissed by the plaintiff, with prejudice, as part of a settlement in which the plaintiff received some relief. Reversing the trial court and the First District Court of Appeal, the supreme court held that the city council members were entitled to reimbursement of their attorney's fees.¹⁴⁴

With respect to their lawsuit to enjoin the recall petition, the court agreed with the lower courts that the council members could not recover attorney's fees under section 111.07 of the Florida Statutes, a provision that is limited to reimbursing the attorney's fees of governing officials who are prevailing defendants.¹⁴⁵ Notwithstanding this, however, the supreme court ruled that the council members were entitled to recover their attorney's fees under common law.¹⁴⁶

The court cited a line of decisions that establish that public officials have a common law right to legal representation, at public expense, to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. It stated that for public officials to be entitled to such publicly financed legal representation, two conditions must be satisfied: 1) the litigation in question must arise out of or in connection with the performance of their official duties and 2) the litigation must serve a public purpose.¹⁴⁷

Applying this principle to the facts, the supreme court concluded that the council members' lawsuit to enjoin the recall petition met both

142. *Id.*

143. 568 So. 2d 914 (Fla. 1990).

144. *Id.* at 919.

145. FLA. STAT. § 111.07 (West Supp. 1991).

146. *Thornber*, 568 So. 2d at 918.

147. *Id.* at 917.

of the requisite requirements. Because the recall petition was a response to the council members' dismissal of Fort Walton Beach's city manager and police chief, the court found it sufficiently connected to the council members' official performance to satisfy the first prong of the test.¹⁴⁸

In addition, in the court's view, the council members' action in defending against the recall petition served useful public purposes. Their lawsuit ensured the effective and efficient functioning of the city's governing body, and protected city offices from untimely and illegal recall petitions. The court reasoned that officials should not have to incur personal expenses to insure that a recall committee follows proper procedures.¹⁴⁹ Even though the case presented an "unusual twist," in that the council members initiated the litigation in question, rather than defending against it, the actions of those officials amounted to a defense against an improper recall petition.¹⁵⁰ Thus, they should not be precluded from recovering their attorney's fees under common law.¹⁵¹

The supreme court also concluded that the common law doctrine that served as the substantive basis for the council members' recovery was not superseded by section 111.07.¹⁵² It noted that the statute itself was silent as to whether it superseded the common law, and that there was nothing in the legislative history of the statute that supported an implication that the common law was being derogated. Applying the well established principle that a statute will not be held to change the common law unless that statute explicitly and clearly exhibits an intent to do so, the court held that section 111.07 is not the exclusive mechanism authorizing an award of attorney's fees to public officials involved in litigation arising from the performance of their public duties.¹⁵³

The supreme court then turned to the council members' claim of attorney's fees for their defense of a federal civil rights suit against them by the former police chief of Fort Walton Beach.¹⁵⁴ That action had resulted in a settlement which called for the plaintiff to voluntarily dismiss his claim, with prejudice. In exchange, the plaintiff was reinstated as police chief, placed on permanent disability leave, reimbursed

148. *Id.*

149. *Id.* at 917-18.

150. *Id.* at 918.

151. *Thorner*, 568 So. 2d at 918.

152. *Id.*

153. *Id.* at 919.

154. *Id.*

his past lost wages, and given a pledge that the city would not interfere with his worker's compensation claim.¹⁵⁵

Notwithstanding the relief obtained by the plaintiff in this settlement, the court concluded that the council members had "prevailed" in the action and were entitled to attorney's fees under section 111.07 as prevailing defendants.¹⁵⁶ The court observed that, under the settlement, all of the plaintiff's relief was awarded by the city and the mayor, who had been co-defendants in the police chief's civil rights action. The council members had been merely signatories to the stipulated settlement; they did not contribute monetarily. The court also relied on the general rule that when a plaintiff voluntarily dismisses an action, the defendant is considered the prevailing party.¹⁵⁷

Finally, the supreme court responded to the council members' contention that, under section 57.105 of the Florida Statutes, they were entitled to recover their attorney's fees in the instant litigation. The court disagreed. It held that the purpose of section 57.105 was narrow. The section was meant to discourage "baseless claims, stonewall defenses, and sham appeals in civil litigation," by assessing attorney's fee awards on losing parties who engage in these activities.¹⁵⁸ In this case, that provision was inapplicable. The city's defense of the council members' attorney's fees claims did not completely lack a justiciable issue of either law or fact. Thus there was no basis for a section 57.105 award.¹⁵⁹

155. *Id.*

156. *Thornber*, 568 So. 2d at 919.

157. *Id.*

158. *Id.*

159. *Id.* at 920.

Real Property: 1991 Survey of Florida Law

Ronald Benton Brown*

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I. INTRODUCTION

This survey focuses on the decisions of the Florida Supreme Court which will be of interest to Florida real property lawyers and real estate professionals. Included are three cases from other courts which the author thinks are worthy of attention. The time frame covered by this survey is October 1, 1990 to August 1, 1991.

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II. FLORIDA SUPREME COURT

A. Real Estate Sales Contracts—Liquidated Damages

Lefemine v. Baron.¹ Justice Grimes wrote the opinion in which Justices Overton, Ehrlich, Barkett, Kogan and Chief Justice Shaw concurred. Justice McDonald dissented without opinion.

The buyers² signed a contract to buy a residence. When they were unable to obtain financing for the purchase, they sued for the return of their ten percent deposit. The sellers³ counterclaimed, asserting that the deposit represented liquidated damages.⁴ The sellers prevailed in the circuit court and that decision was affirmed by the Fourth District Court of Appeal⁵ in a decision which was in direct conflict with an earlier decision of the Third District Court of Appeal, *Cortes v. Adair*.⁶

The question before the supreme court was whether the deposit forfeiture clause was valid. Liquidated damages clauses are valid in Florida if they meet the two part test established in *Hyman v. Cohen*.⁷ The test requires that,

1. the damages must not be readily ascertainable at the time of the drawing of the contract; and
2. the amount must not be so grossly disproportionate to any reasonably expected damages as to indicate that it was chosen to induce performance rather than to liquidate damages.

The first part of the test was not an issue in this case.

An amount chosen for the purpose of preventing a party from breaching would, by definition, be a penalty.⁸ Thus the second part of the test is a method of determining if the parties actually intended to create a penalty clause, regardless of what it is labeled, rather than a liquidated damages clause. If intended as a penalty, the clause would

1. 573 So. 2d 326 (Fla. 1991).

2. Daniel and Catherine Lefemine were the buyers.

3. Judith W. Baron was the seller.

4. The real estate broker, S & N Kurash, Inc., cross-claimed against the seller for one-half of whatever the seller might recover. The broker's right to recover was not discussed by the supreme court.

5. 556 So. 2d 1160 (Fla. 4th Dist. Ct. App. 1990).

6. 494 So. 2d 523 (Fla. 3d Dist. Ct. App. 1986).

7. 73 So. 2d 393 (Fla. 1954).

8. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14-31 (3d ed. 1987).

not be enforceable. This case illustrates that part two of the test is not the only way to determine whether the parties had an impermissible intent.

The amount involved here would not, per se, have made this clause fail the test. In dicta, the supreme court agreed with the district and circuit courts that the loss of ten percent of the purchase price⁹ was neither unconscionable nor so grossly disproportionate to the amount of damages which might reasonably flow from a breach of the sales contract as to show it was intended only to induce full performance. However, there was another factor to consider in this case. The contract provided that upon default,

the deposit(s) . . . may be retained or recovered by or for the account of Seller as liquidated damages . . . and in full settlement of any claims; whereupon all parties shall be relieved of all obligations under the Contract; or Seller, at his option, may proceed at law or in equity to enforce his rights under the contract.¹⁰

Florida courts had previously invalidated lease provisions which gave lessors similar options to keep security deposits or seek actual damages.¹¹ Those precedents had first been applied to a real estate sales contract by the third district in the case providing the conflict here, *Cortes v. Adair*.¹²

The supreme court interpreted those precedents "to mean that the existence of the option reflects that the parties did not have the mutual intention to stipulate to a fixed amount as their liquidated damages in the event of breach."¹³ In a true liquidated damages situation, the buyer takes the risk that the seller's provable actual damages might be lower than the liquidated amount, and the seller takes the risk that his provable actual damages might be higher than the liquidated amount. However, the addition of the option here changed the very nature of

9. In this case the deposit was \$38,500. 573 So. 2d at 327.

10. *Id.* at 327-28.

11. *Kanter v. Safran*, 68 So. 2d 553 (Fla. 1953); *Glynn v. Roberson*, 58 So. 2d 676 (Fla. 1952); *Stenor, Inc. v. Lester*, 58 So. 2d 673 (Fla. 1951); *Pappas v. Deringer*, 145 So. 2d 770 (Fla. 3d Dist. Ct. App. 1962).

12. 494 So. 2d 523 (Fla. 3d Dist. Ct. App. 1986). The supreme court clarified this point by noting that although the contract in *Hutchison v. Tompkins*, 259 So. 2d 129 (Fla. 1970), also gave the seller the option of retaining the deposit as liquidated damages, that case did not deal with that issue. *Lefemine*, 573 So. 2d at 329.

13. 573 So. 2d at 329.

the clause. With the option, the clause merely provided a minimum liability for the breaching buyer, shifting the risk from the seller to the buyer so that the seller might be able to prove higher actual damages. Consequently, the court concluded that the deposit forfeiture clause here was not intended to be a liquidated damages clause and so, apparently for it is unstated, this clause must have been intended as a penalty clause.

The court's conclusion makes sense. A penalty clause is one which "is designed to deter a party from breaching his contract and to punish him in the event the deterrent is ineffective."¹⁴ Since this clause was not intended to fix the amount of the damages, what other purpose might it have had other than to deter the buyers from breaching and to punish them if they did breach? Because penalty clauses are unenforceable in Florida, this seller will have to prove her actual damages.

It is important to note that the court expressly limited its opinion to the facts of this case. It stated:

"[w]e express no opinion with respect to whether the same result would occur if the Uniform Commercial Code were applicable to this transaction, nor do we imply that a liquidated damages clause which merely provided the option of pursuing equitable remedies would be unenforceable."¹⁵

But there is no readily apparent reason to think the outcome would be different under the UCC.¹⁶

14. CALAMARI & PERILLO, *supra* note 8, § 14-31.

15. 573 So. 2d at 330 n.5.

16. U.C.C. § 2-718 (1991) provides:

Liquidation of Limitation of Damages; Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

U.C.C. § 2A-504 (1991) provides:

Liquidation of Damages.

(1) Damages payable by either party for default, or any other act or omission . . . , may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

B. *Attorney's Fees*

The court decided four cases involving attorney's fees. The first was *Stockman v. Downs*.¹⁷ Justice Grimes wrote the opinion for an unanimous court which included Chief Justice Shaw and Justices Overton, McDonald, Barkett and Kogan. The court was presented with the following certified question:

MAY A PREVAILING PARTY RECOVER ATTORNEY'S FEES AUTHORIZED IN A STATUTE OR CONTRACT BY A MOTION FILED WITHIN A REASONABLE TIME AFTER ENTRY OF A FINAL JUDGMENT, WHICH MOTION RAISES THE ISSUE OF THAT PARTY'S ENTITLEMENT TO ATTORNEY'S FEES FOR THE FIRST TIME?

The question was answered in the negative.

The prospective buyer of real estate signed a purchase contract which included a clause providing that the prevailing party in any litigation arising out of the contract would be entitled to recover all costs, including attorney's fees. When that prospective buyer sued the sellers for fraud and breach of contract, the complaint included a claim for attorney's fees based upon that provision. The defendant-sellers raised affirmative defenses, but did not make a claim for attorney's fees until after the court had entered the final judgment in their favor based upon a jury verdict. The court had retained jurisdiction for the taxing of costs and the award of attorney's fees, but the court ruled that it was too late for the defendant-sellers to claim attorney's fees.

Florida case law had distinguished between claims for attorney's fees based upon contract and statute. When the claim was based upon contract, it had to be specifically pled or it would be waived. However, it had not seemed necessary to plead a claim for attorney's fees based upon statute. Two recent supreme court cases had held it proper for a party to file a post-judgment motion for attorney's fees based upon contract.¹⁸ However, those cases were distinguishable because the prevailing parties in both cases had pled their claims for attorney's fees in their complaints, although they waited to enter their proof until after

17. 573 So. 2d 835 (Fla. 1991).

18. *Finkelstein v. North Broward Hosp. Dist.*, 484 So. 2d 1241 (Fla. 1986) (dealing with attorney's fees under FLA. STAT. § 768.56 (1983)); *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977 (Fla. 1987) (dealing with attorney's fees under the provision of a promissory note).

final judgment.

The court held that a party to litigation is entitled to notice that the opponent is going to seek attorney's fees. Important decisions about the course of the litigation, including decisions to pursue the litigation or to settle, cannot be made properly without knowing whether the opposing party is going to ask for attorney's fees. Therefore, to allow the matter to be brought up for the first time in a post-judgment motion is unfair. Consequently, the court ruled that a party must plead a claim for attorney's fees whether that claim is based upon contract or upon a statute.¹⁹ While the holding with respect to attorney's fees under a statute is clearly obiter dictum, it behooves the prudent attorney to plead a claim for attorney's fees, whatever the source.

It is odd that the court would base its conclusion upon the need to protect a litigant from unfair surprise. It seems likely that the only surprise in this case was the one suffered by the successful defendants. The court mentions no evidence that the plaintiff was caught by surprise. Nor does the court mention any evidence on the record that the plaintiff would have been prejudiced in any way. In fact, the court demonstrates that the plaintiff was well aware of the provision because she made a claim for attorney's fees in her own complaint.

The court did note that there is an exception to the rule. A party may waive its objection to its opponent's failure to plead a claim for attorney's fees. Such waiver may be express or it may be implied from the party's conduct which recognizes or acquiesces to the claim. Two examples of implied acquiescence were provided. One example was where the claim for attorney's fees had been raised in the pretrial conference and the plaintiff's pretrial statement listed defendant's attorney's fees claim as an issue. The second example was where the parties had stipulated during trial that the question of attorney's fees would be heard subsequent to the final hearing. The record in this case revealed neither implied nor express acquiescence.

*Insurance Company of North America v. Acousti Engineering Company of Florida*²⁰ involved the consolidated review of three con-

19. The court pointed out, however, that this ruling did not address the question of whether the ruling would apply to attorney's fees sought under 28 U.S.C. § 1988 (1980) due to the United States Supreme Court's decision in *White v. Hew Hampshire Department of Employment Security*, 455 U.S. 445 (1982). *Stockman*, 573 So. 2d at 838 n.4.

20. 579 So. 2d 77 (Fla. 1991).

struction arbitrations.²¹ The Florida Arbitration Code,²² in Florida Statutes section 682.11, states: "Unless otherwise provided in the agreement or provision for arbitration, the arbitrator's and umpire's expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award." Apparently there was no contractual provision for attorney's fees. The prevailing parties sought them under the statute²³ which provides for the award of attorney's fees in successful actions against insurers.

In a *per curiam* opinion, the supreme court concluded that section 682.11 does not prohibit a successful party to an arbitration from recovering attorney's fees for the attorney's services during the arbitration if those are provided for by contract or statute. Furthermore, the attorney's fees recoverable under section 627.428 does include attorney's fees incurred during arbitration. However, section 682.11 does prohibit the arbitrator from making the award of attorney's fees. That award must be made by a court. In reaching these conclusions, the court explicitly adopted the reasoning of the opinion of the Second District Court of Appeal in *Fewox v. McMerit Construction Co.*²⁴

The supreme court also issued two opinions dealing with the award of attorney's fees in the probate of a decedent's estate.²⁵ However, these were still subject to revision by the court at the time that this article was written and so their discussion will have to await next year's survey.

C. Real Estate Purchase Options

*Lassiter v. Kaufman.*²⁶ Justice Harding wrote the opinion in which Justices Overton, Barkett and Kogan concurred. Justice Grimes concurred in the result and wrote an opinion in which Justice Overton con-

21. *Insurance Co. of N. Am. v. Acousti Eng'g Co.*, 549 So. 2d 790 (Fla. 5th Dist. Ct. App. 1989); *Fewox v. McMerit Constr. Co.*, 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989); *Park Shore Dev. Co. v. Higley S., Inc.* 566 So. 2d 439 (Fla. 2d Dist. Ct. App. 1989).

22. FLA. STAT. ch. 682 (1991).

23. FLA. STAT. § 627.428 (1987).

24. 556 So. 2d 419 (Fla. 2d Dist. Ct. App. 1989). The unanimous en banc opinion was written by Judge Ryder.

25. *In re Estate of Warwick*, 16 Fla. L. Weekly S237 (Apr. 1991); *In re Estate of Platt*, 16 Fla. L. Weekly S237 (Apr. 1991).

26. 581 So. 2d 147 (Fla. 1991).

curred. Chief Justice Shaw and Justice McDonald dissented without opinion.

The lessee had exercised his option to purchase the leased property, but then the parties disagreed about purchase price and the buyer sought specific performance. The option had only specified that the price would be not less than \$200,000. The court apparently concluded that the price was to be the fair market value, although how it came to this conclusion is left a mystery. But that still left open the question of whether the fair market value was to be the value of the fee simple absolute or the fee encumbered by the existing lease. There was expert testimony that the freehold encumbered by the lease had a market value of only \$275,000, but the value of the unencumbered fee would be \$1,684,000.

The trial court had solved the question by "mechanically" applying the doctrine of merger.²⁷ Apparently, the logic was that the lease would be extinguished upon the conveyance to the buyer if merger occurred and so the buyer was acquiring, and should pay for, a fee simple which was not subject to a lease. The supreme court criticized that approach by indicating that whether equity would allow merger depended upon what would best serve justice and the intent of the parties. The supreme court reviewed the two district court precedents²⁸ and went to great efforts to reconcile its conclusion with those cases.

The court indicated that the role of the merger doctrine is only to help interpret an ambiguous option term. It can be used because it helps reveal the intent of the parties based upon whether the parties intended for merger to occur. But this author sincerely doubts whether these parties, or most parties to options, have any idea, let alone intentions, about the phenomenon of merger. It is hardly likely parties who were sophisticated enough about real estate law to consider the possibility of merger would have signed an option worded like the one in *Lassiter*.

In the end, the supreme court decided it was "unnecessary to determine whether merger should occur or not"²⁹ because this option clause was not ambiguous. The option was for the purchase of the "fee title" as might be distinguished from a fee subject to an existing lease. Because the option was for the purchase of the "fee title," the purchase

27. *Id.* at 148.

28. *Palm Pavilion of Clearwater, Inc. v. Thompson*, 458 So. 2d 893 (Fla. 2d Dist. Ct. App. 1984); *Contos v. Lipsky*, 433 So. 2d 1242 (Fla. 3d Dist. Ct. App. 1983).

29. *Lassiter*, 581 So. 2d at 149.

price should be the value of the unencumbered fee simple; i.e., \$1,684,000.

However, the court went on to state that the result would have been the same even if the doctrine of merger had been applied. The court states that "the term 'fee title' expresses an implied intent to merge."³⁰ If the court was stating that henceforth it will be implied as a matter of law from such a term that the parties intended a merger, then so be it. The court has the power to make such pronouncements, but the policy which would justify such a pronouncement should be articulated because it is certainly not apparent. Furthermore, to suggest this term reveals the parties' state of mind regarding merger is surely a judicial fantasy.

This author agrees with Justice Grimes' concurrence. He stated, "I do not think the doctrine of merger has much to do with the outcome of this case"³¹ because it involved a simple matter of contract interpretation. He pointed out that the purchase price should be controlled by the intent of the parties and that the words used by the parties should be used to determine that intent. He proceeded to suggest a general rule which would accomplish the important public purpose of eliminating the confusion produced by poor drafting: "[I]n the absence of specific language to the contrary in the lease, I would hold that the option price would *always* be computed as if the property were unencumbered by the lease"³²

D. Mortgage Foreclosure

Haven Federal Savings & Loan Ass'n v. Kirian.³³ Justice McDonald wrote the unanimous opinion in which Chief Justice Shaw and Justices Overton, Barkett, Grimes and Kogan concurred.³⁴

The court held unconstitutional that part of Florida Statute section 702.01³⁵ which required the severance of all counterclaims in a mortgage foreclosure action. In this case, the mortgagor had asserted both affirmative defenses and counterclaims. These were based upon allegations that the lender concealed the serious financial troubles of

30. *Id.* at 148.

31. *Id.* at 149.

32. *Id.* (emphasis added).

33. 579 So. 2d 730 (Fla. 1991).

34. Justice Harding did not participate.

35. FLA. STAT. § 702.01 (1987). This section has not been modified by the legislature in the period between its enactment in 1987 and the present.

the development, and its own financial involvement in the development, from potential buyers to whom it was providing mortgage financing.

In the circuit court, the lender successfully moved to sever the counterclaims based upon the mandate in section 702.01 that "the court shall sever for separate trial all counterclaims . . ." in mortgage foreclosures. The lender then convinced the trial court to strike the affirmative defenses because they were based upon the same grounds as the stricken counterclaims and, because the court had eliminated all the defenses, to grant summary judgment in the lender's favor. The First District Court of Appeal reversed, holding the statute unconstitutional to the extent that it conflicted with the Rules of Civil Procedure,³⁶ a conclusion requiring review by the supreme court under article V, section 3(b)(1) of the Florida Constitution. The supreme court affirmed.

Matters of substantive law are within the province of the Florida legislature, but matters of judicial practice and procedure are within the exclusive realm of the supreme court. In exercising its power, the court had adopted the Florida Rules of Civil Procedure. Rule 1.270(b), in contrast to the statute's mandatory language, allows a judge to sever counterclaims in order to further convenience or to avoid prejudice.

The court distinguished this case from *VanBibber v. Hartford Accident & Indemnity Insurance Co.*³⁷ where it examined the statute which prohibited the joinder of insurance companies in suits against their insureds. In *VanBibber*, the court had found the statute was based upon a clear legislative intent and policy to create substantive rights. Consequently, the statute prohibiting joinder was not an unconstitutional attempt by the legislature to regulate procedure. However, the legislative history behind the mandatory severance provision did not reveal a similar clear legislative intent to create substantive rights.³⁸ The House Commerce Committee had reported that it was but one of a number of amendments which were designed "to create a simple, equitable, and inexpensive method by which a mortgage lender could enforce an assignment of rents contract."³⁹ Absent the legislative intent to create a substantive right, the court apparently concluded that this

36. *Kirian v. Haven Fed. Savings & Loan Ass'n*, 560 So. 2d 380 (Fla. 1st Dist. Ct. App. 1990).

37. 439 So. 2d 880 (Fla. 1983).

38. E.g., the substantive right to foreclose mortgages undelayed by counterclaims.

39. *Kirian*, 579 So. 2d at 733 n.1.

was simply a part of “the machinery of the judicial process”⁴⁰ As such, the legislature’s mandatory rule was unconstitutional.

Furthermore, the supreme court found that the trial court had erred in striking the affirmative defenses merely because the grounds for those defenses were the same as the grounds for the counterclaims. The court pointed out that “counterclaims and affirmative defenses are separate and distinct terms.”⁴¹ So a rule allowing or requiring the severance of a counterclaim should not be applied to affirmative defenses. Further, “[a] court cannot grant summary judgment where a defendant asserts legally sufficient affirmative defenses that have not been rebutted.”⁴² Of course, it may be argued that this is merely *obiter dictum*, but it is so completely sensible that it should be followed.

If the trial court had stricken the affirmative defense because it was based upon inappropriate grounds, that would have been one thing, but there was no such ruling. Nor could there have been because fraud and misrepresentation are appropriate affirmative defenses to an action in equity such as foreclosure. It almost seems that the trial court based its ruling on a misguided election of remedies theory, i.e., the mortgagor was required to choose between using fraud and misrepresentation as a defense or as a counterclaim, and having used it as a counterclaim, it was precluded from using it as a defense. Whatever the justification for the trial court’s ruling, it is hoped that this precedent will prevent similar rulings.

E. *Homestead*

City National Bank of Florida v. Tescher.⁴³ Justice Harding wrote the unanimous opinion in which Chief Justice Shaw and Justices Overton, McDonald, Barkett, Grimes and Kogan concurred.

Article X, section 4(c) of the Florida Constitution provides that “homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner’s spouse if there be no minor child.” In this case, the decedent owned homestead property and was survived by a spouse, though not by a minor child. Read literally, as was argued on behalf of one of

40. *Id.* at 732 (quoting *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

41. *Id.* at 733.

42. *Id.*

43. 578 So. 2d 701 (Fla. 1991).

decedent's adult children, the constitution would seem to prohibit homestead property from being devised to anyone except the spouse, and the homestead in this case had not been devised to the spouse. Since the spouse, in this case the husband, had previously renounced his rights to the decedent's estate, under the laws of intestate succession, the property would be inherited by the decedent's two adult children.

The supreme court disagreed. It concluded that the husband's valid waiver of all rights to homestead in an antenuptial agreement was the legal equivalent, at least for purposes of this constitutional provision, of his having died first. Applying this legal fiction, the decedent was survived by neither spouse nor minor children. Consequently, the prohibition from devising the property was inapplicable. As the will had a valid residuary clause, the home could pass by it to the residuary legatees.

The court looked to the historical purpose of the homestead provision. It was designed to preserve the family by protecting a) surviving spouses and b) surviving minor children from the loss of the family's homestead by restraining the decedent's ability to transfer it. However, restraints on alienation, particularly alienation by devise, should be narrowly construed. Decedent's death left no one who was entitled to the provision's protection. Its interpretation should be narrowed so that it would not be applied in this inappropriate situation. The court adopted this legal fiction to simplify the narrowing process.

F. *Mechanics' Liens*⁴⁴

Stresscon v. Madiedo.⁴⁵ Justice Harding wrote the opinion in which Chief Justice Shaw and Justices McDonald, Barkett, Grimes and Kogan concurred. Justice Overton dissented without opinion.

Florida Statute section 713.16(2) provided⁴⁶ that when a payment was to be made by the owner to a construction contractor, the owner could make a written demand for a written statement of the account made under oath from any person who might claim a mechanics' lien.

44. Technically, mechanics' liens have been replaced by construction liens in Florida. 1990 Fla. Laws ch. 90-109, § 1; see FLA. STAT. § 713.001 (Supp. 1990).

45. 581 So. 2d 158 (Fla. 1991).

46. FLA. STAT. § 713.16(2) (1987). Section 713.16(2) was unchanged as of the time this article was written, although Florida Laws chapter 90-109 transformed the topic into "Construction Lien Law." FLA. STAT. § 713.001 (Supp. 1990).

Failure to provide the statement, or making a false or fraudulent statement, would cause the loss of the lien. In this case, a sub-contractor had received a letter demanding a written statement of its account and had sent a timely and accurate statement, but the statement had not been under oath. The sub-contractor attempted to cure this oversight by filing an affidavit that the statement was accurate in the foreclosure action. The trial court was unimpressed and had granted summary judgment against the sub-sub-contractor and the Third District Court of Appeal affirmed, certifying the following question to the supreme court:

MAY THE FAILURE TO NOTARIZE AN OTHERWISE TIMELY AND ACCURATE STATEMENT OF ACCOUNT UNDER SUBSECTION 713.16(2), FLORIDA STATUTES (1987), BE CURED BY VERIFICATION AFTER THE FACT, SO LONG AS THERE IS NO PREJUDICE TO THE OPPOSING PARTY?

The supreme court agreed with the district court and answered the question in the negative.

The court decided this was a simple matter of statutory interpretation. The court had previously pointed out that mechanics' liens are purely statutory creatures and, consequently, strict compliance with the statute's requirements is "a prerequisite for a person seeking affirmative relief under the statute."⁴⁷ The statute required that a lienor would lose the lien if it failed to provide a written statement under oath within thirty days of demand. When that had not occurred, the lien was lost. This section simply does not allow for cure or for accepting for substantial compliance, even where that does not prejudice another party, as do some other sections.

G. *Landlord and Tenant*

Fitzgerald v. Cestari.⁴⁸ Justice Ehrlich wrote the opinion for an unanimous court. A seven year-old-child was injured when she ran through a sliding glass door of the house which her parents were leasing. The door was not made of safety glass and was not marked by decals so it would be visible when closed. The trial court granted the

47. 581 So. 2d at 160 (quoting with approval *Gonas v. Home Elec. of Dade County, Inc.*, 537 So. 2d 590 (Fla. 3d Dist. Ct. App. 1988)).

48. 569 So. 2d 1258 (Fla. 1990).

landlord's motion for summary judgment which was supported by affidavits that the glass was in the door when the lessors purchased the house, that the glass was not marked as to type, and that the type of glass was not readily discoverable.

The complaint alleged two separate grounds of liability. The first was that the lessors "were negligent for failing to ascertain that the door was not made of safety glass and for failing to conform their premises to the Southern Standard Building Code which requires safety glass be used in sliding glass doors."⁴⁹ The supreme court acknowledged that a landlord does have a duty to reasonably inspect residential premises before the tenant moves in and does have a continuing duty to exercise reasonable care to repair dangerous conditions of which it has notice. However, the landlord does not have a duty to have an expert determine if an unmarked glass door is made of the type of glass required by the building code. Furthermore, the landlords could not be held liable for failure to repair a defect of which they did not have notice.

The court does not discuss the question of whether the landlords could have been held strictly liable for leasing residential premises in a defective or dangerous condition.⁵⁰ Nor does it suggest what might be the effect of leasing residential premises which are in violation of the building code. It merely indicated the issue would not be discussed as the claim was not raised in the trial court that liability should be based upon the code violation.⁵¹

The second claimed basis for liability was the landlord's failure to place decals on the sliding glass doors. The supreme court concluded that the landlords did not have a duty to place decals or the like on the glass doors visible because they did not constitute "the type of 'dangerous condition' which a landlord is in a better position than the tenant to guard against." If a warning of the presence of the closed sliding glass door is needed, the tenants in possession of the premises have that responsibility.

49. *Fitzgerald*, 569 So. 2d at 1260.

50. *See Becker v. IRM Corp.*, 698 P.2d 116 (Cal. 1985).

51. *Fitzgerald*, 569 So. 2d at 1260 n.2.

III. INTERESTING OPINIONS FROM OTHER COURTS

A. *Seller's Duties to Buyer: Florida Third District Court of Appeal*

*Futura Realty v. Lone Star Building Centers, Inc.*⁵² This case involved a per curiam opinion by Judges Nesbitt, Baskin and Jorgenson.

The buyer of real property claimed a) that the seller had committed fraud by failing to reveal pollution problems and also that b) the seller and a prior owner were strictly liable for the harm to the site caused by the use of ultrahazardous chemicals. The trial court granted summary judgment for the defendants and the district court affirmed.

The Florida Supreme Court had imposed on the seller the duty to disclose facts which would materially affect the value of the property which were not readily observable and were not known to the purchaser in *Johnson v. Davis*.⁵³ The supreme court had held that the seller's duty "is equally applicable to all forms of real property, new and used."⁵⁴ However, the third district ignored the plain meaning of that statement and found that "when read in context, as it must be, [that statement] clearly applies solely to the sale of homes."⁵⁵ The district court based its conclusion on how it divined the supreme court might approach a nonresidential case, but without any articulated analysis.

It is possible to distinguish between residential and commercial transactions on a number of theories: equitable, economic or moral. In a commercial transaction, the parties might be assumed to be of equal bargaining power and to operate at arm's length rather than the unequal positions of developer and home buyer. But disparity in bargaining power was not considered a factor by the supreme court in *Davis* and, in fact, did not appear to exist in that case which involved individual sellers rather than a developer.

Nor can economics be seen as supporting the district court's posi-

52. 578 So. 2d 363 (Fla. 3rd Dist. Ct. App. 1991).

53. 480 So. 2d 625 (Fla. 1985).

54. *Id.* at 629.

55. *Futura Realty*, 578 So. 2d at 364. The reference to context might possibly be to the fact that the supreme court in *Johnson v. Davis* only discussed the sale of homes, for that was what the case concerned. Consequently, when articulating the rule, the supreme court phrased it as "where the seller of a home knows of facts materially affecting the value of the property . . ." 480 So. 2d at 629. However, the district court opinion did not specify that it was this language upon which it relied in making its decision.

tion. It might be argued that the cost of repairing latent defects can efficiently be passed on to the customers of the buyer's business while a home buyer has no similar efficient mechanism to spread its similar costs. However, that would ignore the fact that this ruling will probably increase the cost of every commercial real estate purchase by requiring buyers to expend money looking for latent defects about which the seller already is aware. Certainly it would be more efficient to require the seller to reveal facts within its knowledge rather than to require every commercial buyer to engage in an extensive and expensive search for latent defects. Moreover, it is not an efficient mechanism for spreading the cost to buyer's business customers. The buyer's search for latent defects will often fail to disclose existing problems because, being latent, the problems may not be discovered. The only beneficiaries of this policy are professional inspectors.

It may be possible to justify the district court's position on the basis of a philosophy which favors leaving the common law undisturbed. The departure from the common law in *Davis* seems to be based on moral philosophy rather than economics; i.e., that it is good or right to protect consumers and that sellers who fail to reveal what they know about latent defects are behaving wrongfully. But if the point is to encourage correct behavior, it is irrational to allow conduct by commercial sellers which would be considered blameworthy by residential sellers. What possible benefit could there be to society from the existence of a "double standard" in this area? It should also be noted that consumers are no less able, in general, to hire inspectors to discover latent defects than are buyers of commercial property.

It may be arguable that it is the nature of commercial property which makes the commercial sale distinguishable from a residential sale. Perhaps there is something about commercial property that makes it more likely that a latent defect will remain undiscovered by the diligent inspection of a prudent buyer. However, there is nothing evident in this case to suggest anything that might provide the basis for a reasoned distinction as a matter of law. This author concludes that the district court has erred in failing to apply the principle of *Davis v. Johnson* to the sale of a commercial property. It has been reported that the buyers have sought review by the Florida Supreme Court based upon the claim that the decision in this case conflicts with the decisions of other districts.⁵⁶ It will be interesting to see whether the supreme

56. Gibbs, *What's the Duty of Commercial Land Seller?*, MIAMI REVIEW, August 20, 1991, at 3.

court agrees with this author when the court considers the issue, whether in this or some other case.

On the second issue, the district court seems to have fared better. Under the common law of Florida, a landowner has a duty not to permit ultrahazardous activity⁵⁷ which causes harm to a neighbor's land.⁵⁸ In this case, the plaintiff sought to have the scope of the landowner's duty expanded to protect subsequent owners of the same land. The court reasoned that a subsequent owner can protect itself from the harm by carefully inspecting the property before acquiring it and by providing for the possibility of such harm, or risk of it, in the negotiations over the price. That distinguishes the subsequent owner from the otherwise defenseless neighbor whom the strict liability rule evolved to protect. Of course, the court's reasoning on this issue would make more sense if the seller were required, based upon *Davis v. Johnson* to reveal the existence of latent defects, particularly hazardous defects, such as existed in this case.

B. *Arbitration: Florida Fifth District Court of Appeal*

*Laniewicz v. Rutenberg Construction Co.*⁵⁹ Judge Sharp wrote the opinion in which Judges Cobb and Gorshon concurred.

The buyers of a new house sued the seller/builder for damages arising from construction defects in the home. The sales contract included a provision that: "[a]ll claims or disputes between the Buyer and Seller arising out of this agreement shall be decided by arbitration"⁶⁰ Accordingly, the matter was referred to arbitration.

The arbitrator decided that there were construction defects which were the fault of the builder. But because the defects had not been fixed over the two year period and because the defects could most economically be fixed if the builder took the house back, the arbitrator decided that the sale should be rescinded. The buyers objected. That was not the relief which they had sought, but the circuit court confirmed the arbitration award.

The District Court of Appeal reversed on two grounds. First, re-

57. The process by which the environmental hazards accumulated at the site are described in *Seaboard Systems Railroad v. Clemente*, 467 So. 2d 348, 353 (Fla. 3d Dist. Ct. App. 1985).

58. *Rylands v. Fletcher*, 3 H.L. 330 (1868); *Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp.*, 460 So. 2d 510 (Fla. 3d Dist. Ct. App. 1984).

59. 580 So. 2d 203 (Fla. 5th Dist. Ct. App. 1991).

60. *Id.* at 204 n.1.

scission is an equitable remedy and, as such, it is available only where the remedy at law; i.e., monetary damages, would be inadequate. Of course, the claimant had not bothered to enter evidence on that point because it was not an element of the relief sought. Second, rescission is a remedy which a party may elect. But here, neither party had elected rescission. Consequently, the arbitrator had no basis for awarding it. Consequently, the circuit court should not have confirmed the award.

Thus far, the discussion reveals nothing remarkable about this case. However, the court goes on to comment that, "we are essentially reviewing an arbitrator's award which finds that the arbitration contract should be rescinded."⁶¹ That introduced an interesting question. Can an arbitrator make such an award? It may be argued that an arbitrator ordering rescission of the contract containing the arbitration clause would eliminate the contractual authority of the arbitrator, eliminating the effect of the arbitration award. Completing the circle, that would eliminate the rescission award, leaving the contract in effect. The court posited, in dictum, that "[w]e are hesitant to say that under *no* circumstances could an arbitrator determine that a contract should be rescinded . . ."⁶² but it is unclear that this is even the point which the court is addressing and the court did not provide any more on the point.

There is little doubt that under the Federal Arbitration Act⁶³ rescission based upon fraud in the inducement is a question which can be decided by arbitrators based upon the logic that the arbitration clause is a separate contract.⁶⁴ Florida courts have followed similar logic, drawing the distinction between the arbitrable claim that the overall contract was subject to rescission⁶⁵ and the claim that the arbitration clause was the product of fraudulent inducement which must be de-

61. *Id.* at 204.

62. *Id.*

63. 9 U.S.C. §§ 1-14 (1988).

64. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *see also Lawrence v. Comprehensive Business Servs. Co.*, 833 F.2d 1159 (5th Cir. 1987); *Merit Stainless Steel, Inc. v. Nippon Stainless Steel Co.*, 818 F.2d 532 (6th Cir. 1987); *Union Mutual Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co.*, 744 F.2d 524 (1st Cir. 1985); *Manning v. Interfuture Trading, Inc.*, 578 So. 2d 842 (Fla. 4th Dist. Ct. App. 1991).

65. *Shearson/Lehman Bros. v. Ordonez*, 497 So. 2d 703 (Fla. 4th Dist. Ct. App. 1986); *Post Tensioned Eng'g Corp. v. Fairways Plaza Assocs.*, 412 So. 2d 871, 874 n.3 (Fla. 3d Dist. Ct. App. 1982).

cided by the court.⁶⁶

Of course, since the obligation to arbitrate is contractual, the scope of the arbitration can be limited by the contract. In this case, there was no hint that the parties intended to limit the type of relief which the arbitrator could award. But the problem here was that the way the clause was drafted left it open, at least arguably, to different interpretations. If the parties really intended that “[a]ll claims or disputes arising out of this agreement” were to be decided by arbitration, then logically they must have intended that the arbitration clause survive the extinguishment of the contract by its merger into the deed at the closing. Similarly, they also must have intended that the arbitration clause survive any rescission of the contract of sale because the parties intended that the arbitration clause be an independent agreement.

Such matters should be considered when an attorney is drafting an arbitration clause. The attorney should be careful to indicate clearly that the arbitration clause is intended to (or not to) include the possibility of an arbitration award of rescission and that it is intended to (or not to) survive the closing of a real estate sale. Of course, similar consideration in drafting of all the other clauses, e.g., attorney’s fees clauses, is also appropriate.

C. *RICO: United States Court of Appeals for the Eleventh Circuit*

*United States v. One Single Family Residence.*⁶⁷ Circuit Judge Hatchett wrote the opinion for the panel, which also included Judges Clark and Dubina, affirming the decision of District Judge Lenore Carrero Nesbitt.

Two brothers purchased a vacant lot with plans to build a house there and sell it for a profit. When the federal government filed a forfeiture complaint⁶⁸ alleging that the lot had been bought and improved with drug proceeds, brother Gary claimed that he was an innocent owner and his investment was comprised of funds from legitimate sources. The government showed that brother Curtis had “very few reported legitimate sources of income or employment, a bad credit rating,

66. *Spitz v. Prudential-Bache Sec., Inc.*, 502 So. 2d 479 (Fla. 4th Dist. Ct. App. 1987).

67. 933 F.2d 976 (11th Cir. 1991).

68. The complaint was filed under 21 U.S.C. § 881(a)(6) (1990).

and a reputation as a drug smuggler."⁶⁹ Consequently, the government contended, Gary's knowledge of the illegal source of his brother's share deprived Gary of his innocent owner status under the statute, leaving him defenseless in the forfeiture action.

The Court of Appeals framed the issue as follows: "[W]hether a property owner who is aware that a co-owner has purchased and improved the real property with drug proceeds may qualify as an innocent owner whose interest in the property is exempt from forfeiture under 21 U.S.C. § 881(a)(6)?" And the Court of Appeals answered the question in the negative. It was uncontested that there was a substantial connection between the property and Curtis' involvement with the drug trade. The burden of proof was on Gary to prove a) that he lacked actual knowledge that his co-owner's investment was made with tainted funds and b) that his own investment was made with money from entirely legitimate sources in order to qualify as an "innocent owner." Gary did not carry his burden and, consequently, lost his land.

The court rejected the rationale of *United States v. Premises Known as 2639 Meeting House Road*⁷⁰ which concluded that Congress had not intended to deprive legitimate investors of their property. The court decided to classify people as falling into one of only two possible categories, innocent or wrongdoer. "If one is an innocent owner, no amount of that person's or entity's funds are forfeitable On the other hand, if one is a wrongdoer, the full value of the real property is forfeitable because some of the funds invested are traceable as the statute dictates" ⁷¹ Thus it appears that a form of the doctrine of *caveat emptor*, which is becoming so outmoded in other areas of law, is alive and well in RICO law.

The court did, however, recognize that RICO has some limits. Forfeiture is unavailable against a co-owner who learns about the illegal sources of his co-owner after having made the investment,⁷² but only if he makes every reasonable effort possible to withdraw from the co-ownership after learning of the problem.⁷³ Moreover, the burden of

69. *One Single Family Residence*, 933 F.2d at 978.

70. 633 F. Supp. 979 (E.D. Pa. 1986).

71. *One Single Family Residence*, 933 F.2d at 981-82.

72. *Id.* at 982 n.5.

73. This is the "Calero-Toledo dicta." *United States v. One Single Family Residence*, 683 F. Supp. 783 (S.D. Fla. 1988), interpreted language in *Calero-Toledo v. Peterson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), to require an "innocent owner" claimant to have done everything reasonably possible to prevent illegal use of his property.

proof is on the co-owner who is claiming to be innocent of any knowledge of the connection to the tainted money. Failure to carry that burden will mean the loss of the property. The moral of this case, for those who had not heard it before, is to be very careful with whom you get involved. Big Brother is watching you, and it is just possible that Big Brother is going to seize your land.

IV. CONCLUSION

These cases illustrate that real estate law is neither for the faint-of-heart nor the ill-informed. Real estate lawyers cannot rely upon the law remaining static, but the basic skills of drafting, of contract interpretation and of statutory interpretation are still at the crux of the most important disputes. The critical time for the modern real estate lawyer to exercise those skills is before any document is drafted, whether that document be a real estate purchase option, a real estate purchase contract, a will, an affidavit or a complaint.

Torts: 1991 Survey of Florida Law

Edward D. Schuster*

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I. INTRODUCTION

Although Florida appellate courts did not issue numerous landmark opinions this past survey year, several well-recognized Florida legal doctrines were reexamined and in some instances, the preexisting boundary lines of those legal doctrines were changed. Several significant appellate court decisions have recognized further exceptions to the exclusiveness of liability afforded employers for injuries that occur to employees during the course and scope of their employment found in

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Florida's Workers' Compensation Act.¹ Additionally, various appellate court decisions have caused the Florida Supreme Court to reexamine the parameters of Florida's dangerous instrumentality doctrine which holds owners of automobiles liable for injuries occasioned by the negligent operation of their automobiles by others with the owner's permission.² Appellate courts at the intermediate appellate level have been confronted with applying and attempting to harmonize statutes and a rule of civil procedure which are aimed at producing more settlements and less litigation in Florida courts by allowing parties to offer to settle civil cases, accompanied by the sanction of the award of costs and attorney's fees awarded against the party who unreasonably rejects a settlement offer.³

Finally, the legislature has been somewhat active in amending statutes which impact upon Florida's tort laws. Specifically, the legislature has acted to immunize employers from civil liability for disclosure of information concerning the performance of a prior employee.⁴ Additionally, the legislature has acted to allow motorsport race course operators to immunize themselves from liability by obtaining a signed waiver from the participant.⁵ These areas are discussed in the text below and in the order introduced.

II. EXCEPTIONS TO THE "EXCLUSIVITY OF REMEDY" FOUND IN FLORIDA'S WORKERS' COMPENSATION ACT

A. Florida Courts Expressly Recognize an Intentional Tort Exception to an Employer's Immunity for On-the-Job Injuries⁶

For the first time in Florida, the First District Court of Appeal in

1. FLA. STAT. § 440.11(1) (1991).

2. The decision in *Anderson v. Southern Cotton Oil Co.*, 74 So. 975 (1917), is recognized as the genesis of Florida's dangerous instrumentality doctrine.

3. FLA. STAT. § 45.061 (1991); FLA. STAT. § 768.79 (1991); FLA. R. CIV. P. 1.442.

4. FLA. STAT. § 768.095 (1989).

5. FLA. STAT. § 549.09 (1989).

6. FLA. STAT. § 440.11(1) (Supp. 1990). This statute reads in pertinent part:

The liability of an employer prescribed in s.440.10 shall be exclusive and in place of all other liability of such employer to any third party tortfeasor and to the employee, the legal representative thereof . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death

Id.

Cunningham v. Anchor Hocking Corp. expressly recognized that an employee's remedy for work-place injuries does not rest exclusively in Florida's Workers' Compensation Act when it is alleged that the employer committed an intentional tort.⁷ In *Cunningham* though, the First District Court of Appeal started from the erroneous premise that the Florida Supreme Court in *Fisher v. Shenandoah General Construction Co.*⁸ and *Lawton v. Alpine Engineered Products, Inc.*⁹ held that an employee can bring a cause of action for an intentional tort against his employer.¹⁰ Instead, the Florida Supreme Court in *Fisher* and *Lawton* expressly declined the offer to decide whether Florida's workers' compensation law precludes an action sounding in intentional tort against employers.¹¹ In both *Fisher*¹² and *Lawton*,¹³ the cases failed to present a record and allegations which demonstrated the existence of an intentional tort. Accordingly, the question of whether such employer conduct is excepted from civil liability pursuant to Florida's Workers' Compensation Act was not reached by the Florida Supreme Court.

In *Fisher*, the Florida Supreme court held that the allegation Fisher was killed when the employer knowingly exposed him to noxious gases and "in all probability" knew such exposure would cause injury or death did not allege sufficient facts demonstrating the existence of an intentional tort.¹⁴ In *Lawton*, the Florida Supreme Court rejected Lawton's claims of intentional tort where grounded upon allegations that Lawton's employer fraudulently failed to provide guards on a punch press that crushed Lawton's hand, after the employer was informed of the need for the guards by numerous written notifications by the manufacturer.¹⁵

The First District in *Cunningham* also referred to *Byrd v. Richardson-Greenshields Security, Inc.* in support of its ruling.¹⁶ However, the Florida Supreme Court in *Byrd* did not hold that an action sound-

7. 558 So. 2d 93, 95 (Fla. 1st Dist. Ct. App.), *rev. denied*, 574 So. 2d 139 (1990).

8. 498 So. 2d 882 (Fla. 1986).

9. 498 So. 2d 879 (Fla. 1986).

10. *Cunningham*, 558 So. 2d at 95.

11. *See Fisher*, 498 So. 2d at 882; *Lawton*, 498 So. 2d at 879.

12. 498 So. 2d 882.

13. 498 So. 2d 879.

14. 498 So. 2d at 883-84.

15. 498 So. 2d at 880-81.

16. *Cunningham*, 558 So. 2d at 95 n.1 (citing *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099 (Fla. 1989)).

ing in intentional tort by the employer is outside the ambit of Florida's workers' compensation law. Rather, the court found that the sexual harassment claim involved an injury to one's dignity and self esteem, which is not compensable under Florida's workers' compensation law.¹⁷ The *Byrd* court, in following *Strothers v. Morrison Cafeteria*,¹⁸ expressly stated that it did not matter whether the act of sexual harassment by the employer is intentional. Furthermore, the court used a two-part test to determine what types of injuries are compensable:

First the injury must 'arise out of' the employment in the sense it is caused by a risk inherent in the nature of the work in question. *It is immaterial whether the injury is caused by an intentional or unintentional act, so long as the act arose out of this type of risk . . .*¹⁹

In any event, the *Cunningham* court examined the allegations in the third amended complaint which attempted to allege fraud and battery as intentional torts committed by the employer. The plaintiff alleged that the employer consciously and intentionally failed to warn her of the presence of toxic substances in the plant where she worked "with a deliberate intent to injure" and that the conduct was "substantially certain" to "cause injury or death."²⁰ The plaintiff alleged that she was "deliberately" and "intentionally" battered by reason of the employer "knowingly" exposing the plaintiff to toxic substances by removing labels from containers and by "deliberately" diverting a smoke stack so that noxious fumes were delivered back to the plant where she worked.²¹ The complaint further alleged a knowing and intentional failure to provide ventilation²² with a specific intent to injure the plaintiff.²³

The *Cunningham* court found that these allegations were sufficient

17. *Byrd v. Richardson-Greenshields Sec., Inc.*, 552 So. 2d 1099, 1104 (Fla. 1989) (noting that an injury to self-esteem does not inhere in the work place).

18. 383 So. 2d 623, 628 (Fla. 1980).

19. *Byrd*, 552 So. 2d at 1104 n.7 (emphasis added) (citing *Strother*, 383 So. 2d at 624-26).

20. *Cunningham*, 558 So. 2d at 95.

21. *Id.* at 95-96.

22. *Id.* The plaintiffs also alleged that the employer engaged in a "fraudulent and malicious" scheme to save money which included the false representations made to the plaintiffs regarding the ventilation and the need for safety equipment. *Id.*

23. *Id.* at 96.

to state a cause of action amounting to intent against the employer.²⁴ The court distinguished *Fisher*²⁵ on the basis that the plaintiff's allegations in *Fisher* alleged that injury or death would occur "in all probability" instead of to a "substantial certainty."²⁶ Accordingly, the "substantial certainty" standard was recognized by the *Cunningham* court as sufficient to support a claim for intentional tort as an exception to Florida's Workers' Compensation Act.²⁷

Following on the heels of *Cunningham* was the recent Third District Court of Appeal decision in *Connelly v. Arrow Air, Inc.*²⁸ *Connelly* involved an appeal from the trial court's entry of final summary judgment which was based on the theory that Workers' Compensation is the plaintiff's exclusive remedy.²⁹ Karen Connelly brought the action against her husband's employer, Arrow Air, Inc., for the wrongful death of her husband, a co-pilot killed on take-off from Gander, Newfoundland. Mr. Connelly was on board flight 920 which was traveling from the Middle East under a contract which Arrow Air had with the Multinational Force and Observers to transport troops between the Middle East and the United States.³⁰

There was some evidence, mostly in the form of congressional testimony, that the management of Arrow Air consciously disregarded Federal Aviation Administration regulations and disregarded proper maintenance practices.³¹ The Third District found that because there was evidence that Arrow Air's officials knew of the allegedly poor maintenance practices, such evidence created a jury issue as to whether Arrow Air acted in the belief that harm was substantially certain to occur.³² The dissent noted that the Florida Supreme Court in *Lawton*³³ required that the evidence show that the employer's conduct would cause injury to a "virtual certainty" and that violation of safety regula-

24. *Id.* at 97.

25. 498 So. 2d 882 (Fla. 1986).

26. *Cunningham*, 558 So. 2d at 97.

27. *Id.* Unfortunately, in deciding *Cunningham*, the court failed to state the legal basis for reaching the conclusion that an intentional tort exception exists to the exclusivity of remedy found in Florida's workers' compensation law.

28. 568 So. 2d 448 (Fla. 3d Dist. Ct. App. 1990), *rev. denied*, 581 So. 2d 1307 (1991).

29. *Id.* at 449.

30. *Id.*

31. *Id.* at 449-50.

32. *Id.* at 451.

33. 498 So. 2d at 880.

tions and negligent maintenance practices do not equal intent.³⁴

It may now be sufficient in Florida to allege the formula that negligence plus negligence equals intent, and as a result, employers will probably be subjected to another wave of lawsuits despite the "exclusivity of remedy" provision found in workers' compensation law. If employers intentionally injure their employees, they should not be able to find haven under Florida's Workers' Compensation Act. However, it now appears that negligent conduct, when magnified by adjectives and coupled with conclusory allegations, can elevate an employer's conduct from negligent to intentional.

B. The Third District Court of Appeal has Recognized an Exception to the Exclusivity of Remedy Found in Florida's Workers' Compensation Law Based upon the "Dual Persona" Doctrine

The recent case of *Percy v. Falcon Fabricators, Inc.* was initially brought by an employee, Percy, against her employer and others for injuries sustained during the course and scope of her employment and caused by an allegedly defective pressure cooker at a Kentucky Fried Chicken (KFC) outlet.³⁵ The trial court entered summary judgment for the employer, KFC National Management Company, on the basis of the exclusivity of remedy found in Florida's workers' compensation law.³⁶

Although not found in the record before the trial court, on appeal, the plaintiff contended that KFC National Management could be liable to her in tort on the basis of the "dual persona" doctrine.³⁷ The dual persona doctrine provides that a corporate employer is liable in tort for injuries caused to employees by a defective product manufactured by a corporation which merges with the corporate employer after the product is manufactured. The basis for the doctrine rests upon the theory that a corporate successor is liable for the torts of the predecessor corporation, because the predecessor's corporate liability is not extin-

34. *Connelly*, 568 So. 2d at 451 (Jorgenson, J., dissenting).

35. 584 So. 2d 17 (Fla. 3d Dist. Ct. App. 1991).

36. *Id.*

37. *Id.* The dual persona doctrine has its origin in basically two sources. See *Billy v. Consolidated Mach. Tool Corp.*, 412 N.E.2d 934 (N.Y. 1980); 2A ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §§ 72.80, 78.83 (1990).

guished by reason of the merger.³⁸ The employee/plaintiff is then allowed to circumvent the exclusivity of remedy provision of the Workers' Compensation Act upon the theory that the employer is viewed as having a second persona as a third party tortfeasor since a separate corporation manufactured the product prior to the merger, and the plaintiff had no employment relationship with the predecessor corporation. As stated by the Florida Supreme Court in *Celotex Corp. v. Pickett*, "[w]e will not allow such an acquiring corporation to jettison inchoate liabilities into a never-never-land of transcorporate limbo."³⁹ However, it is recognized by the dissents in *Pickett* that a corporation should not be held vicariously liable for an act that it did not commit or authorize.⁴⁰

In line with these dissents, one court has rejected the dual persona doctrine where the injury occurs following the corporate merger.⁴¹ That court reasoned that no tort liability can be transferred to the successor corporation if the injury and damages occur after the merger since there is no tort liability until there are damages.⁴² Florida also adheres to the rule that there can be no tort liability until there is an injury.⁴³ A conceptual problem with the reasoning underlying the dual persona doctrine is that a predecessor corporation should not escape liability due to merger with the employer corporation; also, potential plaintiffs should still have a remedy even after the merger, so that employees have a remedy against the successor corporation in the position of the employer, under Florida workers' compensation law. Thus, the obligation for injuries is not jettisoned into "transcorporate limbo."

Currently, the *Percy* decision is still under appellate review as it apparently conflicts with *Roberson v. Nooter Corp.* which declined to apply the "dual capacity" doctrine as a vehicle for the plaintiff to sue his employer for injuries sustained while using a product manufactured by a subsidiary of the parent corporate employer.⁴⁴ The Third District Court of Appeal attempted to distinguish *Roberson* by stating that the "dual capacity" doctrine and not the dual persona doctrine was rejected and that *Roberson* did not involve a corporate merger between

38. See FLA. STAT. § 607.1106(1)(c) (Supp. 1990).

39. 490 So. 2d 35, 38 (Fla. 1986) (quoting *Wall v. Owens Corning Fiberglass Corp.*, 602 F. Supp. 252, 255 (N.D. Tex. 1985)).

40. *Id.* at 39 (Overton and McDonald, JJ., dissenting).

41. *Quick v. All Tell Mo., Inc.*, 694 S.W.2d 757 (Mo. Ct. App. 1985).

42. *Id.*

43. *McIntyre v. McCloud*, 334 So. 2d 171, 172 (Fla. 3d Dist. Ct. App. 1976).

44. 459 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1984).

the corporate employer and the manufacturer.⁴⁵ However, *Roberson* did involve the merger between a manufacturer of a product and the employer after the product was manufactured.⁴⁶ In addition, in a corporate merger situation, there is little reason for a court to distinguish between the terms "dual capacity" and dual persona because the term "dual capacity" refers to the theory that an employer can be liable by acting in another capacity, such as a landlord, vendor or products manufacturer.⁴⁷ However, a merger occurred in both *Roberson* and *Percy*; thus, the theory of liability in each case is really grounded upon the dual persona doctrine. In any event, the Third District Court of Appeal has added the dual persona doctrine to a growing list of exceptions to the exclusivity of remedy found in Florida's workers' compensation law.

III. THE FLORIDA SUPREME COURT REEXAMINES THE "DANGEROUS INSTRUMENTALITY" DOCTRINE

Recently, the Florida Supreme Court reexamined Florida's dangerous instrumentality doctrine in the course of determining whether that doctrine applied to long-term lessors of motor vehicles.⁴⁸ In *Kraemer v. General Motors Acceptance Corp.*⁴⁹ and in *Abdala v. World Omni Leasing*,⁵⁰ the Florida Supreme Court was asked to revisit the applicability of the dangerous instrumentality doctrine with a view towards determining whether Florida Statute section 324.021(9)(b) exempted long-term lessors of motor vehicles from tort liability under the dangerous instrumentality doctrine if certain insurance and contract requirements outlined in the statute are met.⁵¹

45. *Percy*, 584 So. 2d at 18 n.3.

46. *See Roberson*, 459 So. 2d at 1156.

47. *See generally* 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.81(a) (1990). The "dual capacity" doctrine has been criticized by Larson as subject to misapplication and abuse. *Id.*

48. The first decision that recognized the "dangerous instrumentality doctrine" in Florida holds an owner of a motor vehicle liable for injuries caused by operators of that vehicle with the owner's permission. *Anderson v. Southern Cotton Oil Co.*, 74 So. 975 (Fla. 1917).

49. 572 So. 2d 1363 (Fla. 1990)

50. 583 So. 2d 330 (Fla. 1991).

51. FLA. STAT. § 324.021(9)(b) (1987). The statute reads:

Owner/lessor. Notwithstanding any other provision of the Florida Statutes or existing case law, the lessor, under an agreement to lease a motor vehicle for one year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than \$100,000.00/

Initially, numerous intermediate appellate courts were confronted with attacks upon this statute. *Perry v. GMAC Leasing Corp.* was the first case where a district court considered such attacks and held that a long-term lessor is exempt from liability under the dangerous instrumentality doctrine by reason of section 324.021(9)(b).⁵² The court stated that the statute did not conflict with Florida's constitutional right of access to the courts⁵³ and that there was no right at common law to sue long-term lessors.⁵⁴ Therefore, the court determined that the plaintiff was not unconstitutionally denied a prior right to sue long-term lessors.⁵⁵ Essentially, the Second District Court of Appeal analogized the position of the long-term lessor, such as GMAC, with that of a conditional vendor who held only legal title and had no beneficial use of, or right of control over, the motor vehicle. Further, the court noted that the statute did not place a cap on damages which limited the plaintiff's right to recovery since the plaintiff had an unlimited right of recovery against the lessee.⁵⁶ For these reasons, the court held that the long-term lessor should not be exposed to liability under the dangerous instrumentality doctrine.⁵⁷

The Second District Court of Appeal reaffirmed *Perry* in *Kraemer v. General Motors Acceptance Corp.*⁵⁸ In addition to reiterating the basis for its decision in *Perry*, the Second District rejected the plaintiff's contention that there is no reason for distinguishing those cases which hold a short term lessor of a vehicle liable under the dangerous

300,000.00 bodily injury liability and \$50,000.00 property damage liability, shall not be deemed the owner of said motor vehicle for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith; further, this paragraph shall be applicable so long as the insurance required under such lease agreement remains in effect.

Id.

52. 549 So. 2d 680 (Fla. 2d Dist. Ct. App. 1989).

53. *Id.* at 681; see FLA. CONST. art. I, § 21.

54. *Perry*, 549 So. 2d at 681.

55. *Id.*

56. *Id.* Indeed, section 324.021(9)(b) requires the highest *minimum* level of liability and property damage insurance mandated by the Florida Legislature. See FLA. STAT. § 324.021(9)(b) (1987).

57. *Perry*, 549 So. 2d at 682 (citing *Palmer v. Evans*, 81 So. 2d 635 (Fla. 1955)).

58. 556 So. 2d 431 (Fla. 2d Dist. Ct. App. 1989), *quashed*, 572 So. 2d 1363 (1990).

instrumentality doctrine from long-term lessors.⁵⁹ The *Kraemer* court noted that in short term rental agreements, the owner retains much more control over the use of the motor vehicle since the owner can direct who can drive the automobile, where it is to be driven and where the automobile must be returned.⁶⁰ Subsequently, numerous other intermediate appellate courts have followed the reasoning found in *Perry* and *Kraemer* and have come to the same conclusion.⁶¹

Nevertheless, on review, the Florida Supreme Court quashed the Second District's decision in *Kraemer*.⁶² The Florida Supreme Court rejected the argument that long-term lessors should not be liable under the dangerous instrumentality doctrine by reason of the long-term lessor's lack of beneficial use and control over the vehicle.⁶³ The court noted that the same notion was rejected in *Lynch v. Walker*⁶⁴ and in *Susco Car Rental System v. Leonard*,⁶⁵ which involved a short term lease. The supreme court reaffirmed that the dangerous instrumentality doctrine has been applied with very few exceptions since the 1920s and therefore, refused to adopt the requirement that a long-term lessor of a motor vehicle must have beneficial use and control over the vehicle before liability for its negligent use can attach under the dangerous instrumentality doctrine.⁶⁶

59. *Kraemer*, 556 So. 2d at 434. An excellent discussion of the distinction and the interplay between the dangerous instrumentality doctrine and the legislatively mandated minimum financial responsibility requirements for operation of motor vehicle is found in Judge Altenbernd's concurrence. *See id.* (Altenbernd, J., concurring).

60. *Id.*

61. *See, e.g.*, *Raynor v. De La Nuez*, 558 So. 2d 141 (Fla. 3d Dist. Ct. App. 1990); *Tsiknakis v. Volvo Finance N. Am.*, 566 So. 2d 520 (Fla. 3d Dist. Ct. App. 1990); *approved sub nom. Abdala v. World Omni Leasing, Inc.*, 583 So. 2d 330 (1991); *Folmar v. Young*, 560 So. 2d 798 (Fla. 4th Dist. Ct. App. 1990), *amended*, 16 Fla. L. Weekly D1688 (4th Dist. Ct. App. June 26, 1991) (en banc).

62. 572 So. 2d 1363.

63. *Id.* at 1364-65.

64. 31 So. 2d 268 (Fla. 1947).

65. 112 So. 2d 832 (Fla. 1959).

66. *Kraemer*, 572 So. 2d at 1365. It is interesting to note that although the Florida Supreme Court rejected the element of beneficial use and control over the vehicle as a predicate to impose liability upon a long-term lessor for its use, the supreme court's opinions issued during the same era as *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920), indicate that the dangerous instrumentality doctrine was adopted upon the ground that there must be an element of control by the owner over the driver. In *White v. Holmes*, 103 So. 623, 624 (1925), the court reversed a finding that an owner of an automobile for hire was vicariously liable for the operation of the motor vehicle. The Florida Supreme Court based its decision on the fact that the owner did

In *Kraemer*, the Florida Supreme Court further rejected the notion that a lease is analogous to a conditional sales contract and thus, that the long-term lessor is exempt from ownership liability under Florida Statute section 324.021(9)(a) (1986).⁶⁷ The court noted that the lease in *Kraemer* imposed numerous restrictions on the use of the vehicle, thus evincing that GMAC still retained control over it, unlike the terms of a conditional sales agreement or mortgage.⁶⁸ Although the court held the long-term lessor liable as an owner under the dangerous instrumentality doctrine, the Florida Supreme Court left open the door as to application of section 324.021(9)(b) which, by its enactment, the legislature intended to exempt long-term lessors from ownership liability under the dangerous instrumentality doctrine if certain statutory contractual and insurance requirements are met.⁶⁹ The Florida Supreme Court eventually closed the door opened by *Kraemer* in *Abdala v. World Omni Leasing, Inc.* where the court confronted the contentions that the statute unconstitutionally denied the rights to access to the courts, equal protection, and due process.⁷⁰

not furnish the driver. *Id.* The court distinguished the holding in *Southern Cotton Oil Co. v. Anderson* and explained: "The rules of liability stated in *Anderson v. Southern Cotton Oil Company*, 73 Fla. 432, 74 So. 975, (Fla. 1917) . . . and *Southern Cotton Oil Company v. Anderson*, 80 Fla. 441, 86 So. 629 . . . have referenced to the facts of those cases showing a relation of employer and employee or principal and agent." *White*, 103 So. at 264. Indeed, the supreme court in *Engelman v. Traeger*, 136 So. 527 (1931), expressly rejected strict application of the dangerous instrumentality doctrine to owners unless there existed a principal/agent—master/servant relationship between the owner and the driver. This rejection of the dangerous instrumentality doctrine was recognized by the Florida Supreme Court and overruled in *Lynch v. Walker*, 31 So. 2d 268, 271-72 (1947).

67. *Kraemer*, 572 So. 2d at 1366. The pertinent Florida statute provides:

Owner/Lessor.—a person who holds the legal title of a motor vehicle; or, in the event a motor vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the condition stated in the agreement with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purposes of this Chapter.

FLA. STAT. § 324.021(9)(b) (1987). The supreme court failed to address section 324.021(9)(b) in *Kraemer* since neither party argued that it even applied. *See* 572 So. 2d at 1366 n.5.

68. *Kraemer*, 572 So. 2d at 1366.

69. Regarding legislative intent, see the excerpts of the legislative debate quoted in *Kraemer*, 572 So. 2d at 1364-67.

70. 583 So. 2d 330, 332 (Fla. 1991).

The court began by reiterating its holding in *Kraemer* that long-term lessors are liable for the damages caused by their lessees under the dangerous instrumentality doctrine.⁷¹ Next, the court addressed whether the statute which exempts long-term lessors from that liability violates the constitutional provision guaranteeing access to Florida courts.⁷² The supreme court rejected the argument that there had always been a right of action against persons standing in the position of long-term lessors at common law in Florida.⁷³ The court explained that the legislature has stated that Florida's common law consists of the common and statutory laws of England in existence on July 4th, 1776.⁷⁴ No cause of action existed against lessors of instrumentalities in England on July 4th, 1776 or even in Florida prior to *Kraemer*.⁷⁵ The court thus found that the statute was not violative of Florida's constitutional right of access to the courts.⁷⁶

The Florida Supreme Court also rejected the claim that the statute violated the plaintiff's equal protection and due process rights.⁷⁷ The court stated that there is a rational basis for the legislation due to the legislative recognition that a long-term lease is really an alternative financing arrangement and that long-term lessors, similar to banks that hold mortgages on vehicles, were properly excluded from the definition of "owner" for purposes of determining vicarious responsibility for operation on the motor vehicle.⁷⁸ Furthermore, the court disposed of the petitioner's contention that the statute violated the right to equal protection by finding that plaintiffs that are injured most are not discriminated against⁷⁹ since all plaintiffs, regardless of the severity of their injuries, have the right to sue the long-term lessees in the event of injury.⁸⁰

As the progression of recent appellate decisions illustrate, the

71. *Id.* at 331-32.

72. *Id.*; see FLA. CONST. art. I, § 21.

73. *Abdala*, 583 So. 2d at 333.

74. *Id.* at 332; see FLA. STAT. § 2.01 (1989).

75. *Abdala*, 583 So. 2d at 332; see *Kraemer*, 572 So. 2d 1363.

76. *Abdala*, 583 So. 2d at 333.

77. *Id.* at 333-34.

78. *Id.*

79. *Id.* at 334.

80. *Id.* The court failed to note that Florida Statute section 324.091(9)(b) requires the highest minimum amount of liability and property damage coverage in the state and which also provides a higher minimum source of recovery for injured plaintiffs. See FLA. STAT. § 324.091(9)(b) (1987).

“dangerous instrumentality doctrine” is applied with the same vitality as ever. However, the Florida Supreme Court has properly recognized that long-term lessors are excepted from vicarious liability as “owners” of motor vehicles, because they, like other financial institutions, are institutions through which the public may acquire automobiles and should not be liable in tort for the operation of those vehicles.

IV. OFFERS AND DEMANDS FOR JUDGMENT OR SETTLEMENT

Numerous cases are weaving their way through Florida's appellate courts involving the issues of how and whether the offer of or demand for judgment provisions found in two Florida statutes⁸¹ and a rule of civil procedure promulgated by the Florida Supreme Court⁸² apply in a given case. Both the statutes and the rule have as their goal the early termination of civil litigation, including tort litigation, via settlement. However, because both the Legislature and the Florida Supreme Court have attempted to reach the goal of attaining rapid and reasonable settlements, appellate courts have been confronted with the task of deciding whether the statutes conflict with the supreme court's constitutional rule making authority.⁸³

The history of the offer of judgment rule began in 1972 when the Florida Supreme Court added Rule 1.442 to the Rules of Civil Procedure.⁸⁴ At this time, rule 1.442 was the same as rule 68 of the Federal Rules of Civil Procedure.⁸⁵ Both provided that the sanction of costs be awarded against a party after an offer of judgment is made by a party who rejects the offer if the judgment obtained was not more favorable than the offer.⁸⁶

81. FLA. STAT. § 45.061 (1987); FLA. STAT. § 768.79 (1986). Section 45.061 has been effectively repealed by the Florida Legislature for all causes of action arising after October 1, 1990. FLA. STAT. § 45.061(6) (1991). Section 768.79 is applicable only to those causes of action arising October 1, 1990. FLA. STAT. § 768.79 n.1 (1991).

82. FLA. R. CIV. P. 1.442.

83. FLA. CONST. art. V, § II(a). This constitutional provision reads: “The Supreme Court shall adopt rules for the practice and procedure in all courts” *Id.*

84. *In re The Florida Bar: Rules of Civil Procedure*, 265 So. 2d 21, 40-41 (Fla. 1972).

85. *See* FED. R. CIV. P. 68. It is interesting to note that the Rules Committee at the time of adopting Rule 1.442 could not foresee the extent of its use when it commented: “The committee believes that it will not be used often based on information about the equivalent Federal Rule.” *In re Florida Bar: Rules of Civil Procedure*, 265 So. 2d 21, 40-41 (Fla. 1972).

86. FLA. R. CIV. P. 1.442. The writer will not delve into, or compare, the various

Thereafter in 1986, the legislature enacted Florida Statute section 768.79⁸⁷ which allowed recovery of reasonable costs and attorney's fees from the date of filing to demand for judgment.⁸⁸ The statute provided that if the judgment obtained by the plaintiff is twenty-five percent less

time limitations and the procedural complexities of the rule, or each statute, regarding accepting or rejecting offers as it is beyond the scope of the survey. For an examination of these aspects of the rule and statutes see Bruce J. Berman & Jamie A. Cole, *New Offer of Judgment Rule in Florida: What Does One Do Now?* 64 FLA. B.J. 38 (1990)

87. Section 768.79 states:

(1)(a) In any action to which this part applies, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred from the date of filing of the offer if the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more than the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, he shall be entitled to recover reasonable costs and attorney's fees incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(b) Any offer or demand for judgment made pursuant to this section shall not be made until 60 days after filing of the suit, and may not be accepted later than 10 days before the date of the trial.

(2)(a) If a party is entitled to costs and fees pursuant to the provisions of subsection (1), the court may, in its discretion, determine that an offer of judgment was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim that was subject to the offer.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

FLA. STAT. § 768.79 (1986).

88. FLA. STAT. § 768.79(1)(a).

than the original offer, costs and attorney's fees would be awarded against the plaintiff.⁸⁹ However, if the plaintiff recovered a judgment twenty-five percent greater than the offer of judgment, then an award of costs and attorney's fees is made against the defendant.⁹⁰

Next in 1987, the legislature promulgated Florida Statute section 45.061 which again sought to impose sanctions for unreasonable rejection of an offer of settlement.⁹¹ The statute dictated that an award of

89. *Id.*

90. *Id.*

91. FLA. STAT. § 45.061 (1987). This statute provides:

(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude the making of a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

(2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a 'test-case', presenting questions of far-reaching importance affecting nonparties.

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law.

(3) In determining the amount of any sanction to be imposed under this

costs and attorney's fees be entered by the court if the offer was unreasonably rejected.⁹² The offer is presumed to have been unreasonably rejected if the judgment entered was at least twenty-five percent less than, or greater than, the offer, depending upon whether made by the defendant or the plaintiff respectively.⁹³

Since both the Florida Supreme Court and the legislature spoke on the same subject, the appellate courts have been faced with the task of deciding whether any constitutional conflict exists and thus, whether the statutes or the rule are constitutionally infirm. The Florida Supreme Court was first to address the issue of whether the statutes conflicted with rule 1.442 in *The Florida Bar re: Amendment to Rules of Civil Procedure (offer of judgment)*.⁹⁴ In this opinion, the court declined to address the rule committee's concerns that the adoption of Rule 1.442 by the Florida Supreme Court infringed upon the legislature's power to enact substantive law, and the court implicitly recognized that it was not so clear that the sanction provided for in Rule 1.442 is solely procedural in nature.⁹⁵ The court also declined to rule on the constitutionality of the substantive aspects of sections 768.79 and

section, the court shall award:

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of costs or expenses which may be provided by contract or in other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in s. 768.28.

FLA. STAT. § 45.061 (1987); *see also supra* note 81 and accompanying text.

92. FLA. STAT. § 45.061(2)(b) (1987).

93. *Id.*

94. 550 So. 2d 442 (1989).

95. *Id.*

45.061 in that non-adversarial setting.⁹⁶ However, the court held that to the extent the statutes conflicted with the procedural aspects of the rule, the statutes were unconstitutional.⁹⁷

The Fifth District Court of Appeal in *Milton v. Leapai* ruled that section 45.061 unconstitutionally infringed upon the Florida Supreme Court's rule making authority.⁹⁸ The Fifth District recognized the supreme court's prior holding that the statute's procedural aspects infringed upon the court's rule making authority.⁹⁹ The district court determined that the substantive portion of the statute could not be severed from the procedural aspects of the statute and declared the statute unconstitutional in its entirety.¹⁰⁰ In rendering its decision, the court attempted to distinguish the conflict created between its decision and *A.G. Edwards & Sons v. Davis*, which held section 45.061 as substantive in its entirety.¹⁰¹ However, it is interesting to note that in *Curenton v. Chester*,¹⁰² a different panel of the Fifth District Court of Appeal seemed to narrow *Milton's* holding by reading it to declare section 45.061 unconstitutional only as to its procedural aspects.

The Fifth District was next confronted with the flip side of the constitutional contention that section 45.061 infringed upon the Florida Supreme Court's rule making authority.¹⁰³ In *Reinhardt v. Bono*, the court was concerned that promulgation of Rule 1.442 may have encroached upon the legislature's constitutional authority to create substantive law,¹⁰⁴ but declined to rule on the issue, holding only that the Florida Supreme Court can consider the constitutionality of its own

96. *Id.* at 443.

97. *Id.* However, the Second District Court of Appeal has held section 45.061(2) and (3) to be substantive in nature. See *A.G. Edwards & Sons v. Davis*, 559 So. 2d 235 (Fla. 2d Dist. Ct. App. 1990) (following *Richardson v. Honda Motor Co.*, 686 F. Supp. 303 (M.D. Fla. 1988) and *Hemmerle v. Bramalea, Inc.*, 547 So. 2d 203 (Fla. 4th Dist. Ct. App. 1989)); see also *Tarpon Springs Arcade Ltd. v. City of Tarpon Springs*, 16 Fla. L. Weekly D1924 (2d Dist. Ct. App. July 26, 1991).

98. 562 So. 2d 804 (Fla. 5th Dist. Ct. App. 1990) (currently on review in the Florida Supreme Court).

99. *Id.* at 807.

100. *Id.* at 807-08.

101. *Id.* at 808 (citing *A.G. Edwards & Sons v. Davis*, 559 So. 2d 228 (Fla. 2d Dist. Ct. App. 1990)).

102. 576 So. 2d 969 (Fla. 5th Dist. Ct. App. 1991).

103. *Reinhardt v. Bono*, 564 So. 2d 1233, 1234 (Fla. 5th Dist. Ct. App. 1990).

104. *Id.* at 1234 (citing *The Florida Bar re: Amendment to Rules of Civil Procedure Rule 1.442 (Offer of Judgment)*, 550 So. 2d 442, 443 (Fla. 1989)).

rules.¹⁰⁵

Additionally, section 768.79 has also failed to withstand a constitutional attack brought in the First District Court of Appeal.¹⁰⁶ In *Hughes v. Goolsby*, the First District expressly declared the statute unconstitutional.¹⁰⁷ The court stated that the reasoning of the Fifth District Court of Appeal in *Milton* when declaring section 45.061 unconstitutional also applied to section 768.79.¹⁰⁸ Thereafter, the court certified to the Florida Supreme Court the question of section 768.79's constitutionality as being one of great public importance.¹⁰⁹

In practice, section 45.061 is the only statute that sanctions both defendants and plaintiffs for rejecting offers of settlement in truly meritless cases; the defending party is allowed to recover its costs and attorney's fees where the plaintiff fails to obtain any judgment.¹¹⁰ A requirement that a plaintiff recover a judgment before a defendant can be awarded a sanction against the plaintiff has the effect of rewarding plaintiffs bringing truly meritless claims but who still reject reasonable offers of settlement or judgment. The purpose of the statute and the rules is not furthered by this result.¹¹¹

In any event, it will ultimately be up to the Florida Supreme

105. *Id.* at 1235.

106. *See Hughes v. Goolsby*, 578 So. 2d 348, 349 (Fla. 1st Dist. Ct. App. 1991).

107. *Id.*

108. *Id.* (citing FLA. STAT. § 768.79 (1989)).

109. *Id.*

110. FLA. STAT. § 45.061 (1987); *see, e.g.*, *Memorial Sales v. Pike*, 579 So. 2d 778, 779-80 (Fla. 3d Dist. Ct. App. 1991) (holding that, unlike section 768.79(1)(a) and Rule 1.442, section 45.061(2)(b) *does not* require that a judgment be entered in favor of the plaintiff in order for that statute to apply). However, the Second District Court of Appeal has recently followed those cases construing Rule 1.442 and section 768.79 requiring that a judgment in favor of the plaintiff must be recovered in order for that rule to operate; therefore, a defendant is not entitled to sanctions pursuant to section 45.061 unless the plaintiff recovers a judgment. *Westover v. Allstate Ins. Co.*, 581 So. 2d 988 (Fla. 2d Dist. Ct. App. 1991). The *Westover* court erroneously followed *Kline v. Publix Supermarkets, Inc.*, 568 So. 2d 928 (Fla. 2nd Dist.Ct.App. 1990), which construed section 768.79 and Rule 1.442 to require that a judgment must be recovered by the plaintiff since both expressly required that a judgment be entered in favor of the plaintiff. *Id.*

111. It now appears that the legislature has acted to resolve any conflict created by Florida Statute section 45.061 by effectively repealing section 45.061 and inserting the curious provision, which apparently conflicts with the historical note and applies to policies, or contracts, after the effective date of 10-1-90: "This section does not apply to causes of action that accrue after the effective date of this act." FLA. STAT. § 45.061(6) (Supp. 1990).

Court and the legislature to harmonize, or eliminate the redundancy, between the rule and the statutes. Regardless of whether by rule or by statute, sanctions should be awarded to those who present meritless claims or defenses and thereafter, unreasonably reject offers to compromise cases requiring useless judicial labor be expended.

V. RECENT LEGISLATIVE ENACTMENTS THAT HAVE IMPACTED UPON FLORIDA TORT LAW

The Florida legislature, by enacting Florida Statute section 768.095 codified the common law qualified privilege employers had previously enjoyed when communicating their opinions about former employees to potential employers.¹¹² The statute provides that employers who disclose information about a prior employee pursuant to a request by the prospective employer are presumed to be acting in good faith.¹¹³ The plaintiff has the burden of demonstrating by clear and convincing evidence that the prior employer lacked good faith.¹¹⁴ In order to rebut the presumption of good faith, the plaintiff must show

112. The text of section 768.095 reads:

768.095 Employer Immunity from Liability; Disclosure of information regarding former employees.

(1) An employer who discloses information about a former employee's job performance to a prospective employer of the former employee upon request of the prospective employer or of the former employees presume to be acting in good faith, and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. For purposes of this section, the presumption of good faith is rebutted upon a showing that the information disclosed by the former employer was knowingly false or deliberately misleading, was rendered with malicious purpose, or violated any civil right of the former employee protected under Chapter 760.

(2) This act shall take effect July 1, 1991, or upon becoming a law, whichever occurs later, and shall apply to causes of action accruing after that date.

FLA. STAT. § 768.095 (Supp. 1990).

Prior to enactment of section 768.096, case law recognized that an employer had a qualified common law privilege to communicate their opinions of their former employee's performance to prospective employers. *Boehm v. American Bankers Ins. Group, Inc.*, 557 So. 2d 91 (Fla. 3d Dist. Ct. App. 1990); *Kellums v. Freight Sales Centers, Inc.*, 467 So. 2d 816 (Fla. 5th Dist. Ct. App. 1985); *Biggs v. Cain*, 406 So. 2d 1202 (Fla. 4th Dist. Ct. App. 1981).

113. See FLA. STAT. § 768.095 (1989).

114. *Id.*

that the employer disclosed information which the employer knew to be false, deliberately misleading, was given with a malicious purpose or which violated a right of the employee under Florida Statutes chapter 760 which prohibits discrimination against a person on the basis of race, color, religion, national origin, handicap, or marital status.¹¹⁵

The Florida legislature's enactment of section 768.095 clarified the burden of proof allocated to litigants in actions brought by employees against their former employers for untrue or inaccurate comments. Additionally, the statute identifies what type of evidence is necessary for a plaintiff to overcome the statutory presumption of good faith. These evidentiary standards and burdens were absent from previous decisional law which recognized that an employer has a qualified privilege to communicate his opinions about an employee's performance to a prospective employer.

The legislature has also taken action to exempt operators of a closed course motorsport facility from liability to nonspectators. By enacting Florida Statute section 549.09,¹¹⁶ the legislature now allows an

115. See FLA. STAT. § 760.01 (1977).

116. 549.09 Motorsport nonspectator liability release.

(1) As used in this section:

(a) "Closed-course motorsport facility" means a closed-course speedway or racetrack designed and intended for motor vehicle competition, exhibitions of speed, or other forms of recreation involving the use of motor vehicles, including motorcycles.

(b) "Nonspectator area" means a posted area within a closed-course motorsport facility, admission to which is conditioned upon the signing of a motorsport liability release, which is intended for event participants, and which excludes the "spectator area" as defined in paragraph (c).

(c) "Spectator area" means a specified area within a closed-course motorsport facility intended for admission to the general public, whether or not an admission price is charged, or to which admitted persons of the general public have unrestricted access including the grandstands and other general admission seating or viewing areas.

(d) "Posted" means a nonspectator area enclosed by a fence or wall at least 6 feet high in all areas where nonparticipants might gain entrance, and at least 3 feet high in any other areas, with signs having letters at least 4 inches high restricting entry, including, but not limited to, signs reading "Nonspectator Area," displayed not more than 500 feet from the entrance to the nonspectator area and at each entrance to the nonspectator area.

(e) "Negligence" means all forms of negligence, whether misfeasance or nonfeasance and failure to warn against an existing or future dangerous condition but does not include gross negligence, recklessness, or willful and

operator of a closed course motorsport facility to require the signing of a liability release form as a condition of entry into any nonspectator part of the facility. The statute further sets forth the requirements regarding contents of the form.

VI. CONCLUSION

This survey year, Florida courts have further attenuated the already beleaguered statutory immunity previously afforded employers by the Workers' Compensation Act. As an unintended counter balance, the courts have eliminated a potential party defendant in automobile negligence cases by recognizing the conditional statutory tort immunity given long-term lessors by the legislature. It appears that this past survey year, through common law decisions, the courts have expanded avenues of recovery for plaintiffs. At the same time, the courts have also respected legislative directives regarding limiting tort liability.

wanton conduct.

(f) "Motor vehicle" means an automobile, motorcycle, or any other vehicle propelled by power, other than muscular power, used to transport persons and which operates within the confines of a closed-course motorsports track.

(g) "Nonspectators" means event participants who have signed a motorsport liability release.

(2) Any person who operates a closed-course motorsport facility may require, as a condition of admission to any nonspectator part of such facility, the signing of a liability release form. The persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator, or his heirs, representative or assigns, for negligence which proximately causes injury or property damage to the nonspectator within a nonspectator area during the period of time covered by the release.

(3) A motorsport liability release may be signed by more than one person so long as the release form appears on each page, or side of a page, which is signed. A motorsport liability release shall be printed in 8 point type or larger.

Section 2. This act shall take effect October 1, 1991.

FLA. STAT. § 549.09 (1989).

Workers' Compensation: 1991 Survey of Florida Law

James F. Robinson*

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WHEREAS, the [Florida] Legislature finds that there is a financial crisis in the workers' compensation insurance industry, causing severe economic problems for Florida's business community and adversely impacting Florida's ability to attract new business development to the state. . . .¹

I. INTRODUCTION

Given the above statement, it is little wonder that the Florida Legislature set out to enact a comprehensive change in the workers' compensation law in this state. Actually, the groundswell for change had been building in the late 1980s, particularly from various business groups which claimed that workers' compensation insurance coverage for their employees was becoming extremely cost prohibitive. The proposition that escalating workers' compensation costs were a problem was supported by various sources referred to by the Legislature. For example, the Florida Economic Growth and International Development Commission, created in 1988, concluded that Florida's reputation as a high cost workers' compensation state inhibited economic growth.² Also, the Florida Chamber of Commerce published a report concluding that workers' compensation costs were a significant negative factor on the state's business climate and urged reforms in the worker's compensation laws which had placed Florida in a competitive disadvantage vis-a-vis other states.³ Additionally, a joint legislative committee found that Florida had experienced one of the highest five-year period premium increases in the country for workers' compensation insurance. Insurance rates were fifty-four percent higher than the national average, and seventy-five percent higher than other southeastern states.⁴ This same legislative report also focused on the medical and indemnity benefits paid to employees under Florida's workers' compensation law and concluded those benefits were substantially higher than the national average.⁵ Specifically, medical benefits were forty-two percent higher in Florida than the national average and thirty-eight percent higher than

1. Comprehensive Economic Dev. Act of 1990, ch. 90-201, 1990 Fla. Laws 894, 899 (codified as amended at FLA. STAT. § 440 (Supp. 1990)).

2. *Id.* at 897-98.

3. *Id.* at 898.

4. *Id.* at 899.

5. Comprehensive Economic Dev. Act of 1990, ch. 90-201, 1990 Fla. Laws 894, 899 (codified at FLA. STAT. § 440 (Supp. 1990)).

the southern state average.⁶ Likewise, indemnity benefits were thirty-one percent higher than the national average and sixty percent higher than the southern state average.⁷

Legislative reform actually began in 1989 with several significant changes in the existing law.⁸ Some of these changes included: the implementation of a work place drug testing policy;⁹ a requirement that all construction industry employers having one or more employees carry workers' compensation coverage;¹⁰ and, changing the threshold for wage loss benefits to include not just a permanent impairment rating, but also the need for a work-related physical restriction.¹¹ Furthermore, bad faith was eliminated and replaced with a modified twenty-one day rule for establishing entitlement of an attorney's fee by the injured worker's attorney to be paid by the employer/carrier.¹² Considerable case law has developed since the adoption of the bad faith standard in 1989, and even technical omissions or commissions of an employer/carrier were found to constitute bad faith. Thus, finding bad faith combined with a demonstrated economic loss to the injured worker provided the basis for an award of attorney's fees to the injured worker's attorney which was to be paid by the employer/carrier.¹³

Case decisions pointed out that the workers' compensation system was intended to be self-executing and carriers had an affirmative duty to timely investigate and provide needed benefits to injured workers.¹⁴ Rehabilitation services under section 440.49 of the Florida Statutes were also eliminated and replaced with something called training and education.¹⁵ While the rehabilitation services necessary to restore the injured worker to suitable gainful employment had previously been the responsibility of the employer/carrier, training and education was to be

6. *Id.*

7. *Id.*

8. See FLA. STAT. § 440.13(2)(e)2 (1989).

9. FLA. STAT. § 440.09(6)(a) (1989).

10. FLA. STAT. § 440.09(14)(b)2 (1989).

11. FLA. STAT. § 440.15(3)(b)1 (1989).

12. FLA. STAT. § 440.34(3)(b) (1989).

13. FLA. STAT. § 440.34(3)(b) (1987).

14. *King Motor Co. v. Parisi*, 445 So. 2d 1074, 1075 (Fla. 1st Dist. Ct. App. 1984); *Holiday Care Center v. Scriven*, 418 So. 2d 322, 326 (Fla. 1st Dist. Ct. App. 1982); *Florida Erection Serv., Inc. v. McDonald*, 395 So. 2d 203, 209 (Fla. 1st Dist. Ct. App. 1981).

15. See Comprehensive Economic Dev. Act of 1990, ch. 90-201, sec. 40, 1990 Fla. Laws 394, 980 (codified at FLA. STAT. § 440.49 (Supp. 1990)).

provided by the Division of Workers' Compensation, unless voluntarily offered by the employer or carrier.¹⁶

II. THE COMPREHENSIVE ECONOMIC DEVELOPMENT ACT OF 1990

The new Comprehensive Economic Development Act of 1990 (the Act), affected the entire workers' compensation system including the amount of benefits payable, various medical provisions, and appellate procedure. The following is a summary of the major changes made by the Legislature in 1990.

A. Definitions

In response to a growing concern for the increase in claims for stress-related injuries in the work place, the definition of "accident" was amended.¹⁷ Specifically, "[a] mental or nervous injury due to stress, fright or excitement only . . . [is] deemed not to be an injury by accident arising out of the employment."¹⁸ The definition of "employee" was broadened to include partners, sole proprietors,¹⁹ and corporate officers of companies actively engaged in the construction industry.²⁰ This further tightened the coverage requirements which were initially directed at the construction industry in 1989.²¹ Prior to that, the term "employment" included all private employments in which three or more employees were employed by the same employer. However, effective October 1, 1989, an exception to this general rule was carved out for the construction industry providing that all construction-related private employments having one or more employees, who were employed by the same employer, were included under the employment definition.²² The 1990 law also provided that the term "employee" excluded an independent contractor not subject to the control and direction of the employer as to actual conduct.²³ However, the term "employee" was also amended to include the construction industry worker

16. *Id.*

17. *See* FLA. STAT. § 440.02(1) (Supp. 1990).

18. *Id.*

19. FLA. STAT. §§ 440.02(13)(c), (d)(4) (Supp. 1990).

20. FLA. STAT. § 440.02(13)(d)4 (Supp. 1990).

21. FLA. STAT. § 440.02(14)(b)(2) (1989).

22. *Id.*

23. FLA. STAT. § 440.02(13)(d)1 (Supp. 1990).

who was otherwise an independent contractor.²⁴

The definition of "wages" was revised to eliminate many fringe benefits included in the average weekly wage calculation (AWW).²⁵ Previously, a substantial body of case law developed regarding what constituted fringe benefits.²⁶ In practice, the failure of the employer/cARRIER to include fringe benefits was often based on a fair market replacement basis. Thereafter, the reasonable value of fringe benefits was defined as the actual cost to the employer. Effective July 1, 1990, the only fringe benefits to be included in the AWW are health insurance, the reasonable value of permanent year-round residential housing provided to an employee, and housing for migrant workers unless provided after the time of injury.²⁷ This amendment eliminated a multitude of previously defined fringe benefits from the AWW calculation including life, disability and accident insurance,²⁸ uniforms,²⁹ vacation,³⁰ vested pension plans,³¹ parking,³² and meals.³³

Two other major changes in the wages definition involve gratuities and concurrent employment. In practice, claims of many service-oriented employees, such as bartenders and waitresses, commonly involve litigation over the amount of tips to be included in the AWW calculation. Employers would "look the other way" when their service personnel (who are usually paid a minimum hourly wage) under-reported tips, but would vigorously protest when those same employees—when injured on the job—sought workers' compensation benefits based on the full amount of tips earned. Inclusion of tips obviously could make a significant difference in an employee's compensation benefits. The Industrial Relations Commission, and later Florida's First District Court of Appeal, have indicated disapproval of an employer's indifference to

24. *Id.*

25. *See* Comprehensive Economic Dev. Act of 1990, ch. 90-201, sec. 9, 1990 Fla. Laws 894, 908 (codified at FLA. STAT. § 440.02(24) (Supp. 1990)).

26. *See infra* notes 28-33 and accompanying text.

27. FLA. STAT. § 440.02(24) (Supp. 1990).

28. *Mobley v. Winter Park Memorial Hosp.*, 471 So. 2d 591, 593 (Fla. 3d Dist. Ct. App. 1985).

29. *Rhaney v. Dobbs House, Inc.*, 415 So. 2d 1277, 1278 (Fla. 1st Dist. Ct. App. 1982).

30. *Vida Appliances, Inc. v. Gates*, 416 So. 2d 1186, 1189 (Fla. 1st Dist. Ct. App. 1982).

31. *Tampa v. Bartley*, 413 So. 2d 1280, 1281 (Fla. 1st Dist. Ct. App. 1982).

32. *Rhaney*, 415 So. 2d at 1278.

33. *Id.*

accurate tip reporting through decisions which hold that an injured worker's unreported tips would be included in the AWW calculation if there was evidence suggesting the employer knew tips were being received but not reported.³⁴ However, unreported tips would not be included in the AWW calculation if the employer had provided a reasonable reporting system with which the employee had failed to follow.³⁵ The 1990 amendment codified the notion that gratuities are considered wages only "to the extent reported to the employer in writing as taxable income."³⁶

Perhaps one of the more controversial changes in the 1990 amendment involved the elimination of wages earned in concurrent employment. Previously, an injured worker having two jobs was entitled to be compensated on the basis of wages earned at both jobs, assuming that the injured worker was unable to work at either job following the injury and the concurrent employment was of a type covered under the Act.³⁷ Under the new definition, wages now include only those wages earned on the job where the injury occurred and does not include wages from concurrent employment.³⁸ The only exception to this rule is the concurrent earnings of a volunteer firefighter.³⁹

B. Coverage

The Legislature continued to address and refine the law relative to the interrelationship between alcohol or drug abuse and injuries in the work place. In section 440.102(1)(a) of the Florida Statutes, "drug" was defined as "alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of the substances listed."⁴⁰ The Act continued to provide that injuries "occasioned primarily by the intoxication of the employee" or the influence of narcotic drugs, barbiturates, or other stimulants "not prescribed by a physician" that impaired the employee's normal faculties

34. *See, e.g.*, *Hanks v. Tom Brantley's Tire Broker*, 500 So. 2d 614, 615 (Fla. 1st Dist. Ct. App. 1986).

35. *Id.*

36. FLA. STAT. § 440.02(24) (Supp. 1990).

37. *See* FLA. STAT. § 440.02(23) (1989).

38. FLA. STAT. § 440.02(24) (Supp. 1990).

39. *Id.*

40. FLA. STAT. § 440.102(1)(a) (Supp. 1990).

were not compensable.⁴¹ It is legally presumed that the injury was primarily occasioned by intoxication given evidence of a .10 percent (or greater) blood alcohol level or influence of a drug upon a positive test confirmation.⁴² Where the employer does not have a drug-free work place program, the presumption may be rebutted by clear and convincing evidence that intoxication or drug influence did not contribute to the injury.⁴³ Furthermore, if before the accident, "the employer had actual knowledge of and expressly acquiesced in the employee's presence at the workplace while under the influence," the presumption is inapplicable.

As initially provided in the 1989 law,⁴⁴ the employer who has "reason to suspect" that an injury was primarily occasioned by intoxication or use of any drug may require the employee to submit to a test for the detection of any or all drugs.⁴⁵ Seeking to provide employers with some guidance, the legislature defined "[r]easonable suspicion drug testing" as that based on a belief that the employee has or is using drugs in violation of the work place policy.⁴⁶ Such belief is to be made in light of specific facts and inferences drawn therefrom.⁴⁷ These facts and inferences may be based on:

- (1) direct observation of drug use or the associated physical symptoms;
- (2) abnormal or erratic behavior or significant work performance deterioration;
- (3) report of drug use by reliable and credible source independently corroborated;
- (4) evidence of drug test tampering with current employer;
- (5) information that employee has caused or contributed to accident; and,
- (6) evidence that employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery or equipment.⁴⁸

If the employee refuses to submit to a test for nonprescription controlled substances or alcohol, it is presumed, in the absence of clear and convincing evidence otherwise, that the injury was primarily occasioned

41. FLA. STAT. § 440.09(3) (Supp. 1990).

42. *Id.*

43. *Id.*

44. FLA. STAT. § 440.09(6)(a) (1989).

45. FLA. STAT. § 440.09(7)(a) (Supp. 1990).

46. FLA. STAT. § 440.102(1)(i) (Supp. 1990).

47. *Id.*

48. *Id.*

by alcohol or a nonprescription controlled substance⁴⁹ and benefits are not payable.⁵⁰

The 1989 law provided for a twenty-five percent reduction of indemnity benefits where the employee's injury was caused by a "willful" refusal to use a safety appliance provided by the employer.⁵¹ Presumably in an effort to lessen the employer/carrier's burden of proof to support this partial defense, the 1990 law substituted the term "knowing" for willful.⁵²

The 1990 legislation also sought to address the compensability issue in several categories which commonly arise⁵³ and have given impetus to their own sub-body of case law. These cases have usually turned on the specific facts presented and have produced widely recognized rules of compensability.

1. Recreational and Social Activities

Injuries by accident occurring at recreational or social activities are not compensable unless the activity was an expressly required incident of employment and produced a substantial and direct benefit to the employer beyond a general improvement in employee health and morale.⁵⁴ This provision is a codification of a three-prong test previously adopted by Florida's First District Court of Appeal in *Brockman v. City of Dania*.⁵⁵

2. Going or Coming

The general rule that an injury occurring while going to or coming from work does not arise out of, and in the course of, employment now applies even where the employer has provided some means of transportation.⁵⁶ This is contrary to previous decisional law providing generally that employer-provided transportation, incident to the employment contract, is the exception to the going and coming rule.⁵⁷ However, an em-

49. FLA. STAT. § 440.09(7)(b) (Supp. 1990).

50. See FLA. STAT. 440.09(3) (Supp. 1990).

51. FLA. STAT. § 440.09(4) (1989).

52. FLA. STAT. § 440.09(4) (Supp. 1990).

53. See generally FLA. STAT. § 440.092 (Supp. 1990).

54. FLA. STAT. § 440.092(1) (Supp. 1990).

55. 428 So. 2d 745 (Fla. 1st Dist. Ct. App. 1983).

56. FLA. STAT. § 440.092 (Supp. 1990).

57. See, e.g., *Martinez v. A & D Elec. Contractors*, 510 So. 2d 1042 (Fla. 1st

employee's injuries which occur going to or coming from work in employer-provided transportation remain compensable if, at the time of the accident, the employee was "engaged in a special errand or mission for the employer."⁵⁸

3. Deviation from Employment

Injuries occurring while an employee has deviated from the course of employment, including the leaving of the work premises, are not compensable unless the deviation was either expressly approved by the employer or in response to an emergency and designed to save life or property.⁵⁹

4. Traveling Employee

In an effort to limit what had become a general rule that injuries occurring to traveling employees were nearly always compensable, the new law provides that the traveling employee must be actively engaged in the employment duties including travel to and from the place where the duties "are to be performed and other activities reasonably required by the travel status."⁶⁰ While it remains unclear how "other activities reasonably required"⁶¹ will be interpreted, this amendment was clearly aimed at cases where traveling employees have sustained what were held to be compensable injuries in activities seemingly far removed from the employment and more of a personal nature.

In *Gray v. Eastern Airlines, Inc.*,⁶² a flight attendant sustained a broken nose in a pickup basketball game at a YMCA located near the hotel where the attendant was staying.⁶³ The incident occurred on a two-day layover.⁶⁴ Citing Larsen's treatise, on workers' compensation law, the court noted that the "traveling employees" rule was applicable and stated that:

"Employees whose work entails travel away from the employer's

Dist. Ct. App.), *rev. denied*, 519 So. 2d 987 (1987).

58. FLA. STAT. § 440.092 (Supp. 1990).

59. FLA. STAT. § 440.092(3) (Supp. 1990).

60. FLA. STAT. § 440.092(4) (Supp. 1990).

61. *Id.*

62. 475 So. 2d 1288 (Fla. 1st Dist. Ct. App. 1985).

63. *Id.* at 1289.

64. *Id.*

premises are held . . . to be within the course of their employment continuously during the trip, except when a distinct [departure] on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable."⁶⁵

In a two-to-one decision, the appellate court reversed a finding of noncompensability and held that exercise (in the form of basketball) was necessary as an activity reasonably required for the employee's personal health and comfort.⁶⁶

In a second case, *Garver v. Eastern Airlines, Inc.*,⁶⁷ again involving a flight attendant, the employee was injured in a motor vehicle accident during an extended layover.⁶⁸ With her morning return flight canceled and rescheduled for midnight, the employee arranged lunch with a friend who lived in the area.⁶⁹ After lunch, they started out for the friend's house about twenty miles from the restaurant.⁷⁰ After traveling about five miles, the accident occurred.⁷¹ Announcing a new test for a traveling employee's injury sustained while not actively performing employment duties, the appellate court held such injury is compensable "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of employment."⁷² Interestingly, this was also a two-to-one decision. A thoughtful dissent was written by the same judge who earlier had dissented in *Gray*.⁷³

C. Medical Services and Supplies

Several of the 1990 changes under the medical provision of the Act had as their impetus the sometimes truly adversarial nature of the system. An "[i]ndependent medical examination" was defined as an objective medical or chiropractic evaluation of an injured employee's

65. *Id.* (quoting ARTHUR LARSON, WORKMAN'S COMPENSATION § 25.00 (1979)).

66. *Id.* at 1290.

67. 553 So. 2d 263 (Fla. 1st Dist. Ct. App. 1989).

68. *Id.* at 264.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Garver*, 553 So. 2d at 267 (quoting *Cavalcante v. Lockheed Elec. Co.*, 204 A.2d 621, 624 (N.J. Super. Ct. 1964)).

73. *See id.* at 268-69 (Nimmons, J., dissenting); *Gray*, 475 So. 2d 1290 (Nimmons, J., dissenting without opinion).

medical condition and work status.⁷⁴ In apparent response to the erosion of the employer/carrier's traditional right to authorize medical care, the new law provides that referrals may not be made by health care providers to other providers or facilities without prior authorization from the carrier or self-insured employer, except in emergency situations.⁷⁵

Previously, the employer/carrier's right to seek an independent medical examination (IME) was grounded in section 440.25(6) of the Florida Statutes, which provided that the physician conducting such an examination was to be either designated, or at least approved, by the judge of compensation claims (JCC).⁷⁶ The 1990 Act gave the employer/carrier the right to schedule an IME with a doctor of its own choice without court approval in the following situations:

- (1) [W]hen the authorized doctor fails to provide medical reports;
- (2) to determine if overutilization by a health care provider has occurred; (3) to determine if a change of doctors is necessary; or,
- (4) to determine if treatment is necessary or where the employee appears not to be making appropriate progress.⁷⁷

In the absence of agreement between the parties, the doctor conducting the IME shall not become the treating physician.⁷⁸ It should be noted that some doctors who conduct IMEs refuse to become the treating physician even where the parties are in agreement.

The new law has also sought to address the procedure to be followed where the employer/carrier wishes to deauthorize a previously-authorized treating physician.⁷⁹ Previously, the statute provided that a carrier was required to seek an order of deauthorization from the JCC.⁸⁰ Furthermore, in *Cal Kovens Construction v. Lott*,⁸¹ the First District Court of Appeal made it clear that once a satisfactory doctor-patient relationship had been established, the employer/carrier seeking to deauthorize that doctor must obtain an order approving the

74. FLA. STAT. § 440.13(1)(c) (Supp. 1990).

75. FLA. STAT. § 440.13(2)(a) (Supp. 1990).

76. FLA. STAT. § 440.25(6) (1989).

77. FLA. STAT. § 440.13(2)(b) (Supp. 1990).

78. *Id.*

79. FLA. STAT. § 440.13(2)(c) (Supp. 1990).

80. FLA. STAT. § 440.13(2)(a) (1989).

81. 473 So. 2d 249 (Fla. 1st Dist. Ct. App. 1985).

deauthorization and designation of a newly-authorized physician.⁸² The 1990 Act provided for peer review⁸³ and utilization review⁸⁴ whereby treatment by a medical care provider could be reviewed by a panel of physicians having the same specialty.⁸⁵ If it was determined that overutilization had occurred, the medical care provider could be deauthorized without a judge's order provided alternative medical care was offered.⁸⁶ If there is a finding of overutilization, the division of workers' compensation may order the doctor to show cause why he or she should not make repayment.⁸⁷ The law also continued to provide that a physician was barred from payment under the Act upon three findings of overutilization.⁸⁸

The subject of attendant care also continued to receive the legislature's attention. Without a doubt, awards of attendant care had become increasingly frequent during the late 1980s. In 1988, the Act had been amended to provide that nonprofessional attendant or custodial care provided by a family member was to be reimbursed at the federal minimum wage if the family member was unemployed.⁸⁹ If the family member chose to leave employment in order to provide the attendant/custodial care, he or she would be paid at a rate equal to his or her hourly wage at the previous employment which could not exceed the customary hourly rate for such care in the community.⁹⁰ "Family member" was also defined as "spouse, father, mother, brother, sister, child, grandchild, father-in-law, mother-in-law, aunt or uncle."⁹¹

In 1989, the Act was again amended to limit the compensation of family members for nonprofessional attendant/custodial care to no more than twelve hours per day.⁹² In 1990, seeking to further define the parameters of attendant care reimbursement, the Legislature indicated that both professional and nonprofessional custodial care must be performed at a physician's direction and control.⁹³ Attendant or custo-

82. *Id.* at 252-54.

83. FLA. STAT. § 440.13(1)(f) (Supp. 1990).

84. FLA. STAT. § 440.13(1)(i) (Supp. 1990).

85. FLA. STAT. §§ 440.13(1)(f)-(i) (Supp. 1990).

86. FLA. STAT. § 440.13(1)(c) (Supp. 1990).

87. FLA. STAT. § 440.13(1)(d) (Supp. 1990).

88. FLA. STAT. § 440.13(1)(c) (Supp. 1990).

89. FLA. STAT. § 440.13(2)(e)1 (1989).

90. FLA. STAT. § 440.13(2)(e)2 (1989).

91. *Id.*

92. *Id.*

93. FLA. STAT. § 440.13(2)(f) (Supp. 1990).

dial care was defined as care usually rendered by trained professionals and beyond the scope of household duties.⁹⁴ The doctor must state that the home or custodial care is required because of the compensable accident and must describe the nature and extent of the duties to be performed with a reasonable degree of particularity.⁹⁵ Codifying existing case law, family members can be reimbursed only for care which goes beyond the scope of routine household duties normally performed as a gratuity.⁹⁶

Another one of the more controversial provisions of the 1990 Act involved the obligation of the court to order an IME under any of the following circumstances:

where there is disagreement in opinions of medical providers; where two providers have determined there is no medical evidence supporting the employee's complaints or the need for further medical treatment; or, where the providers agree that the employee is able to work.⁹⁷

If one or more of these situations exist, the judge must, within fifteen days upon the written request of any party, order an IME to be performed by a doctor chosen from a list promulgated by the division of workers compensation.⁹⁸ Under this so-called "Super-Doc" feature of the statute, the opinion of the independent medical examiner is presumed correct unless there is clear and convincing evidence otherwise.⁹⁹ The independent medical examiner's report is to be sent within thirty days from the order providing for the examination.¹⁰⁰ All indemnity benefits "shall terminate" during any period the employee fails to cooperate in performance of the independent medical exam.¹⁰¹

A final change in the medical service provision of the Act addressed the expert witness fee charged by health care providers to give deposition testimony.¹⁰² Typically, most medical evidence is offered at the merits hearing through deposition. Prior to this amendment, expert

94. *Id.*

95. *Id.*

96. *Id.*

97. FLA. STAT. § 440.13(2)(i)3.a (Supp. 1990).

98. *Id.*

99. *Id.*

100. FLA. STAT. § 440.13(2)(i)3.c (Supp. 1990).

101. FLA. STAT. § 440.13(2)(i)3.a (Supp. 1990).

102. See FLA. STAT. § 440.13(2)(k) (Supp. 1990).

fees charged by providers ranged from \$150 to \$500 and occasionally more. The amendment provides that the expert witness fee cannot exceed \$200.¹⁰³

Initially, this fee cap created some problems, but as time has passed, it has become less so. While the legislation had a commendable purpose of attempting to provide some control and uniformity on medical expert witness fees, it may have contributed to the undesirable trend of an increasing number of health care providers refusing to treat workers' compensation patients as a result of the reimbursement for their services being reduced according to a maximum fee schedule. The dwindling availability of medical care providers to treat injured employees is becoming an increasing problem in everyday practice.

D. *Compensation for Disability*

1. Permanent Total Disability

In order to establish entitlement to permanent total disability (PTD) benefits, the employee has the burden to show an inability to perform even light work on an uninterrupted basis as a result of physical limitations. A 1990 amendment added a geographical component to this burden of proof providing that the employee must demonstrate an inability to do light work which is available within a 100-mile radius of the injured employee's home.¹⁰⁴

2. Temporary Total Disability

The length of time for which temporary total disability (TTD) benefits may be received was reduced from 350 weeks to 260 weeks.¹⁰⁵ Catastrophic temporary total disability benefits (i.e. the increased benefit for the severely injured) were eliminated for the permanent and total loss of use of an arm, leg, hand or foot because of organic damage to the nervous system.¹⁰⁶

3. Permanent Impairment and Wage-Loss Benefits

The legislature provided that a three-member panel and the divi-

103. FLA. STAT. § 440.13(2)(k) (Supp. 1990).

104. FLA. STAT. § 440.15(1)(b) (Supp. 1990).

105. FLA. STAT. § 440.15(2)(a) (Supp. 1990).

106. FLA. STAT. § 440.15(2)(b) (Supp. 1990).

sion were to establish a uniform disability rating guide.¹⁰⁷ For post-July 1, 1990 injuries, the Minnesota Department of Labor and Industry Disability Schedule is to be used until the new rating guide is developed.¹⁰⁸ Retaining the language of the 1989 amendment, an injured worker with a permanent impairment and one or more work-related physical restrictions may be entitled to wage-loss benefits.¹⁰⁹

The wage-loss formula was amended to reduce the amount of benefits payable.¹¹⁰ Additionally, the legislature indicated that wage-loss forms and job search reports must be filed with the carrier within fourteen days after the time benefits are due.¹¹¹ Failure to timely file the forms and job search reports, demonstrating that the employee made a minimum of five job searches, will result in no payment of benefits for that respective period of time.¹¹²

Also, a significant change in wage-loss entitlement was made. Prior to July 1, 1990, an injured employee with a permanent impairment and work-related physical restriction could receive wage-loss benefits for up to 525 weeks after reaching maximum medical impairment.¹¹³ Under the new law, the length of time for which wage-loss benefits can be received is tied directly to the impairment rating assigned.¹¹⁴ For example, an employee with a three percent permanent impairment is eligible for wage-loss benefits for up to twenty-six weeks.¹¹⁵ At the other end of the spectrum, an employee with a permanency of twenty-four percent or greater is entitled to the maximum length of wage-loss benefits, which is 364 weeks.¹¹⁶ In addition to reducing the number of weeks for which wage-loss benefits could be received, a number of defenses were also codified.¹¹⁷ The right to wage loss benefits ends if, in a two-year period, there are three occurrences of the following:

- (1) the employee voluntarily terminates employment for reasons

107. FLA. STAT. § 440.15(3)(a)3 (Supp. 1990).

108. *Id.*

109. FLA. STAT. § 440.15(3)(b)1 (Supp. 1990).

110. *Id.*

111. FLA. STAT. § 440.15(3)(b)2 (Supp. 1990).

112. *Id.*

113. *See* FLA. STAT. § 440.15(3)(b)4.c (1989).

114. FLA. STAT. § 440.15(3)(b)4.d (Supp. 1990).

115. FLA. STAT. § 440.15(3)(b)4.d.(I) (Supp. 1990).

116. FLA. STAT. § 440.15(3)(b)4.d.(V) (Supp. 1990).

117. *See* FLA. STAT. § 440.15(3)(b)5 (Supp. 1990).

unrelated to the injury; (2) refusal of suitable employment within the employee's ability; (3) termination from employment due to the employee's own misconduct as statutorily defined; and, (4) the employee voluntarily limits his or her own income.¹¹⁸

Each of the three occurrences must arise in different bi-weekly periods.¹¹⁹ Also, with each occurrence, the employee may be disqualified from receiving workers' compensation benefits for three bi-weekly periods.¹²⁰

The 1990 Act also provided for the termination of wage-loss benefits if the employee is convicted of criminal violations ranging from second degree misdemeanors to capital felonies.¹²¹ "Convicted" is defined as "adjudication of guilt, a plea of guilty or nolo contendere" or "a jury verdict of guilty when . . . adjudication is withheld" and probation is imposed.¹²² Wage-loss benefits are also terminated if the employee is imprisoned for motor vehicle/uniform traffic control offenses thereby affecting the ability to perform his usual or other appropriate employment.¹²³

4. Temporary Partial Disability

As with wage-loss benefits, the formula for temporary partial disability was changed resulting in reduced benefits.¹²⁴

5. Fraud

Another major change in the 1990 Act involved the defense of fraud in the hiring process.¹²⁵ Theretofore, the landmark case, *Martin v. Carpenter*,¹²⁶ provided a three-prong test which the employer/carrier had to satisfy in order to defeat compensability: 1) the employee knowingly misrepresented the existence of the previous condition; 2) the employer relied on the misrepresentation thereby hiring the employee; and

118. *Id.*

119. *Id.*

120. *Id.*

121. FLA. STAT. § 440.15(3)(b)6 (Supp. 1990).

122. *Id.*

123. *Id.*

124. FLA. STAT. § 440.15(4) (Supp. 1990).

125. FLA. STAT. § 440.15(5)(a) (Supp. 1990).

126. 132 So. 2d 400 (Fla. 1961).

3) that such reliance resulted in consequent injury to the employer.¹²⁷

However, benefits are now payable for an aggravation or acceleration of a preexisting condition unless the employee falsely represents in writing that he or she was not previously disabled or received compensation because of such previous disability, impairment, anomaly or disease.¹²⁸ Employer reliance on the misrepresentation of a preexisting condition is no longer required.

E. *Death Benefits*

In 1989, the Act was amended to eliminate the termination of death benefits to a deceased employee's spouse who remarries. Pursuant to the 1990 amendment, the spouse who remarries is entitled to a lump sum payment equal to twenty-six weeks of compensation at the rate of fifty percent of the average weekly wage.¹²⁹ If such lump sum causes the \$100,000.00 benefits limitation to be exceeded, the spouse who remarries shall receive the remaining balance.¹³⁰

F. *Claim Procedure*

Claims for benefits under the 1990 Act must be dismissed if they lack the required specificity.¹³¹ The legislative intent is the avoidance of needless litigation or delay in payment of benefits by requiring claimants to provide sufficiently detailed information to the employer/carrier so a timely and informed decision on the benefits requested can be made. However, if the claimant is unrepresented, the division shall provide the necessary assistance in filing a claim that conforms to the specificity requirements.¹³²

Emphasizing the role of the division in cases of disputed claims, the legislature has indicated the division is to take a proactive position in preventing and resolving disputes.¹³³ If after investigation, the division determines that the claimed benefits are due, it shall assist the employee in securing those benefits.¹³⁴ If the division determines the

127. *Id.* at 406.

128. FLA. STAT. 440.15(5)(a) (Supp. 1990).

129. FLA. STAT. § 440.16(1)(b)2 (Supp. 1990).

130. *Id.*

131. FLA. STAT. § 440.19(1)(e)4 (Supp. 1990).

132. *Id.*

133. FLA. STAT. § 440.19(1)(h) (Supp. 1990).

134. *Id.*

claimed benefits are not due and owing, the division must inform the employee accordingly.¹³⁵ The division decision is not *res judicata*, but may be considered by the JCC or mediator.¹³⁶

G. *Payment of Compensation*

Prior to July 1, 1990, lump sum settlements under the Act took only two forms. The first, under Florida Statutes section 440.20(12)(a) permitted the employer/carrier's release of liability for all benefits other than future medical care, training and education. This form of settlement could only occur where the employee was at least three months past maximum medical improvement.¹³⁷ The second form of pre-July 1, 1990 settlement was pursuant to Florida Statutes section 440.20(12)(b). This settlement, commonly referred to as a total lump sum washout, provided for a full discharge of the employer's liability in cases where it was denied that a compensable accident or injury had occurred and a written notice to controvert had been filed.¹³⁸ Interestingly, this form of settlement since the July 1989 amendment specifically excluded discharge from training and education expenses.¹³⁹

There is now a third form of settlement available under limited circumstances which is a true total washout.¹⁴⁰ The requirements are that the employee has: 1) reached MMI; 2) a five percent or less permanent impairment rating; and 3) not received medical treatment for at least three months.¹⁴¹

The amount of settlement is determined by a statutory formula consisting of the compensation rate multiplied by three producing a product which is then multiplied by the permanent impairment rating.¹⁴² This form of settlement mandates that the claimant be responsible for payment of his or her own attorney's fees and fully discharges the employer/carrier for all benefits including medical expenses, training and education.¹⁴³

135. *Id.*

136. *Id.*

137. FLA. STAT. § 440.20(12)(a) (Supp. 1990).

138. FLA. STAT. § 440.20(12)(b) (Supp. 1990).

139. *Id.*

140. FLA. STAT. § 440.20(12)(c) (Supp. 1990).

141. *Id.*

142. *Id.*

143. *Id.*

H. *Claims Procedure and Hearing Requests*

1. Mediation

The 1990 Act retained the provision for mediation, while eliminating a major objection to the original 1989 legislation involving attorney participation. In its initial form, neither party could be represented at the mediation. Now, the employer/carrier may be represented if the employee has counsel.¹⁴⁴

2. Pre-Trial Hearings

A pre-trial hearing is to be held between thirty and sixty days after the request for an application for a hearing has been filed.¹⁴⁵ All parties shall be given at least fifteen days notice of the pre-trial hearing.¹⁴⁶ A final hearing is to be set at the pre-trial hearing which allows, absent consent of the parties otherwise, at least ninety days to conduct discovery.¹⁴⁷ Final hearings are to be held within 120 days after the pre-trial hearing.¹⁴⁸

I. *Attorney's Fees*

In determining a reasonable attorney's fee, the JCC is to consider only benefits the attorney was responsible for securing when applying the statutory formula.¹⁴⁹ Under the 1990 Act, the term "benefits secured" does not include future medical benefits provided beyond five years after the date the claim was filed.¹⁵⁰ This obviously has the potential to limit the amount of attorney's fees awarded in connection with successful prosecution of a claim for medical benefits for which the evidence supports the need for lifetime medical care.

J. *Self-Insurers*

An extensive provision was included in the 1990 Act relative to

144. FLA. STAT. § 440.25(3)(b)1 (Supp. 1990).

145. FLA. STAT. § 440.25(3)(b)3 (Supp. 1990).

146. *Id.*

147. *Id.*

148. *Id.*

149. FLA. STAT. § 440.34(2) (Supp. 1990).

150. *Id.*

employers seeking to be self-insured for workers' compensation purposes.¹⁵¹ The employer may be required to post an indemnity bond or securities to procure payment of compensation.¹⁵² A company seeking to be self-insured must have trained personnel who can ensure that benefits are provided and a safe working place available.¹⁵³ The self-insured employer must also carry reinsurance for actuarial stability.¹⁵⁴ If the employer fails to maintain the required financial security, the authority to self-insure shall be revoked unless a certified opinion of an independent actuary estimating future compensation benefits is provided and a security deposit is made.¹⁵⁵ Failure to do so will result in revocation of the employer's authorization to self-insure.¹⁵⁶ At that point, the employer must provide a certified actuarial opinion regarding estimated future compensation payments for claims incurred while self-insured and post a security deposit equal thereto.¹⁵⁷ Such actuarial opinions are to be provided at six month intervals until such time as the claims incurred have no remaining value.¹⁵⁸ Failure to provide reports or security deposit gives rise to a cause of action in circuit court against the employer by the Florida Self-Insured Guarantee Association to recover a judgment equal to the present value of estimated future compensation payments and attorney's fees.¹⁵⁹

The new Act also provides a third alternative to a company purchasing traditional workers' compensation coverage or becoming self-insured. The employer can obtain a twenty-four hour health policy which provides medical benefits and an insurance policy which provides the indemnity benefits required by the Act.¹⁶⁰

K. *Penalty for Failing to Secure Compensation*

An employer failing to have workers' compensation coverage is guilty of a second degree misdemeanor and may be enjoined from employing individuals and doing business until payment for compensation

151. FLA. STAT. § 440.38(1)(b)1 (Supp. 1990).

152. *Id.*

153. *Id.*

154. *Id.*

155. FLA. STAT. § 440.38(1)(b)2 (Supp. 1990).

156. *Id.*

157. FLA. STAT. § 440.38(1)(b)3 (Supp. 1990).

158. *Id.*

159. *Id.*

160. FLA. STAT. § 440.38(1)(e) (Supp. 1990).

is secured.¹⁶¹ If upon being provided written notice, the employer fails to show evidence of workers' compensation coverage, a \$500.00 penalty shall be assessed.¹⁶² If coverage is not obtained within the next ninety-six hours, a daily penalty of \$100.00 will be assessed until the employer complies.¹⁶³

L. *Special Disability Trust Fund*

The schedule of preexisting physical conditions giving rise to a conclusive presumption that the employer considered the condition to be permanent or likely to be a hinderance or obstacle to employment was amended to add obesity.¹⁶⁴ To qualify under the provision, the employee had to be thirty percent or more over the average weight designated for that employee's height and age.¹⁶⁵

III. THE CONSTITUTIONAL CHALLENGE

In *Scanlon v. Martinez*,¹⁶⁶ the plaintiffs filed an action for declaratory and injunctive relief seeking a determination as to the validity of portions of chapter 89-289 and chapter 90-201 of the Laws of Florida. The plaintiffs consisted of a group of individuals as well as some labor organizations.¹⁶⁷ It was the plaintiffs' position that sections of the Comprehensive Economic Development Act of 1990 violated certain constitutional provisions, including due process, separation of powers and the single subject rule under the Florida Constitution.¹⁶⁸

The Circuit Court of Leon County held that chapter 90-201 of the Laws of Florida did, in fact, violate the single subject rule contained in the Florida Constitution.¹⁶⁹ The court found that the subject matter of

161. FLA. STAT. § 440.43 (Supp. 1990).

162. *Id.*

163. *Id.*

164. FLA. STAT. § 440.49(2)(f)1.x (Supp. 1990).

165. *Id.*

166. 44 Fla. Supp. 2d 170 (Fla. 2d Cir. Ct. 1990).

167. *Id.*

168. *Id.*

169. *Id.* at 171. FLA. CONST. art. III, § 6 provides:

Every Law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section subsection, or paragraph of a subsection. The enacting clause of every Florida law

the Act, the economic growth and development of Florida, was too broad and that the disparate topics were not reasonably and rationally related to the subject of the bill.¹⁷⁰ Chapter 90-201 was, therefore, held to be constitutionally invalid in its entirety.¹⁷¹

The circuit court then addressed the alleged separation of powers violation under the Florida Constitution.¹⁷² It analyzed the section of chapter 90-201 which created the Industrial Relations Commission within the executive branch. While an executive branch entity, the new law provided that the IRC judges were subject to Supreme Court Judicial Nominating Commission appointment and retention.¹⁷³ Further, the law provided that the governor must reappoint any IRC judge who received a favorable report from the Judicial Nominating Commission.¹⁷⁴ The circuit court held that the retention provision, together with the fact that the IRC judges were subject to disciplinary proceedings by the JNC, violated the separation of powers rule and therefore, chapter 90-201 was invalid in its entirety for this reason as well.¹⁷⁵

In addition to finding the entire Act constitutionally invalid, the circuit court also addressed several specific provisions. It found that the "Super-Doc" provision lacked a rational basis in providing that the opinion of the court-appointed doctor should carry greater credibility than the opinions of other doctors.¹⁷⁶ The court also found that this provision usurped the fact-finding responsibility of the JCC and concluded that this section violated both the due process and access to courts guarantees.¹⁷⁷

The circuit court also held that chapter twenty of the Act, providing that the employee seeking permanent total disability benefits must show that he or she is unable to do even light work available within a 100 mile radius of home, violated the access to courts guarantee of the Florida Constitution because it was not a reasonable alternative to common law rights otherwise available.¹⁷⁸ Constitutional deficiencies were also found in chapter twenty of the Act amending the wage loss

shall read: "Be It Enacted by the Legislature of the State of Florida".

170. *Scanlon*, 44 Fla. Supp. 2d at 171.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 171.

175. *Scanlon*, 44 Fla. Supp. 2d at 172.

176. *Id.*

177. *Id.*

178. *Id.* at 173.

provision by providing for a shifting burden of proof based on the amount of permanency.¹⁷⁹ The circuit court likewise found that the sunset provisions of chapter 89-289 and backward repealer provision of chapter 90-201 were an invalid attempt by the legislature to sunset general laws.¹⁸⁰ The circuit court did rule that constitutional frailties of the individual provisions outlined above were, however, severable and therefore declined to declare the entire Act unconstitutional on that basis.¹⁸¹ The circuit court held that the sunset provision of chapter 89-289 and all of chapter 90-201 of the Laws of Florida were invalid.¹⁸²

Following the Leon County Circuit Court announcement of its opinion on December 5, 1990, the legislature met in a special session in order to address the objections enunciated to the new legislation. Out of this special session emerged two different bills which served to separate the workers' compensation provisions¹⁸³ from the international affairs and trade subject matter.¹⁸⁴ Both bills essentially readopted the provisions initially contained in chapter 90-201 and with minor exception, provided for retroactive application to July 1, 1990. The legislature also passed chapter 91-2, House Bill 11-b, which provided for the repeal of Florida Statutes section 20.171(5) (chapter 90-201 of the Laws of Florida), which had created the Industrial Relations Commission, and section four, chapter 90-201 of the Laws of Florida, relating to IRC rules of adoption by the Florida Supreme Court. This bill also provided for the repeal of section 440.4415 regarding creation of the Workers' Compensation Oversight Board and legal counsel.

In addition to the above provisions, chapter 91-2 of the Laws of Florida, House Bill 11-b, also amended the Act relative to the construction industry. The definition of "employee" was amended to permit no more than three officers of a corporation involved in the construction industry to make an election of exemption from the Act by filing written notice pursuant to Florida Statutes section 440.05. It also provided that partners or sole proprietors in the construction industry are considered employees unless they elect to be excluded and file written notice. As with corporations in the construction industry, no more than three partners in a partnership actively involved in the construc-

179. *Id.*

180. *Scanton*, 44 Fla. Supp. 2d at 173.

181. *Id.* at 174.

182. *Id.* at 175.

183. 1991 Fla. Sess. Law Serv. ch. 91-1 (West).

184. 1991 Fla. Sess. Law Serv. ch. 91-5 (West).

tion industry may elect to be excluded from the Act.

Chapter 91-2 also amended section 440.05 regarding the notice of waiver of exemption as it applies to every sole proprietor, partner or corporate officer actively engaged in the construction industry.¹⁸⁵ Upon receipt of a proper written notice, the division must issue a certificate of the election to the party so making it. A copy of the election certificate is to be sent to the workers' compensation carrier that is otherwise providing coverage for the sole proprietorship, partnership or corporation. The election certificate remains valid for two years or until the election is revoked, whichever occurs first. Additionally, any contractor responsible for compensation under section 440.10 can register with any subcontractor's carrier thereby being entitled to receive written notice of any cancellation or non-renewal of coverage. Further, the contractor may require any subcontractor to provide evidence of workers' compensation coverage or a copy of the subcontractor's certificate of election. Any subcontractor who has elected to be exempt from the Act must provide a copy of the election certificate to the contractor. If the contractor or third party payor becomes liable for payment of compensation to an employee of a subcontractor who has made an invalid election to be exempt, the contractor or third party payor may recover from the sole proprietorship, partnership or corporation all benefits paid or payable, plus interest, unless the contractor and subcontractor had a written agreement that coverage was to be provided by the contractor.¹⁸⁶

Following the 1991 special legislative session, during which the above amendments were passed, the Florida Supreme Court, in a deeply divided opinion, announced its decision in *Martinez v. Scanlon*.¹⁸⁷ This decision had been received by way of certification from the First District Court of Appeal as a case of great public importance.¹⁸⁸ This list of parties to the action and non-parties submitting amicus curiae briefs reads like a list of who's who in the business and labor world.¹⁸⁹

185. 1991 Fla. Sess. Law Serv. ch. 91-2 (West).

186. *Id.*

187. 582 So. 2d 1167 (Fla. 1991).

188. *Id.*

189. *Id.* The list included Associated Industries of Florida, the Florida Chamber of Commerce, National Counsel on Compensation Insurance, Employers Insurance of Wausau, Tampa Bay Area NFL, Inc., South Florida Sports Corporation, Professional Firefighters of Florida, Inc., the AFL-CIO and IBEW, Communication Workers' of America, Florida Police Benevolent Association, Florida Construction, Commerce and

Turning to the trial court opinion, the supreme court noted that the plaintiffs alleged in the declaratory action that they were taxpayers, employers, employees or labor organizations who were interested in and had doubt as to their rights under the 1989 and 1990 amendments.¹⁹⁰ The defendants argued that the plaintiffs lacked the requisite standing to bring suit, that some of the claims were either premature or moot and that the amendments were constitutional.¹⁹¹

Reviewing the declaratory judgment statute,¹⁹² the court noted that an individual may seek declaratory relief only where it can be shown there exists a bona fide, actual present need for the declaration.¹⁹³ The court's majority stated it had serious reservations that the action was properly the subject of the declaratory judgment act.¹⁹⁴ It noted the parties had given little or no mention to this procedural issue. However, while cautioning trial courts to exercise their discretion in such cases involving constitutional challenges, the court declined to dismiss the action itself.¹⁹⁵

Citing case law, the court rejected the argument that the provisions of the 1990 law, with the substantial reduction in benefits, violated the constitutional right of access to courts.¹⁹⁶ While acknowledging the reduction in benefits, the court found the law to be a reasonable alternative to tort litigation noting that full medical care and wage loss benefits, regardless of fault, continued to be available without delay and uncertainty.¹⁹⁷ It also noted that in situations which were previously compensable, but no longer so because of the amendment, employees were still free to prosecute their claims in tort.¹⁹⁸

The court next addressed the constitutional challenge for violation of the single subject requirement. It agreed with the lower court that

Industry Self-Insurer's Fund, Florida Association of Self-Insurers, Florida Group Risk Administrators Association, Inc., Academy of Florida Trial Lawyers, Florida Chamber of Commerce Self-Insurance Fund, Employers Association of Florida, Florida Fruit and Vegetable Association Self-Insurer's Fund, Lee County Electrical Cooperative and Harper Brothers, Inc. Self-Insured Employers. *Id.*

190. *Id.* at 1169-70.

191. *Id.* at 1170.

192. FLA. STAT. § 86 (Supp. 1990).

193. *Martinez*, 582 So. 2d at 1170.

194. *Id.* at 1171.

195. *Id.*

196. *Id.*

197. *Id.* at 1171-72.

198. *Martinez*, 582 So. 2d at 1172.

chapter 90-201 violated this principle and was therefore unconstitutional.¹⁹⁹ However, the State of Florida argued that this constitutional problem had been cured by virtue of the January 1991 special session which separated chapter 90-201 into distinct bills, one addressing international trade and the other workers' compensation.²⁰⁰ While acknowledging merit in the state's argument, the court noted that it was being asked to scrutinize the constitutionality of a statute that was no longer in existence.²⁰¹ Noting that the 1991 Act was not before it, the court indicated that if it were subsequently found unconstitutional as a result of the reenacted provisions, the validity of the 1990 Act would still be in question.²⁰² While suggesting that it could remand the case back to the trial court for reconsideration in the light of the 1991 amendments, the court chose to retain jurisdiction in the interest of judicial economy.²⁰³

The court found that the separation of powers violation had been resolved by the 1991 Act and the issue was therefore moot.²⁰⁴ However, it also stated that the trial court erred when finding the entire Act unconstitutional as a result of the separation of powers violation. The court found that the IRC provisions and creation of the Workers' Compensation Oversight Board were severable and even if unconstitutional, would not render the entire Act invalid.²⁰⁵ Further, the trial court should not have considered these provisions under the Declaratory Judgment Act because the plaintiffs were unable to show their rights were affected by them.²⁰⁶

As with the separation of powers argument, the court also noted that the plaintiffs could not demonstrate their rights were actually affected by the individual provisions of the 1989 and 1990 Acts which were attacked on various other constitutional grounds.²⁰⁷ Since the plaintiffs could show only that their rights might be affected in the future by these provisions, they were not properly the subject of a declaratory judgment action. Accordingly, the trial court's finding that chapter 90-201 was unconstitutional for violation of the single subject rule

199. *Id.*

200. *Id.*

201. *Id.* at 1172-73.

202. *Id.* at 1173.

203. *Martinez*, 582 So. 2d at 1173 n.5.

204. *Id.* at 1173.

205. *Id.*

206. *Id.* at 1174.

207. *Id.*

was affirmed, as was its holding that the 1990 law did not violate any constitutional access to courts provision. The remainder of the trial court's holding was reversed.²⁰⁸

The Florida Supreme Court then addressed the issue as to what effective date should apply to its ruling. Previous case law suggested that whether or not a statute was void ab initio depended on whether the legislative body passing the law had the power or authority to do so. Here, the issue was not one of the legislature's constitutional authority to pass chapter 90-201, but rather the form of the law itself.²⁰⁹ The supreme court pointed to previous opinions, both its own²¹⁰ and those of the United States Supreme Court²¹¹ where statutes had been declared unconstitutional, but the decisions were given prospective effect only.²¹² The rationale common to these decisions involve equitable principles and the avoidance of injustice or hardship resulting from a retroactive application.²¹³ The legislature's declaration that the 1991 curative statutes were to be given application retroactively to the effective date of the 1990 Act was cited by the court. While refusing to rule on these retroactive provisions of the 1991 Act, the court concluded that its holding of chapter 90-201 as unconstitutional in its entirety was prospective only.²¹⁴

In his concurring opinion, Justice Kogan agreed that the 1990 statute was unconstitutional for violation of the single subject rule.²¹⁵ He found all other issues raised therefore moot, noting that the court later address the constitutionality of the 1991 Act, if challenged.

In an opinion, concurring in part and dissenting in part, Justice Barkett (joined by Chief Justice Shaw and Justice Kogan) agreed that the 1990 Act violated the single subject rule and therefore other issues raised were premature.²¹⁶ However, Justice Barkett dissented to the extent that the majority opinion was to be given prospective application only. While acknowledging existence of legal precedent supporting prospective application, Justice Barkett's disagreement with these deci-

208. *Martinez*, 582 So. 2d at 1174.

209. *Id.*

210. *See, e.g., Interlachen Lakes Estates, Inc. v. Snyder*, 304 So. 2d 433 (Fla. 1973).

211. *See, e.g., Ciprano v. Houma*, 395 U.S. 701 (1969).

212. *Martinez*, 582 So. 2d at 1175.

213. *Id.*

214. *Id.* at 1175-76.

215. *Id.* at 1176 (Kogan, J., specially concurring).

216. *Id.* (Barkett, J., concurring in part, dissenting in part).

sions was evident. In her view, a statute declared facially unconstitutional is null and void from its inception.

IV. CONCLUSION

While it is now clear that the Comprehensive Economic Development Act of 1990, chapter 90-201, has been declared unconstitutional, there remain many questions as to what direction the workers' compensation law of this state will take in the foreseeable future. Certainly, as Justice Kogan suggested in his concurring opinion, the door remains open for a separate constitutional challenge to the 1991 statute. However, as a result of the curative 1991 legislation which addressed the constitutional objections to the 1990 Act, it is perhaps more likely that further constitutional challenges will be more narrow, focusing on specific provisions of the 1991 Act as amended.

Articles

The Florida Condominium Act

Gary A. Poliakoff*

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I. INTRODUCTION

In the twenty-eight years since the condominium concept was introduced in Florida, condominiums have not only changed Florida's skyline, but its economic and political climate as well. This article will briefly review, from this author's firsthand experience, past events which influenced the development of the Florida Condominium Act and provide insight into those factors which led to the extensive revisions of 1991.

Initially, we can appreciate the extent of the political, social and economic impact that condominium communities have had on the state. The Florida Division of Land Sales, Condominiums and Mobile Homes estimates that there are approximately 20,000 condominium associations operating more than one million residential units. An estimated 2.5 to 3 million Floridians presently reside in condominiums. In performing their management and administrative functions, condominium associations spend in excess of \$100 million each month for services, encompassing a diverse spectrum from lawn and pool maintenance to security and legal services. Tens of millions of additional dollars are spent every year on building repairs and replacements. These expenses are in addition to the billions of dollars spent on the initial condominium construction.

Real property taxes on condominiums pump hundreds of millions of dollars into state and local coffers annually. These dollars go toward the increased governmental support services required to meet the growing population of communities impacted by condominium development. Services include new roads, police and fire protection, hospitals, sanitation, shopping and entertainment.

The condominium association, established to provide a vehicle for coordinating the interests of co-owners in the maintenance and operation of their shared or owned facilities, has become a means of rapid dissemination of information to tens of thousands of individuals. As a result, condominium communities have become a focal point for candidates seeking political office. Legislators, keenly aware of the potential political clout of condominium communities, are quick to respond to alleged abuses within the condominium field. This is evidenced by the fact that the Florida Condominium Act has been amended nearly every year since its inception in 1963. While most amendments brought about reforms, some amendments were passed to placate the desires of local constituents without much forethought as to their impact on the

condominium concept.¹

II. STATUTORY HISTORY

The Florida Condominium Act was enacted in 1963 as enabling legislation designed to give statutory recognition to air right conveyances. At the time of its enactment, Florida was experiencing a period of economic growth, high employment and spiraling inflation. Florida led the nation in both population gain and construction growth. The boom was approaching its peak. Retirees and tourists were emigrating to Florida in unprecedented numbers. The demand for housing outstripped the available supply tenfold. Entire unbuilt condominium communities were sold out with little more than promises of future construction. Out of this chaos developed problems never envisioned by the authors of the Condominium Act.

Buyers were given unrealistic completion dates. Estimated operational budgets were purposely understated. Completed condominium units and support facilities differed in both design and quality from artists' renditions in sales brochures and model units. For instance, carpeting and fixtures in completed units substantially differed from the quality found in model apartments. In addition, use of devices such as "sweetheart management contracts," which usurped the owners' authority granted by the Condominium Act, and compulsory 99-year recreation leases with unconscionable escalation provisions, prompted one of the Condominium Act's authors to warn in 1964 that if developers persisted in perverting the Condominium Act, it would ultimately be necessary to qualify condominiums through a state regulatory commission. Condominium purchasers generally were unaware of the contracts and leases because, during this period, Florida law did not require disclosure to purchasers. Consequently, few disclosures, if any, were ever provided by developers.

With the sole exception of escalation clauses in compulsory leases, the area of abuse which created the greatest anguish to condominium purchasers was that of construction deficiencies. These defects had various causes. The most prevalent among these was the fact that con-

1. The amendment to section 718.115(1), which allowed the "cost of mangrove trimming" to be included as a common expense, is a classic example of a legislative response to a constituent request. *See* FLA. STAT. § 718.115(1) (Supp. 1990), *amended* by FLA. STAT. § 718.115(1)(a) (1991) (deleting the "cost of mangrove trimming" provision).

struction lenders were more concerned with the amount and profitability of their loans than the competence of the borrowers. Additionally, many of these condominium projects received virtually no municipal inspection. Consumers, inexperienced in the technical language of building codes, were forced to rely upon municipal building inspectors for assurance that their home or condominium would be built in accordance with the applicable building codes. Purchasers considered the issuance of Certificates of Occupancy as a stamp of approval, indicating that the buildings had met all code requirements and had been constructed in accordance with approved plans and specifications. In reality, many structures which did not meet current building codes were issued Certificates of Occupancy. In 1976, a grand jury investigating construction practices in Dade County during the early 1970s reported that a former inspector told us that inspection practices of the last several years have resulted in the construction of buildings which could be blown away in another 1926 hurricane. The evidence we heard supports this statement.

In 1971, in an effort to avoid the necessity of more severe regulatory control, the Florida Legislature passed amendments to the Condominium Act, in essence, finally acknowledging the existence of consumers. Minimal disclosures were required from developers. Unit owners were given the right, following transition, to cancel pre-transition contracts entered into by developers for the operation and maintenance of condominium property. However, these early efforts were mostly "too little, too late." In 1972, in response to pressures from consumer groups, an 18-member condominium commission was organized to bring together individuals representing the various interests of the industry. The commission concluded that amendment of the statutes had been deemed to be more important and more easily obtainable than the creation of a regulatory agency. They also concluded that even though a majority of the commission was philosophically opposed to the use of ground leases and leases of recreational and other commonly used facilities in the creation of condominiums it was not realistic to recommend the prohibition of such leases. Various other recommendations were made, but did not become law for several years.

In 1974, many of the recommendations of the condominium commission became law. Major revisions, requiring full disclosure by developers, were added to the Condominium Act. Included was a requirement of a prospectus describing everything from recreational and other commonly used facilities, to the number of units that would be served by each facility. A new formula for relinquishment of developer control

ended the developer's virtual perpetual control of condominium associations.

Open board meetings and access to records were also mandated. Tighter regulations were established for the use of buyers' deposits. To protect consumers from faulty construction, the common-law-evolved concept of "implied warranties" was statutorily imposed. The Act established broad guidelines affecting all aspects of condominium living, yet still lacked enforcement procedures and penalties for non-compliance.

This problem was partially rectified in 1975 with the creation of the Florida Division of Land Sales and Condominiums. The Division, established as a depository for the condominium documents of all Florida condominiums, has grown in the ensuing decade into a complete regulatory agency with rule-making and enforcement authority. Today, the Bureau of Condominiums is the largest of four bureaus that comprise the Division of Florida Land Sales, Condominiums and Mobile Homes, under the auspices of the Florida Department of Business Regulation, with offices in Tallahassee, Hollywood and Tampa.

Legislation designed to discourage the use of recreational leases was also adopted in 1975. Escalation clauses in leases or agreements for recreation or other commonly used facilities were prohibited. Courts would later restrict the application of this section to leases entered into after the effective date of the amendment.

In 1976, the entire Condominium Act was again rewritten. This action was the result of a mandate by the 1975 legislature to the Florida Law Revision Council (now defunct) to eliminate ambiguities and inconsistencies in the Condominium Act which were created by the patchwork amendments of the prior years. The revised and renumbered Act has been amended nearly every year since then. As a result of new concepts, experience and judicial interpretation, new legislation has been added addressing operational problems and other areas of potential abuse. Specifically, this new legislation has encompassed conversion to time-sharing, the manner of delivering notice to owners of the annual meeting, defining what documents constitute the "official" records of the association, mandatory reserves and the methods of accounting, removal of board members, and arbitration of disputes.

The decade of the 1980s was marked as a period of rapid development of appellate decisions providing guidance in interpreting legislative intent and areas not specifically covered by the Condominium Act. It was also a period which witnessed an increase in friction between unit owners and their boards concerning the manner in which the con-

dominium was being operated. For instance, unit owners commonly complained about the ability of boards to perpetuate themselves in offices through proxy abuse. As alleged incidents of board improprieties escalated, condominium unit owners began organizing legislative action committees. Among the groups advocating for legislative reforms to protect the interests of condominium unit owners was SCORN (Secure Condominium Owners Rights Now). SCORN persuaded State Representative Ron Silver to introduce legislation during the 1990 Legislative Session which created a commission to study alleged abuses. The legislature created the Condominium Study Commission with the following mandate:

It shall be the duty of the Commission to conduct public hearings throughout the State and to take testimony regarding issues that are of concern with respect to condominiums and to receive recommendations for any changes to be made in the Condominium Law.²

The commission held nine public hearings. The final report of the Condominium Study Commission was issued in February, 1991.

The legislature responded by enacting sweeping reforms governing the manner in which condominiums operate. The following is an examination of the impact of the 1991 amendments on the development and operation of Florida's condominiums.³

III. 1991 AMENDMENTS TO THE FLORIDA CONDOMINIUM ACT

A. *Operations*

1. Let The Sunshine In

Unit owner dissatisfaction with a board's conduct in operating the condominium is often exacerbated by the denial of an opportunity to speak out on issues being considered by the board or a committee. While unit owners were granted the right to attend board meetings,⁴ the right to speak was left totally up to the board's discretion. In many

2. 1990 Fla. Laws ch. 218.

3. The effective date of most amendments to the Condominium Act is April 1, 1992. Several became effective, however, on January 1, 1992; e.g., FLA. STAT. §§ 718.112(2)(b), (d); § 718.501(2)(a) (1991).

4. FLA. STAT. § 718.112(2)(c) (1991) (this provision first took effect January 1, 1977).

instances, boards merely rubber stamped recommendations made by committees which met behind closed doors.

Effective January 1, 1992, unit owners will be given the right to speak at membership meetings and the annual meeting with reference to all designated agenda items.⁵ This right will be extended to board meetings and committee⁶ meetings after April 1, 1992.⁷ While the association is given the right to adopt rules governing the frequency, duration and manner of unit owner statements, these rules must meet a reasonable standard. It is anticipated that most boards will adopt guidelines similar to those used by governmental bodies. Individuals desiring to speak should be required to complete a registration card indicating their name, unit number and the agenda item they wish to address. The board should establish time limitations for each speaker.⁸ In order to maintain decorum at the meeting, it will be important for the board and members to avoid turning the public forum section of meetings into public debates. While it may be appropriate for speakers to ask questions of the board, or vice-versa, there is no specific mandate compelling board members to engage in discourse with unit owners.

To ensure that unit owners are kept informed of topics which will be discussed at board and unit owners' meetings, notice of meetings must be conspicuously posted on the condominium property at least 48 continuous hours preceding the board meeting and fourteen days preceding the unit owners' meeting.⁹ Such notice must include the meeting agenda.¹⁰ In addition, fourteen days prior to a board meeting, written notice must be given of any non-emergency special assessments or

5. FLA. STAT. § 718.112(2)(d) (1991).

6. "Committee" means a group of board members, unit owners, or board members and unit owners appointed by the board to make recommendations to the board or take action on behalf of the board. FLA. STAT. § 718.103(6) (1991).

7. FLA. STAT. § 718.112(2)(c) (1991).

8. FLA. ADMIN. CODE ANN. r.7D-23.002 (proposed) (operations of the association would preclude any limitation greater than three minutes).

9. FLA. STAT. § 718.112(2)(c) (1991) (board meetings) and FLA. STAT. § 718.112(2)(d)2 (1991) (unit owner meetings). As to FLA. STAT. 718.112(2)(c) (1991), it is uncertain what repercussions would follow proof of 47.5 hours notice as opposed to the 48 hours mandated notice for board meetings. The law is silent concerning the burden of proof needed to demonstrate 48 *continuous* hours of notice. *See id.* One might speculate that a video camera focused on the notice in a manner similar to that used to guard the British Crown Jewels will suffice.

10. *See* FLA. STAT. §§ 718.112(2)(c), (d)2 (1991). The board must, by rule, adopt a specific location on the condominium property upon which all notices of unit owner meetings shall be posted. *See* FLA. STAT. § 718.112(2)(d)2 (1991).

amendments to rules regarding unit use that will be proposed, discussed, or approved.¹¹

Unit owners are also given the opportunity to tape record or videotape meetings of the board.¹² While the Division is mandated to adopt rules governing the tape recording and video taping of meetings,¹³ it is uncertain how this right will apply at Paradise Gardens Condominium, a large nudist condominium outside Tampa, Florida.

2. Democratization of the Elections Process

No single process has created more ill will or more vocal objection than the use of proxies for the election of board members. Notwithstanding the right of unit owners to be nominated from the floor at the annual meeting,¹⁴ the potential for election of such a candidate is nil in situations where board-solicited proxies constitute the overwhelming participation at the annual meeting.

After January 1, 1992, proxies will no longer be permitted in the election of directors.¹⁵ To ensure all unit owners equal access to the ballot box, the association must implement the following election procedure:

[60 Day Notice] Not less than 60 days before a scheduled election, the association shall mail or deliver, whether by separate association mailing or included in another association mailing or delivery including regularly published newsletters to each unit owner entitled to vote a first notice of the date of the election.¹⁶

[Qualifying for Office] Any unit owner or other eligible person¹⁷

11. FLA. STAT. § 718.112(2)(c) (1991).

12. *Id.*

13. *Id.*; FLA. ADMIN. CODE ANN. r.7D-23.002 (proposed) would only allow such audio and video equipment which does not produce distracting sound or light emissions and also would allow the board to adopt rules which preclude a unit owner recording a meeting from moving about the room.

14. FLA. STAT. § 718.112(2)(d)1 (Supp. 1990) (repealed effective January 1, 1991).

15. See FLA. STAT. § 718.112(2)(b)2 (1991). This provision does not apply to time share condominiums.

16. FLA. STAT. § 718.112(2)(d)3 (1991).

17. While most bylaws restrict board members to record unit owners, there is no statutory prohibition against anyone serving on a condominium board. In fact, the current board dilemma, coupled with the unwillingness of many unit owners to serve on condominium boards, may ultimately necessitate the hiring of professional directors.

desiring to be a candidate for the board shall give written notice to the secretary of the association not less than 40 days before a scheduled election.¹⁸

[Second Notice with Campaign Literature and Ballot] Not less than 30 days before the election meeting, the association shall mail or deliver a second notice of the mailing to all unit owners entitled to vote together with a ballot which shall list all candidates.¹⁹ Upon request of a candidate, the association shall include an information sheet, no larger than 8 ½ inches by 11 inches furnished by the candidate,²⁰ to be included with the mailing of the ballot, with the costs of mailing and copying to be borne by the association.²¹

[Prohibition Against Marking Another's Ballot] No unit owner shall permit any other person to vote his ballot, and any such ballot improperly cast shall be deemed invalid.²²

[Civil Penalty] Any unit owner violating the provisions of this section may be fined by the association.²³

18. FLA. STAT. § 718.112(2)(d)3 (1991).

19. The written ballot shall indicate in alphabetical order by surnames, each and every unit-owning eligible person who desires to be a candidate for the board and who gave written notice to the association not less than forty days before the scheduled election. No ballot shall indicate which candidate or candidates are incumbents on the board. FLA. ADMIN. CODE ANN. r.7D-23.0021(9).

20. The association may need to incorporate a disclaimer in its notice in order to avoid potential liability for the dissemination of libelous language. An association may not edit, alter or otherwise modify the content of the information sheet. FLA. ADMIN. CODE ANN. r.7D-23.0021(7).

21. FLA. STAT. § 718.112(2)(d)3 (1991). Not less than thirty days before the scheduled election, the association shall mail or deliver to the eligible voters at the addresses listed in the official records a second notice of the election, together with a ballot and any information sheets timely submitted by the candidate. Accompanying the ballot shall be an outer envelope addressed to the person or entity authorized to receive the ballots and a smaller inner envelope in which the ballot shall be placed. The exterior of an outer envelope shall indicate the name of the voter and the unit or unit numbers being voted and shall contain a signature space for the voter. The inner envelope shall be placed within the outer envelope and the outer envelope shall be sealed. If a person is entitled to cast more than one ballot, separate inner envelopes shall be used for each ballot. The voter shall sign the exterior of the outer envelope in the space provided for signature. The envelope shall either be mailed or hand-delivered to the association. FLA. ADMIN. CODE ANN. r.7D-23.0021(8).

22. *Id.* The prohibition against marking another's ballot does not preclude a unit owner needing assistance in casting a ballot from obtaining such assistance. *See id.*

23. *Id.* The right of an association to fine is conditioned upon the declaration or bylaws providing for fining authority. *See* FLA. STAT. § 718.303(3) (1991). It is not

3. Annual Budget/Statutory Mandated Reserves

In an effort to encourage condominium owners to set aside monies for future repair and maintenance, the Condominium Act was amended in 1984 to require that reserve funds be established for "capital expenditures" and "deferred maintenance."²⁴ A threshold of \$10,000 was established in 1986. Effective April 1, 1992, reserve accounts must be established for roof replacement, building painting and pavement resurfacing, regardless of the amount of deferred maintenance expense or replacement cost. In addition, reserve accounts will continue to be required for any other item when the deferred maintenance expense or replacement cost exceeds \$10,000.²⁵

The 1991 legislature addressed several other aspects of reserve requirements. First, it clarified the use of interest earned on reserve accounts by providing that the interest accruing on reserve accounts remain in the reserve account, unless its use for other purposes is approved in advance by a vote of a majority of the voting interest present at a duly-called meeting of the association.²⁶ Second, it further clarified the right of a developer-controlled association to waive statutorily mandated reserves. A developer-controlled association may vote to waive the reserves for the first two years of the operation of the association. Thereafter, waiver or reduction will require approval of a majority of non-developer voting interests present at a duly-called meeting of the association.²⁷

4. Kickbacks

In order to end what has become a growing problem for condominiums, namely, the practice of vendors bribing officers, directors and/or managers to secure favorable contracts, the 1991 amendments provide

clear whether a condominium whose declaration or bylaws fails to provide fining authority could levy a fine for violation of this section.

24. See FLA. STAT. § 718.112(2)(f) (1991). A "capital expenditure" is an expense that results from the purchase of an asset whose life is greater than one year in length or the replacement of an asset whose life is greater than one year in length or the addition of an asset which extends the life of the previously existing asset for a period greater than one year. FLA. ADMIN. CODE ANN. r. 7d-23.004 (1991). "Deferred Maintenance" is an expenditure for maintenance or repair that will result in extending the life of an asset for a period greater than one year. *Id.*

25. FLA. STAT. § 718.112(2)(f)2 (1991).

26. FLA. STAT. § 718.112(2)(f)3 (1991).

27. FLA. STAT. § 718.112(2)(f)2 (1991).

that no officer, director, or manager²⁸ "shall solicit, offer to accept, or accept any thing or service of value exceeding \$100.00, for which consideration has not been provided for his own benefit or that of his immediate family, from any person providing or proposing to provide goods or services to the association."²⁹ Any officer, director or manager who knowingly violates this provision is subject to civil penalty of up to \$5,000.³⁰

An exhaustive debate precipitated the commission's recommendation concerning the value of gifts which an officer, director or manager could receive without violating the laws. Of primary concern was the imposition of penalties in a situation in which a manager might receive a christmas gift given by one without intention of influencing the manager's decision. The commission ultimately recommended a \$10 ceiling, which was later changed to \$100 by the legislature. Specifically excepted from the application of this section are gifts or services received in connection with trade fairs or educational programs.³¹

5. Access to and Inspection of the Association Records

a. Access to Books and Records

In the beginning, unit owners who sought access to the association's books and records were denied such access or told that the books were maintained elsewhere. Over the years, the legislature addressed this problem by requiring that the official records be maintained in the county where the condominium is located, or within 50 miles (now reduced to 25 miles) if maintained in another county.³² In addition, the association is compelled to maintain the records from the inception of the association.³³

28. Applies to those managers who are required to be licensed pursuant to FLA. STAT. § 468.432 (1991). See FLA. STAT. § 718.111(1)(a) (1991).

29. FLA. STAT. § 718.111(1)(a) (1991). H.B. 841 being considered by the 1992 Legislature would repeal the \$100.00 cap precluding receipt of anything of value.

30. See *id.* (referring to FLA. STAT. § 718.501(1)(d) which allows the Division to impose a civil penalty individually against any officer or board member who willfully and knowingly violates a provision of Chapter 718, Florida Statutes, and sets a maximum fine for each offense of \$5,000).

31. FLA. STAT. § 718.111(1)(a) (1991).

32. FLA. STAT. § 718.111(12)(b) (1991) (the 1991 amendments changed mileage from 50 to 25 miles).

33. FLA. STAT. § 718.111(12) (1984) (effective October 1, 1984). It was designed to require developer-controlled associations to have records available for unit owner

b. Inspection of the Books and Records

An important aspect of a unit owner's right to inspect the books and records involves a determination of what constitutes the "official records." This was clarified in 1984 with the addition of the "Official Records" section of the Act which lists those items constituting the official records.³⁴

At first, unit owners were gratified that they had the right to inspect the records. Following the decision in *Winter v. Playa del Sol, Inc.*,³⁵ the Act was further amended to provide that the right to inspect the records includes the right to make or obtain copies of said records.³⁶ However, in this age of electronic marvels, some unit owners abused the right. Unit owners have been known to appear at association meetings or the association office with a portable copier in tow. Following a circuit court's affirmation of an association's right to restrict excessive inspections,³⁷ the Act was again amended, this time to authorize the association to adopt reasonable rules regarding the frequency, time, location, notice and manner of record inspection and copying.³⁸

Concerned that some boards might use their rule-making authority to frustrate unit owner's efforts, the legislature amended the Act to provide that associations must deliver the records within five working days of receipt of a written request, or pay damages to the unit owner in an amount equal to three times the actual damages, but not less than \$500.³⁹

In addition to imposing a penalty for delaying access to the records, the legislature expanded the definition of official records to include, "all other records of the association not specifically included in the foregoing which are related to the operation of the association."⁴⁰ This expanded definition is certain to create controversy. For instance, attorneys are scrambling to figure out ways to avoid publication of le-

inspection.

34. FLA. STAT. § 718.111(12) (1984) (effective October 1, 1984).

35. 353 So.2d 598, 599 (Fla. 4th Dist. Ct. App. 1977) ("The right to inspect public records carries with it the right to make copies.").

36. FLA. STAT. § 718.111(12)(c) (1984) (effective October 1, 1984).

37. *O'Brien v. Sterling Village Condominium, Inc.*, No. 83-5997 (Fla. 15th Cir. Ct.), *aff'd*, 471 So. 2d 56 (Fla. 4th Dist. Ct. App. 1985).

38. FLA. STAT. § 718.111(12)(c) (Supp. 1990) (effective October 1, 1990).

39. FLA. STAT. § 718.112(12)(c) (1991).

40. FLA. STAT. § 718.111(12)(a)15 (1991).

gal opinions concerning pending litigation, which presumably now fall within the definition of official records. Additionally, associations should now explore potential conflicts with state or federal privacy legislation, insofar as the amended language will now compel associations to open, for unit owner scrutiny, confidential screening investigative reports.⁴¹

To insure that every unit owner has an opportunity to learn of his/her rights and responsibilities as a condominium owner, every purchaser may now request and receive a complete set of the current condominium documents, as well as the question and answer sheet provided for by section 718.504.⁴² The association must maintain, as part of the official records, an adequate number of copies of the declaration of condominium, articles of incorporation, by-laws, rules, and all amendments to each of the foregoing, as well as the question and answer sheet on the condominium property.⁴³ The association may charge its actual cost for preparing and furnishing these documents to those requesting same.⁴⁴

6. Hurricane Shutter Specifications

Having learned a lesson from the effects of Hurricane Hugo along the South Carolina coast in 1989, the legislature was quick to adopt a provision mandating boards to approve the installation or replacement of hurricane shutters, notwithstanding the fact that the installation of hurricane shutters might be determined to be a material alteration of the type normally requiring board or membership approval.⁴⁵ The board must adopt hurricane shutter specifications for each building within each condominium operated by the association. Specifications should include color, style, and any other factors deemed relevant by the board.⁴⁶

41. See Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 (1988), which limits disclosure of information obtained from credit reports.

42. FLA. STAT. § 718.111(12)(c) (1991).

43. *Id.*

44. *Id.*

45. FLA. STAT. § 718.113(5) (1991); see *Sterling Village Condominium v. Breitenbach*, 251 So. 2d 685 (Fla. 4th Dist. Ct. App. 1971).

46. FLA. STAT. § 718.113(5) (1991).

7. Fidelity Bonding

In an effort to identify dishonest individuals who could potentially misappropriate association monies, the Act was amended in 1978 to require all persons who control or disburse funds of the association be bonded.⁴⁷ The original legislation contained no stated amount for the bond. In 1981, the Act was amended to provide for bonds in the amount of \$10,000 per person.⁴⁸ Effective April 1, 1992, the amount will be increased to \$50,000 per person.⁴⁹ Previously, associations operating one or more condominiums, which in the aggregate contained 50 or fewer units, were exempt from bonding requirements.⁵⁰ The 1991 amendments deleted this exception; effective April 1, 1992, all associations must comply with the fidelity bonding provision, regardless of size or number of units.⁵¹

8. Insurance

Initially, condominium associations were responsible for maintaining insurance on the common elements and condominium property. Unit owners were responsible for insuring the non-supportive internal walls of their units and their personal property. This "bare wall" approach was mandated until the late 1970s when a fire destroyed much of the Sabal Palm Condominium. In the aftermath of the fire, it was discovered that most unit owners maintained traditional "tenant" type coverage, insuring only personalty, not the internal unit walls or fixtures. To avoid a recurrence of the Sabal Palm experience, the Act was amended to require that the association provide coverage for all improvements to the property initially installed by the developer or "replacements thereof."⁵² Difficulty with determining the replacement value of upgraded appliances and fixtures resulted in another amendment, deleting the reference to "replacements thereof."⁵³ That solution,

47. FLA. STAT. § 718.112(2)(l) (1978) (effective October 1, 1978).

48. FLA. STAT. § 718.112(2)(l) (1981) (effective July 1, 1981).

49. FLA. STAT. § 718.112(2)(j) (1991). H.B. 841 being considered by the 1992 Legislature would modify the bonding requirements by creating a sliding scale based upon the size of a community and its revenues.

50. FLA. STAT. § 718.112(2)(j) (Supp. 1990).

51. See 1991 Fla. Sess. Law Serv. 103 (West) (deleting exception from bonding requirement for 50 or fewer units).

52. FLA. STAT. § 718.111(9)(b) (1979) (effective October 1, 1979).

53. FLA. STAT. § 718.111(9)(b) (1980) (deletion of provision effective October 1,

analogous to throwing the baby out with the bath water, created more problems than solutions. Accordingly, the Act was again amended. This time, the Association was required to cover replacements of "like kind and quality" in addition to the initial improvements.⁵⁴ The amended law worked for a short time until a few shrewd unit owners found that by dropping bottles of bleach on their carpeting, they were able to compel the association's carrier to give them new carpeting. It readily became apparent that requiring the association to insure certain components, over which it had no maintenance control, was unreasonable. Thus, in 1984, the Act was once again amended to exclude from the association's coverage floor, wall and ceiling coverings within the condominium units.⁵⁵ Further experience suggested the need to expand upon the excluded coverage. In 1991, the pendulum swung back toward the center between the "bare wall" concept of 1963 and the full coverage approach of 1980. Effective April 1, 1992, in addition to floor, wall, and ceiling coverings, unit owners will become responsible for insuring electrical fixtures, appliances, air conditioning or heating equipment, water heaters and built-in cabinets contained within their units.⁵⁶ While it is clear that the amendment will not affect coverage in effect as of April 1, 1992, a determination must be made regarding the application of this legislation to condominiums created after October 1, 1979, if the condominium documents require the association to insure all improvements to the property.⁵⁷

9. Assessments and Liability; Lien and Priority; Interest Collection

a. *Collecting Assessments from Mortgagees*

A unit owner is liable for all assessments which come due while he is the unit owner, regardless of how title is acquired.⁵⁸ This includes owners who purchased at a judicial sale.⁵⁹ The grantee is jointly and severally liable with the grantor for all assessments left unpaid at the

1980).

54. FLA. STAT. § 718.111(9)(b) (1981).

55. See FLA. STAT. § 718.111(11)(b) (1991).

56. FLA. STAT. § 718.111(11)(b) (1991).

57. See *Pomponio v. The Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) (relating to re-retroactive statutes).

58. FLA. STAT. § 718.116(1)(a) (1991).

59. *Id.*

time title is transferred from grantor to grantee. This liability does not prejudice any right the grantee may have to recover from the grantor the assessments paid by the grantee⁶⁰—unless the acquirer of title is a first mortgagee.⁶¹ From inception of the condominium concept through April 1, 1992, first mortgagees have enjoyed a special status regarding payment of assessments. When the mortgagee of a first mortgage of record, or a purchaser at a public sale from the first mortgagee's foreclosure⁶² judgment or as a result of a deed in lieu of foreclosure, acquired title, the acquirer of title or his successors and assigns were not liable for assessments which became due prior to acquiring title. This privilege, coupled with the practice of delaying foreclosure until market conditions warranted, has created havoc within condominiums already experiencing tight financial conditions. Associations are often forced to carry delinquent units for years while waiting for the lender to foreclose. The condominium commission recommended that this privilege be abolished, thus placing lenders in the same shoes as all acquirers of title. But, the lender's lobby was successful in replacing the commission's recommendation with a compromise provision which does little to alleviate the problem.

For mortgages recorded after April 1, 1992, mortgagees who acquire title to the unit by foreclosure or by a deed in lieu of foreclosure are not liable for the share of common expenses or assessments which come due prior to taking title, as long as the mortgagee records its deed in lieu of foreclosure or files a foreclosure proceeding within six months after the last payment of principal or interest received by the mortgagee.⁶³ And in no event shall the mortgagee be liable for more than six months of the unit's unpaid common expenses of assessments accrued

60. *Id.*

61. FLA. STAT. § 718.116(7) (1991).

62. In amending section 718.116, the drafter deleted, in its entirety, the language of section 718.116(7) which addressed the rights of, not only a mortgagee of a first mortgage of record, but also a purchaser of a condominium unit at the public sale resulting from a first mortgagee's foreclosure. *See* 1991 Fla. Sess. Law Serv. 130 (deleting a portion of section 718.116(7)). The revised statute is silent as to the obligations of a purchaser from the first mortgagee's foreclosure. This has lead some to speculate that a foreclosure purchaser might be liable for unit assessments to the same extent as any other judicial purchaser. The drafter also inadvertently deleted the language which imposed upon all the unit owners the liability for sharing in the assessments eliminated by the mortgage foreclosure. *Id.*

63. FLA. STAT. § 718.116(1)(a) (1991). The sixth month period is extended for any period of time during which the mortgagee is precluded from initiating such procedures due to the bankruptcy laws. *Id.*

before the acquisition of the title to the unit by the mortgagee.⁶⁴

b. Application of Assessment Payments

In 1990, the Condominium Act was amended to establish a priority for applying payments against a unit owner's obligation.⁶⁵ Section 718.116(3) provided that "[a]ny payment received by an association shall be applied first to any interest accrued by the association, then to any administrative late fees, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment."⁶⁶ It was unclear what impact, if any, a restrictively-endorsed check would have on the statutorily-mandated process. The Act has now been amended to provide that the statutory priority shall control "notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment."⁶⁷

c. Lien Priorities—The "Super Lien"

There had been an on-going debate as to whether an association's lien, once recorded, relates back to the date of recording of the declaration of condominium, or the date on which it is actually filed in the public records.⁶⁸ The determination of whether the lien is effective from recording, or whether it relates back to the date of recording the declaration, affects the lien's priority in relation to other intervening liens, judgments or claims against a unit. To insure that an association's lien will remain superior to all but a first mortgagee of record, effective April 1, 1992, an association's lien will be effective from and shall relate back to April 1, 1992, or the date of the recording of the original declaration of condominium, whichever occurs last.⁶⁹

64. *Id.*

65. FLA. STAT. § 718.116(3) (Supp. 1990).

66. *Id.*

67. FLA. STAT. § 718.116(3) (1991).

68. See FLA. STAT. § 718.116(5)(a) (Supp. 1990). The association has a lien on each condominium parcel for any unpaid assessment with interest and for reasonable attorney's fees incurred by the association which are incidental to the collection of the assessment or enforcement of the lien. Prior to the 1991 amendments, the Act provided that the lien did not become effective until recorded in the public records of the county where the condominium is located. *Id.*; see *In re Maas*, 69 B.R. 245 (M.D. Fla. 1986); *Bessmer v. Gersten*, 381 So. 2d 1344 (Fla. 1980).

69. FLA. STAT. § 718.116(5)(a) (1991).

d. Attorney's Fees

The right to recover reasonable attorney's fees is extended to both lien foreclosure actions and an action to recover a money judgment for unpaid assessments.⁷⁰

10. Bingo/The "Sunrise Lakes" Amendment⁷¹

After Broward County's Bingo Administrator refused to renew the bingo license of several large condominiums, legislators came to their aid by introducing legislation which would permit condominium associations qualifying as exempt organizations under Section 528 of the Internal Revenue Code to conduct bingo games.⁷² As amended, the law mandated that associations conducting bingo games do so in accordance with section 849.093, Florida Statutes.⁷³ In addition, section 718.114 provided that the right to conduct bingo games was conditioned upon the return of all the gross receipts from such games to the players in the form of prizes.⁷⁴ In addition, the gross receipts of the games were not to be used for any purpose other than payment of prizes.⁷⁵ If, at the conclusion of play on any day, there remained proceeds which had not been paid out in prizes, the association was precluded from imposing any charge on the players at the next scheduled game until the previous proceeds were exhausted.⁷⁶ Further, any person involved in conducting the game had to be a resident of the particular community sponsoring the game.⁷⁷

Section 849.093(2)(a) allows a qualified organization to deduct

70. FLA. STAT. § 718.116(6)(a) (1991).

71. On October 1, 1991, Circuit Judge George Reynolds, III, in the circuit court for the Second Judicial Circuit in Leon County, issued a temporary injunction in the case of Largo Veterans Council v. Department of Business Regulation, Case No. 91-3922. The court found that the public's interest would be served by enjoining the DBR from enforcing the criminal penalty and injunctive relief section of the Act. Subsequently, the Legislature, during a special session, eliminated the newly-adopted language and specifically readopted the former language, now modified to allow condominiums and other associations to conduct bingo games without a state license and without state taxation.

72. See FLA. STAT. § 718.114 (Supp. 1990).

73. FLA. STAT. §§ 718.114, 849.093 (Supp. 1990).

74. FLA. STAT. § 711.114 (Supp. 1990).

75. *Id.*

76. *Id.*

77. *Id.*

from the proceeds of bingo operations the actual business expenses which are directly related and essential to the operation, conduct and playing of bingo. While other associations were able to take advantage of these deductions, condominium associations were precluded from doing so. The 1991 amendments address this oversight. The amendment has been incorporated into the substantially revised text of section 849.093, governing all bingo operations within the state. These changes impose strict licensing, financial reporting and record-keeping requirements on associations conducting bingo operations. In so doing, the legislature has scrapped most of the changes to section 718.114 that were enacted in 1990.⁷⁸ The revised statute seemingly applies to all community associations, including mobile homeowner associations. As under the old version of the statute, in order to be "authorized" to conduct bingo games, an association must be tax exempt under either section 501 or section 528 of the Internal Revenue Code of 1986. However, even if authorized, the association must still obtain a license from the state. In addition, the association must have been in existence in the state for not less than three years prior to filing an application for a license.⁷⁹

The statute expressly preempts and supersedes all existing county and local ordinances on the subject (except zoning requirements) as of its effective date.⁸⁰ This means that condominium associations desiring to conduct bingo games must obtain a state license and comply with both the statute and supplemental regulations to be adopted by the Division of Pari-Mutuel Wagering, of the Department of Business Regulations. The new statute extensively regulates the actual conduct of games, including such matters as: game rules; qualification to work for the bingo game; equipment to be used; security; prize amounts; hours and frequency of operation; use of receipts and a prohibition against possessing or consuming alcoholic beverages in any room where bingo is held.⁸¹ Bingo games may only be conducted in facilities owned or leased full time by the association and are only open to association members, condominium residents and their guests.⁸²

78. See 1991 Fla. Sess. Law 103 (deleting certain provisions relating to the operation of bingo games).

79. See FLA. STAT. § 849.093 (1991).

80. *Id.*

81. *Id.*

82. *Id.*

11. Master Antenna Television Systems and Cable Television

The controversy surrounding condominium master cable or antenna television systems stems from the issue of whether unit owners can be compelled to pay for these services as a common expense. A look at an analogous situation which arose at Century Village with respect to bus transportation services may aid in understanding the controversy.

For most of the evolution of the Florida Condominium Act, the determination of what was chargeable as a common expense was fairly simple. As recited in the 1987 Act, common expenses included “[t]he expense of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, *and any other expense designated as a common expense by this Chapter, the declaration, the documents creating the condominium, or the by-laws.*”⁸³ Then came the Century Village bus case.⁸⁴ One of the Century Village condominium associations had contracted for bus transportation service for its members to areas outside the condominium property. The contract provided for the association to pay a lump sum for the service; the unit owners were not required to pay for individual trips. The association then assessed a pro rata portion of this lump sum as a common expense against all unit owners. Certain unit owners refused to pay the assessment and the association placed a lien on their units, ultimately pursuing a foreclosure claim, which the trial court granted.⁸⁵

On appeal, the Fourth District Court correctly noted that the condominium documents of Century Village did not provide for bus transportation to be chargeable as a common expense (the simple statement of which under the Act would have precluded charging the same as a common expense).⁸⁶ However, the court proceeded to muddy the waters regarding common expenses by boldly proclaiming, in direct contradiction of the Act, that:

In the instant case, the bus transportation service is not condominium property nor is it a recreational facility. As such, it does not fall within the realm of either 718.111 or 718.114, Florida Statutes

83. See FLA. STAT. § 718.115(1) (1987).

84. *Rothenberg v. Plymouth #5 Condominium Ass’n*, 511 So. 2d 651 (Fla. 4th Dist. Ct. App. 1987).

85. *Id.* at 651.

86. *Id.*

(1983), and therefore the association does not have the power to assess the cost for this service as a common expense against the unit owners.⁸⁷

As a result of this case, in 1988, an amendment was offered that continues to wreak havoc on the condominium concept. The Act already provided that any expense designated as a common expense by the Condominium Act, the declaration, or by-laws could be a common expense. But via the amendment, the legislators attempted to list those services which would constitute common expenses. This implied that a non-listed service would be precluded from being a common expense.⁸⁸ As amended in 1988, section 718.115(1) provided:

Common expenses include the expense of the operation, maintenance, repair, or replacement of the common elements, costs of carrying out the powers and duties of the association, and any other expense designated as common expense by this chapter, the declaration, the document creating the condominium or the by-laws. *Common expenses also include reasonable transportation services, insurance for directors and officers, road maintenance and operation expenses, in-house communications, and security services, which are reasonably related to the general benefit to the unit owners even if such expenses do not attach to the common elements or property of the condominium. 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 from the condominium documents or by-laws.*⁸⁹

Despite the rewording of the statute, condominium boards continued to wrestle with the question of whether they could enter into bulk cable television contracts, and charge the costs to unit owners as a common expense. On December 8, 1988, the Division, relying upon *Rothenberg v. Plymouth #5 Condominium Association*⁹⁰ and the 1988

87. *Id.* at 652.

88. See *Towerhouse Condominium, Inc. v. Millman*, 475 So. 2d 674 (Fla. 1985) (applying the rule *expressio unius est exclusio alterius*, meaning the mention of one thing implies the exclusion of another).

89. FLA. STAT. § 718.115(1) (Supp. 1988) (effective July 1, 1988) (emphasis added).

90. 511 So. 2d 651 (Fla. 4th Dist. Ct. App. 1987).

amendments to section 718.115(1), declared that cable television services only constitute a common expense in two instances. First, cable television services could be defined as a common expense in the condominium documents or by-laws by amendment. Second, the services were chargeable as a common expense if they were being provided at the time control of the board of administration of the association was transferred from the developer to the unit owners.

With support from cable television industry, legislation was introduced which bifurcated the delineation of common expense under section 718.115. Category one included:

the expense of the operation, maintenance, repair, replacement, or protection of the common elements and *association property*, costs of carrying out the powers and duties of the association, and any other expense, *whether or not included in the foregoing*, designated as common expenses by this chapter, the declaration, the documents creating the *association*, or the by-laws.⁹¹

Also included within this category was the following:

If approved by the board of administration, the cost of mangrove trimming⁹² and the cost of a master television antenna system or duly franchised cable television service obtained pursuant to a bulk contract are common expenses.⁹³

The second set of common expenses consisted of those categories created in 1988, which, as previously noted, must have either been provided from date of transition or as part of the condominium documents.

The condominium commission heard testimony from senior citizens on fixed incomes, widows and widowers, and individuals with sight and hearing impediments, all of whom opposed compulsory cable television. The commission recommended that the board's ability to obligate unit owners to cable television be limited to those situations in which the members approve the cable contract in advance by a majority of *all* voting interests. The commission further recommended that individuals with hearing and visual impediments be exempted from the

91. FLA. STAT. § 718.115(1)(a) (1991) (emphasis added) (it reflects additions to the section effective October 1, 1990).

92. See 1991 Fla. Sess. Law Serv. 103 (deleting the "mangrove trimming" provision from section 718.115).

93. FLA. STAT. § 718.115(1)(b) (1988).

cable television obligation.

Assisted by an effective lobbyist,⁹⁴ the cable television industry was successful in modifying the commission's recommendations to place the burden of cancellation of a cable contract on the unit owners, and to provide for a minimum term of two years.⁹⁵

As amended, the new law provides that the cost of a master antenna television system or duly franchised cable television service obtained pursuant to a bulk contract shall be deemed a common expense if provided for in the declaration, *or* if designated as such in a written contract between the board and company providing the service.⁹⁶ Any contract made by the board after April 1, 1992 for a community antenna system or duly franchised television service may be canceled by a majority of the voting interests *present at the next regular or special meeting of the association*.⁹⁷ Any member may make a motion to cancel the contract, but if the motion fails to obtain the required majority, the contract is deemed to be ratified for its full term.⁹⁸

Contracts for a master antenna television system or duly franchised cable television service shall provide for the right of any hearing-impaired or legally blind unit owner, who does not occupy the unit with a non-hearing-impaired or sighted person, to discontinue the service without incurring disconnect fees.⁹⁹

An interesting twist to the common expense equation occurs in situations when less than 100% of the units are connected to a master television antenna system or cable television. In situations of 100% participation, the expense is apportioned among the unit owners in accordance with the percentage or fraction of sharing common expenses contained in the documents. If less than 100%, everyone pays equally, regardless of the common expense formula in the documents.

12. Proxies

To the condominium unit owner activist, it is the proxy¹⁰⁰ which

94. Peter Dunbar, formerly a State Representative and Counsel to Florida State Governor Bob Martinez.

95. FLA. STAT. § 718.115(1)(b)1 (1991).

96. *Id.*

97. *Id.*, § 718.115(1)(b)1.

98. *Id.*

99. FLA. STAT. § 718.115(1)(b)2 (1991).

100. "Proxy" is defined as the "authorization given by one person to another so that the second person can act for the first" BLACK'S LAW DICTIONARY 1103-04

lies at the root of all condominium operational problems. For it is through the misuse of proxies that SCORN contends dishonest directors were able to perpetuate themselves in office and control all aspects of an association's operation.

Effective January 1, 1992, unit owners will not be able to vote by general proxy, except for a very limited number of purposes.¹⁰¹ Limited proxies¹⁰² shall be used for the following purposes:

- i. for votes taken to waive or reduce reserves.
- ii. for votes taken to amend the declaration pursuant to section 718.110, Florida Statutes.
- iii. for votes taken to amend the articles of incorporation or bylaws
- iv. for any other matter for which the Condominium Act requires or permits a vote of the current officers.¹⁰³

As previously noted, no proxy, limited or general, may be used in the election of board members.¹⁰⁴ To insure that unit owners have the benefit of knowing how their fiduciaries vote, the prohibition against proxy voting by directors is expanded to include a prohibition against the use of secret ballots.¹⁰⁵

(5th ed. 1979). As applied to the condominium setting, it refers to the granting of one's right to vote at an association meeting to a third party.

101. FLA. STAT. § 718.112(b)(2) (1991). General proxies may be used to establish a quorum (a quorum is the minimum voting interest which must be present to conduct association meetings). *Id.* In addition, general proxies are permitted to be used in other matters for which limited proxies are not required, and may also be used for non-substantive changes to items for which limited proxies are required and given. *Id.* This latter right is critical for it allows some corrective measures to be taken concerning proposed amendments, which otherwise would necessitate re-noticing of an amended item for a future meeting.

102. A limited proxy is the assignment of one's right to vote to a third party when the assignment is restricted to that of voting in a predetermined manner. An example of a limited proxy would be: "I hereby instruct my proxy to vote for the proposed amendment to Article X(2)(1)."

103. *Id.* Notwithstanding the apparent mandated use of limited proxies as evidenced by the phrase, "limited proxies shall be used," the clarifying statement at the end of the subsection, namely, that "notwithstanding the provisions of the subparagraph, unit owners may vote in person at unit owner meetings," would indicate the use is permitted, but not mandatory. *See id.*

104. *Id.*

105. FLA. STAT. § 718.111(1)(b) (1991).

13. Vote Required to Acquire, Convey or Lease Real Property

The vote required to acquire, convey, lease, or mortgage association property¹⁰⁶ is generally stated within the declaration of condominium. If the declaration fails to specify the procedures for acquiring, conveying, leasing or mortgaging association property, then approval of seventy-five percent of the total voting interests will be required.¹⁰⁷

14. Commingling

A condominium association is an entity which is responsible for the operation and management of the condominium property, as distinguished from "the condominium" which is the form of property ownership. An association may operate more than one condominium.¹⁰⁸ When an association operates more than one condominium, since there is no mutuality of ownership of the condominium(s), the association must maintain separate books and records for each condominium it operates.¹⁰⁹ Prior to the 1991 amendments, it had been common practice for an association operating more than one condominium to commingle the funds into a single operating account, so long as it maintained separate records. Also, management companies operating one or more condominiums often established accounts in the name of the management company for the benefit of the condominium. Reserve funds were often commingled with the operating funds.

However, effective April 1, 1992, all monies of a condominium must be maintained separately in the association's name.¹¹⁰ And, no manager or business entity required to be licensed under section 468.432,¹¹¹ and no agent, employee, officer or director of a condomin-

106. "Association property" is property, real and personal, owned, leased, or dedicated to the association, for the use and benefit of the members. FLA. STAT. § 718.103(3) (1991). Association property is not part of the "common elements," which denotes that part of the property submitted to condominium ownership which is an appurtenance to the condominium units. *See* FLA. STAT. § 718.103(12) (1991).

107. FLA. STAT. § 718.111(7) (1991).

108. FLA. STAT. § 718.111(1)(a) (1991).

109. *See* FLA. STAT. § 718.111(12)(a)11 (1991).

110. FLA. STAT. § 718.111(15) (1991). It is still unclear whether the requirement that the funds be separately maintained in the association's name will preclude the practice of commingling multiple condominium funds into a single association account, as long as separate records are maintained.

111. Companies and individuals performing management services for associa-

ium association, will be permitted to commingle any association funds with his funds or with the funds of any other condominium association or community association.¹¹²

15. Waiver of Audit Requirement by Developer-Controlled Association

A condominium association is required to deliver to each unit owner a complete financial report of actual receipts and expenditures for the previous twelve months, within sixty days following the end of the fiscal or calendar year.¹¹³ In lieu of this requirement, the Division may require the association to deliver a complete set of either compiled, reviewed or audited financial statements for the preceding fiscal year.¹¹⁴ However, the requirement of providing a complete compiled, reviewed and audited financial statement does not apply to associations for which a majority of the voting interests of the association present at a duly-called meeting¹¹⁵ vote to waive the requirement for a particular year.¹¹⁶

In order to preclude a developer-controlled association from being able to circumvent the legislative intent by continuously voting to waive the reporting requirements, the Act has been amended. The amendment provides that, in an association in which turnover of control has not occurred, the developer may vote to waive the audit requirement for the first two years of the operation of the association, after which,

tions operating more than 50 units or having a budget(s) in excess of \$100,000 must be licensed if the company or individual controls or disburses funds of a community association, prepares budgets or other financial documents for a community association, assists in the noticing or conducting of community association meetings, and coordinates maintenance for residential development and other day to day services involved with the operation of a community association. See FLA. STAT. § 468.431(2) (1989).

112. FLA. STAT. § 718.111(15) (1991).

113. FLA. STAT. § 718.111(13) (1991).

114. FLA. STAT. § 718.111(14) (1991).

115. *Id.* Meetings called pursuant to this section must be held prior to the end of the fiscal year, and the waiver is only effective for one year. *Id.*

116. Associations having annual receipts in excess of \$100,000 but less than \$200,000 shall at a minimum prepare and deliver compiled financial statements; associations having annual receipts of at least \$20,000 but less than \$400,000 shall at a minimum, prepare and deliver reviewed financial statements, and associations having annual receipts of \$400,000 or more shall prepare and deliver audited financial statements. Fla. Admin. Code Ann. r.7D-23.004 (1991). Section 718.111(14) and Rule 7D-23.004 do not apply to a condominium of 50 or fewer units.

waiver of an applicable audit requirement shall be by a majority of voting interests other than the developer.¹¹⁷ A strict interpretation of the amendment would limit its application to associations with annual receipts of \$400,000 or more because these are the only ones for which financial reports must be audited. An association voting to waive the financial reporting requirements of section 718.111(14) must still comply with section 718.111(13). In addition, provisions in a condominium declaration requiring a stricter reporting standard than that mandated by section 718.111(13) or (14) will control.

16. Application of Excess Special Assessments

Funds collected pursuant to a special assessment can only be used for the specific purpose or purposes for which the special assessment was levied.¹¹⁸ Up until the passage of the 1991 amendments, it was unclear whether any excess funds from the special assessment had to be refunded to the unit owner, or whether they could be placed in the general revenue accounts of the associations. The question has now been answered. Any excess funds remaining after completing the project for which the special assessment was levied may, at the discretion of the board, either be returned to the unit owners or applied as a credit toward future assessments.¹¹⁹

17. Contracts for Products and Services; In Writing; Bids; Exceptions

Related to the kickback amendment¹²⁰ are the contract and competitive bid requirements of section 718.3026. Designed to assure unit owners that the board is acting in their best interest, the provisions establish certain criteria for letting contracts for the purchase, lease, or rental of materials or equipment to be used by the association in accomplishing its purposes under the Act.¹²¹ It governs all contracts for the provision of services.¹²² A contract which will not be fully per-

117. FLA. STAT. § 718.111(14) (1991).

118. FLA. STAT. § 718.116(10) (1991).

119. *Id.*

120. *See* FLA. STAT. § 718.111(1)(a) (1991) ("No officer, director or manager . . . shall solicit, offer to accept, or accept anything or service exceeding \$100 . . .").

121. *See* FLA. STAT. § 718.3026(1) (1991).

122. *Id.*

formed within one year from its making,¹²³ or one which requires payment by the association in the aggregate amount of \$5,000 on behalf of any condominium operated by the association, must be in writing.¹²⁴ Additionally, all contracts entered into by the association on behalf of a condominium in the aggregate amount exceeding \$5,000, are subject to competitive bidding.¹²⁵

The statute is silent as to the number of bids required. But it specifically provides, despite the competitive bid requirement, that an association is not required to accept the lowest bid.¹²⁶ Also, an association may obtain needed products and services in an emergency without submitting to the competitive bid process.¹²⁷ In addition, competitive bids are not required in those situations in which the business entity with which the association desires to enter into a contract is the only source of supply within the county serving the association.¹²⁸ Exempted from the application of the section are contracts with attorneys and accountants.¹²⁹

It is important to remember that the provisions of section 718.3026 are in addition to those in section 718.3025. Parties providing maintenance or management services to a condominium must, in addition to complying with section 718.3026, also include within their contract the specified provisions mandated by section 718.3025.

18. Enforcing the Covenants Against Tenants and Invitees of a Unit Owner

The law is well-developed concerning the enforcement of covenants and restrictions against a violating unit owner. However, the ability to enforce the covenants against a violating tenant or guest of an owner is in doubt without following the circuitous process of suing the owner to compel him to enforce the restriction against his tenant. In an effort to expedite the process, thereby giving an association the authority to proceed directly against an owner's tenant or invitee, the legislature

123. Given the literal translation, the provision would apply to all contracts which will not be fully performed within one year of their execution as opposed to one year from the effective date, which is obviously not the intent.

124. FLA. STAT. § 718.3026 (1991).

125. *Id.*

126. *Id.*

127. FLA. STAT. § 718.3026(2)(b) (1991).

128. FLA. STAT. § 718.3026(2)(c) (1991).

129. FLA. STAT. § 718.2036(2)(a) (1991).

amended the Act to incorporate into the lease the provisions of the Act, as well as those of the declaration and by-laws.¹³⁰ In addition, the association is empowered to seek relief directly against any tenant or invitee violating the Act or the condominium documents.¹³¹

19. Unit Owner Enforcement

A unit owner sued by the association for an alleged violation of the covenants must pay his/her pro rata share of the common expense assessed to cover the cost of the litigation, even when the unit owner is determined by the courts not to be in violation of the covenants. To afford a unit owner who has prevailed in action brought by the association the opportunity to be "made whole," a provision was added to the Act to allow the unit owner the right to recover reasonable attorney's fees and such other amounts as determined by the court to be necessary to reimburse the unit owner for his share of the assessment levied by the association to fund its expenses of litigation.¹³² Of course, the unit owner will be obligated to pay his pro rata share of the assessment levied for said purpose.¹³³

20. Fines

One alternative means of enforcing minor violations of the covenants and restrictions is fining. The authority for fining was initially found in the not-for-profit corporation laws. Section 617.10(3), Florida Statutes, provided that the corporation might, in its by-laws, delegate to its board the power to assess fines in such sums as may be fixed, or the limits or occasions determined by said by-laws. The first reported use of the fining authority occurred at the Winston Tower 100 Condominium in North Dade County.¹³⁴ Mr. Rosenthal was fined by the association for repeatedly leaving the condominium parking garage through the entrance, rather than the exit. The trial court confirmed

130. FLA. STAT. § 718.303(1) (1991).

131. *Id.*

132. *Id.*

133. No unit owner may be excused from paying his pro rata share of the common expenses unless all unit owners are similarly excused. Although the unit owner cannot theoretically be made 100 percent whole, he will be able to recover most of the costs and expenses.

134. *Rosenthal v. Winston Tower 100 Ass'n, Inc.*, No. 75-23064 (SP Dade County Ct. 1976).

the association's authority to levy fines.¹³⁵ It wasn't until several years later that the ability to place a lien on the unit and foreclose the lien, in order to collect the fine, was resolved.

In *Elbadaramany v. Oceans Seven Condominium Association*,¹³⁶ the condominium association attempted to foreclose a lien it placed on the unit of Mr. Elbadaramany for parking his boat and boat trailer in the condominium parking lot. The Florida Fifth District Court of Appeal determined that a fine against a unit was not a common expense assessable against all units, and thus was not susceptible to being liened or foreclosed.¹³⁷ The *Elbadaramany* decision was codified by the legislature the same year, with the addition of fining authority to the enforcement provision of section 718.303.¹³⁸ The enactment specifically prohibited a fine from becoming a lien against a unit, and limited the maximum amount of a fine to \$50.¹³⁹ In addition, it required notice and an opportunity for a hearing to the unit owner.¹⁴⁰ Still unresolved was the question of whether a fine could be levied for each day of a recurring violation, and whether there was any limitation on the total amount of a fine. These questions were answered by the 1991 amendments. Effective April 1, 1992, the maximum amount of each fine was increased from \$50 to \$100; however, a ceiling of \$1,000 for a continuing violation was imposed.¹⁴¹

21. Frequently Asked Questions and Answers

A future condominium purchaser will be provided with a separate sheet entitled "Frequently asked Questions and Answers" by the association.¹⁴² The intent is to provide prospective purchasers with a summary of key questions affecting elements of ownership of their condominium units. Included in the question answer sheet must be information pertaining to the following: voting rights; unit use restrictions, including restrictions on the leasing of a unit; recreation rental, if applicable; assessments, including the basis for levying assessments.¹⁴³

135. *Id.*

136. 461 So. 2d 1001 (Fla. 5th Dist. Ct. App. 1984).

137. *Id.*

138. FLA. STAT. § 718.303(3) (1984) (effective October 1, 1984).

139. *Id.*

140. *Id.*

141. FLA. STAT. § 718.303(3) (1991).

142. FLA. STAT. § 718.504 (1991).

143. *Id.*

The question and answer sheet must also state and identify any court cases in which the association is currently a party of record and for which the association may face liability in excess of \$100,000.¹⁴⁴ The question and answer sheet shall be maintained as part of the association's official records.¹⁴⁵

22. Alternative Dispute Resolution; Voluntary Mediation; Mandatory Nonbinding Arbitration

While there have been many advocates for alternative means of resolving internal condominium disputes,¹⁴⁶ early legislative efforts¹⁴⁷ failed because they were neither mandatory nor binding. Furthermore, the absence of prevailing party legal fees provided little incentive for an association to utilize the voluntary arbitration procedures of the Division. With the enactment of the 1991 amendments, alternative dispute resolution is now mandatory within certain defined parameters,¹⁴⁸ and voluntary mediation is encouraged.¹⁴⁹ While parties to any dispute may voluntarily agree to binding arbitration, in the condominium setting, only disputes which fall within the specified provisions of the Act are subject to its "mandatory nonbinding arbitration" provisions.¹⁵⁰ The term "dispute," as defined in the Act, only covers disagreements between two or more parties which involve the authority of the board of directors, or arises under any law or association document requiring a owner to take action, or not take action regarding its unit.¹⁵¹ Also in-

144. *Id.*

145. FLA. STAT. § 718.111(12)(a)(14) (1991).

146. *See* *Martin v. Key Largo Kampground, Inc.*, 501 So. 2d 645 (Fla. 3d Dist. Ct. App. 1987) ("We remain hopeful, though not optimistic that the legislature will provide a forum to settle disputes of this nature without employing the full panoply of trial and appellate procedures.").

147. *See, e.g.*, FLA. STAT. § 718.1255 (1982); FLA. STAT. § 718.112(2)(L) (1986).

148. FLA. STAT. § 718.1255 (1991). The language of the Act was modeled after provisions of the Montgomery County, Maryland Community Association Dispute Resolution Law [Bill 44-89 adopted February 27, 1990]

149. *See* FLA. STAT. § 718.1255(2) (1991).

150. The term "mandatory non-binding arbitration" appears to be contradictory of itself. It is necessary due to the provision in the Florida Constitution which provides that "the courts shall be open to every person for redress of any injury . . ." *See* FLA. CONST. art 1, § 21. As a result, any mandatory alternative dispute resolution in process must afford the parties the right of review by the courts.

151. FLA. STAT. § 718.1255(1) (1991). *See* FLA. STAT. § 718.111(12)(c) 1991

cluded in the definition of a "dispute" is a disagreement between the parties involving the alteration or addition to a common area or element, the failure of the association to properly conduct meetings or elections, the failure to give proper notice of a meeting, and the failure to allow inspection of the books and records.¹⁵² While disagreements that primarily involve title to any unit or the common elements, warranties and the levy of and collection of assessments are specifically excluded from mandatory arbitration.¹⁵³ These are not the only disagreements excluded, other disputes not specifically covered by the provisions of the Act would be excluded as well.

Where mandatory arbitration applies, the parties must arbitrate their disputes prior to instituting a court action.¹⁵⁴ Arbitration is to be conducted by the Division.¹⁵⁵ Arbitrators must be members in good standing with the Florida Bar, and full-time employees of the Division.¹⁵⁶ The arbitration is to be conducted pursuant to rules of procedure promulgated by the Division.¹⁵⁷ The decision of the arbitrators shall be final if a complaint for a trial de novo is not filed within thirty days.¹⁵⁸ In an effort to discourage unnecessary delays in the enforcement of the arbitration decision, a party seeking a review of the arbitrator's decision will be assessed the other party's arbitration costs, court costs, and other reasonable costs, including attorney's fees, investigation expenses, and expenses for expert or other testimony or evidence incurred after the arbitration hearing, if the judgment upon the trial de novo is not more favorable than the arbitration decision.¹⁵⁹ If the judgment is more favorable, the party who filed a complaint for trial de novo and won will be entitled to court costs and attorney's fees.¹⁶⁰ Enforcement of a final decision of the arbitrator is through the

(an additional penalty for failure to provide records within five working days after receipt of a written request).

152. *Id.*

153. *Id.*

154. FLA. STAT. § 718.1255(4)(a) (1991).

155. FLA. STAT. § 718.1255(4) (1991).

156. *Id.*

157. FLA. STAT. § 718.1255(4) (1991). As of the writing of this article, the proposed Rules of the Division of Florida Land Sales, Condominiums and Mobile Homes for mandatory non-binding arbitration, Rule 7D-45.001 to .048, were still in the drafting stage.

158. FLA. STAT. § 718.1255(4)(c) (1991). In a trial de novo, the decision of the arbitrator is admissible in evidence. FLA. STAT. § 718.1255(4).

159. FLA. STAT. § 718.1255(4)(d) (1991).

160. *Id.*

circuit court in the jurisdiction where the arbitration took place.¹⁶¹

B. *Creation, Application*

1. *Jungle Den*

Given the alternatives of either submitting property to condominium ownership or avoiding the complex regulatory scheme by adopting a non-condominium format, perhaps a homeowner association, most developers will elect the latter. It is therefore particularly disconcerting for one making that election to be told that the condominium laws will be applied to their "non-condominium" property owners' association. The question of whether a property owners' association¹⁶² that is responsible for the operation and maintenance of non-condominium property is subject to the condominium laws was first addressed in *Palm Beach Leisureville Community Ass'n v. Raines*.¹⁶³ A companion case¹⁶⁴ decided the question of prevailing party legal fees. Given the fact that attorney's fees are only awarded when provided by statute or contract, the determination of whether the prevailing party in the initial *Leisureville* case was entitled to recovery of attorney's fees under section 718.303(1) became critical. In *Raines v. Palm Beach Leisureville Community Association, Inc.*,¹⁶⁵ the court answered in the negative. Several years later, the Florida Supreme Court was given the opportunity to revisit the question. The Third District Court of Appeal had determined that a homeowners' association which had membership comprised solely of condominium unit owners, which operated on assessments of unit owners, and whose function encompassed some maintenance and control of condominium property, was an "association" under the Condominium Act.¹⁶⁶ On appeal, the Florida Supreme Court

161. FLA. STAT. § 718.1255(4)(e) (1991). A petition of enforcement cannot be granted unless the time for appeal by the filing of a complaint for trial de novo has expired. *Id.*

162. Homeowners Association (HOA) or Master Association, as distinguished from a Statutory Condominium Association.

163. 398 So.2d 471 (Fla. 4th Dist. Ct. App. 1981).

164. *Raines v. Palm Beach Leisureville Community Ass'n, Inc.*, 413 So. 2d 30 (Fla. 1982).

165. *Id.*

166. *See Siegel v. Division of Florida Land Sales & Condominiums*, 453 So. 2d 414 (Fla. 3d Dist. Ct. App. 1984).

reversed¹⁶⁷ and reaffirmed its decision in *Raines*. The court held that a homeowners' association which *might* eventually be partially comprised of non-condominium dwellers, and presently had authority to impose assessments upon properties which were not condominium property within the scope of the Condominium Act, was not a Condominium Association.¹⁶⁸

The issue became clouded in 1988 after the Florida Fifth District Court of Appeal determined that a recreation association, organized to provide an entity for ownership, operation, and management of recreational facilities for the use of all present and future condominium unit owners, was in substance and foundation acting as a condominium association, and therefore, subject to the Condominium Act.¹⁶⁹ In an effort to resolve the controversy, the definition of "association" in the Condominium Act has been amended to include "any entity which operates or maintains other real property in which condominium unit owners have use rights, where unit owner membership in the association is composed exclusively of condominium unit owners¹⁷⁰ or their elected or appointed representatives and where membership in the association is a required condition of unit ownership."¹⁷¹

2. Undivided Share in the Common Elements

An essential component of every unit is that unit's proportion of fractional interest in the common elements. In a residential condominium, the proportional or fractional share of the ownership must be the same as the fractional or proportional share of the common expenses.¹⁷² Beyond said requirement, there has never been any guideline for establishing a uniform relationship among units based upon size or location. In fact, as long as ownership and sharing were the same, and as long as the relationship was disclosed, it could be totally arbitrary and/or purposely designed to benefit a particular unit at the expense of others. To preclude the potential for abuse,¹⁷³ the legislature amended the act so

167. Department of Business Regulation v. Siegel, 479 So. 2d 112 (Fla. 1985).

168. *Id.*

169. Downey v. Jungle Den Villas, 525 So. 2d 438 (Fla. 5th Dist. Ct. App. 1988).

170. See *Siegel*, 479 So. 2d 112 (applying a constituency test).

171. FLA. STAT. § 718.103(2) (1991).

172. FLA. STAT. § 718.104(4)(g) (1991).

173. For example, a developer building the entire penthouse floor for his personal unit might allocate the percentage of ownership in the common elements and propor-

that for condominiums created after April 1, 1992, the ownership share of the common elements assigned to each residential unit shall be based upon the total square footage of each residential unit in uniform relationship to the total square footage of each of the other residential units in the condominiums or on an equal fractional basis.¹⁷⁴

3. Ceiling Imposed on Vote Requirement to Approve Amendments to the Declaration

Drafters of condominium documents have traditionally retained the ability to permanently control development concepts by imposing severe limitations on the ability of a condominium to amend its declaration of condominium without the written consent of every unit owner. For example, a developer selling to foreign investors could insure the purchasers of their long term ability to lease their units by restricting the right to prohibit leases without the consent of every owner. For condominiums created after April 1, 1991, the right to impose long term controls will be significantly diminished. Except for the right to continue to require 100% consent in order to materially alter or modify the appurtenances¹⁷⁵ to a unit, or create a time share unit,¹⁷⁶ no declaration recorded after April 1, 1992 shall require that amendments be approved by more than four-fifths of the voting interests.¹⁷⁷ The right of the developer to unilaterally amend the condominium documents without the consent of unit owners will be limited to certain specific situations.¹⁷⁸ In addition to the imposition of a ceiling, there is now a floor. The minimal threshold for approving amendments for condominiums recorded after April 1, 1992, is a majority of the total voting interest.¹⁷⁹

Requiring the consent of mortgagees to an amendment to the declaration for declarations recorded after April 1, 1992, will similarly be limited to amendments materially affecting the rights or interests of the

tional sharing in the common expenses at a nominal level, shifting the operational burden for his unit to the other unit owners.

174. FLA. STAT. § 718.104(4)(f) (1991).

175. FLA. STAT. § 718.110(4) (1991).

176. FLA. STAT. § 718.110(8) (1991).

177. FLA. STAT. § 718.110(1)(a) (1991).

178. FLA. STAT. § 718.110(2) (1991). This limitation does not apply to time share condominiums. *Id.*

179. FLA. STAT. § 718.110(4) (1991).

mortgagees.¹⁸⁰

4. Developer Maintenance Guarantee

A condominium developer may elect to guarantee the operating budget for a stated period of time, in lieu of paying assessments for developer-owned units.¹⁸¹ There has been an on-going controversy concerning the developer's right to extend the guarantee period without the consent of the unit owners. After April 1, 1992, the guarantee may provide that after the initial stated period, the developer has an option to extend the guarantee for one or more additional stated periods.¹⁸²

5. Transfer of Association Control

In the early years of condominiums, developers were able to maintain perpetual control over the operation of condominium communities through the use of devices such as long-term sweetheart management contracts or by reserving the right in the condominium documents to select or manage the association board. Among the first rights afforded unit owners during an era of consumer reforms was the right at a specified time to have representation on the board and, ultimately, to have the right to control the board.¹⁸³ These rights were tied to closing on a given number of condominium sales.¹⁸⁴ An economic downturn could leave a developer holding a large inventory of units and thus ensure virtually perpetual control. Provisions designed to force transition when the developer was no longer building or selling¹⁸⁵ did not alleviate the

180. FLA. STAT. § 718.110(11) (1991).

181. FLA. STAT. § 718.116(9)(a)2 (1991). A developer guaranteeing the budget must obligate itself to pay any amount of common expenses incurred during the guarantee period that is not covered by the assessments receivable from other unit owners. *Id.*

182. *Id.*

183. See FLA. STAT. § 711.66 (1974) (effective October 1, 1974).

184. Unit owners were entitled to elect a majority of the members of the board three years after seventy-five percent of the units that would be operated ultimately by the association were conveyed to purchasers; or, three months after ninety percent of the units that would be operated ultimately by the association were being conveyed to purchasers. See FLA. STAT. § 711.66(1) (1974) (effective October 1, 1974).

185. Developers were compelled to turn over control when all units were completed but some were no longer being offered for sale in the ordinary course of business. See FLA. STAT. § 711.66(1) (1974); see also FLA. STAT. § 718.301(1)(d) (1977) (providing for control when a developer is no longer constructing units).

problem. To insure the right of unit owners to ultimately take control of their associations, the Act has again been amended. Established is an outside turnover time requirement of seven years after recordation of the declaration of condominium for associations operating a single condominium, or seven years from recordation of the declaration of the first condominium it operates for an association operating more than one condominium.¹⁸⁶ In the case of a phase condominium, the time requirement is seven years after recordation of the declaration creating the initial phase.¹⁸⁷

Following transition, the developer, at the developer's expense, is obligated to turn over to the association the financial records of the association, reviewed by an independent certified public accountant.¹⁸⁸ The scope of the report is clarified by the 1991 amendments. It is now mandated that the financial records be audited for the period from the incorporation of the association or from the period covered by the last audit.¹⁸⁹

6. Warranties

The duty owed by a design professional to the ultimate purchaser of a condominium unit and the association was thought to have been well settled.¹⁹⁰ However, the question as to the liability of a design professional for negligence in design was clouded by the holding of the Second District Court of Appeal in *Seibert, AIA, Architect & Planner, P.A. v. Bayport Beach & Tennis Club Ass'n*.¹⁹¹ In order to resolve any doubt, the Florida Legislature amended section 718.203 to specifically add design professionals, architects and engineers to the list of those who warrant the fitness of their work in the construction of condominium buildings.¹⁹²

186. FLA. STAT. § 718.301(1)(e) (1991); a proposed division rule has construed this amendment as having prospective application only. It would apply to condominiums created after April 1, 1992. FLA. ADMIN. CODE ANN. r.7D-23.003(11) (proposed).

187. *Id.*

188. FLA. STAT. § 718.301(4)(c) (1991).

189. *Id.*

190. *See Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So. 2d 689 (Fla. 2d Dist. Ct. App. 1979).

191. 573 So. 2d 889 (Fla. 2d Dist. Ct. App. 1990).

192. FLA. STAT. § 718.203(2) (1991).

7. Leasehold Condominiums

The right to declare leasehold estates to condominiums was clarified in 1976 with the enactment of section 718.401. This section provides that a condominium could be created on lands held by a developer under lease, if, on the date the first unit is conveyed by the developer to a bona fide purchaser, the lease has an unexpired term of at least 50 years.¹⁹³ The 1991 amendments allow for the creation of commercial condominiums and time-share condominiums on leaseholds with unexpired terms of 30 years.¹⁹⁴

8. Powers and Duties of Division of Florida Land Sales, Condominiums and Mobile Homes

There was little to compel a recalcitrant officer or director of a condominium association to follow the strict mandates of the Act. Notwithstanding the pronouncement within the Act that the officers and directors have a fiduciary relationship to the unit owners,¹⁹⁵ a director was not personally liable for monetary damages to the corporation or any other person for any statement, vote, decision, or failure to act, regarding corporate management or policy, unless the director breached or failed to perform his duties as a director, and this breach or failure to perform constituted a violation of criminal law or was a transaction for which the director derived an improper personal benefit.¹⁹⁶ Although the Division had the authority to institute enforcement proceedings against an association violating the Act,¹⁹⁷ and assess a civil penalty for the violation,¹⁹⁸ the parties ultimately responsible to pay for the violation were the unit owners. As amended, effective April 1, 1991, the Act now allows the Division to seek enforcement directly against an officer or director, issue a cease and desist order directly against an officer or director, and/or impose a civil penalty directly

193. FLA. STAT. § 718.401 (1977).

194. FLA. STAT. § 718.401(1) (1991).

195. See FLA. STAT. § 718.111(1)(a) (1991). This language first appeared in the Act in 1974 in response to the lobby efforts of condominium activist David Osterer. See FLA. STAT. § 711.12 (1974).

196. See FLA. STAT. § 617.0831 (Supp. 1990). A director appointed by a developer to the board of directors of a condominium or cooperative association are not extended this protection. *Id.*

197. FLA. STAT. § 718.501(1)(d) (Supp. 1990).

198. FLA. STAT. § 718.501(1)(d)4 (Supp. 1990).

against an officer or director violating provisions of the Act.¹⁹⁹ The condominium commission recommended that the association be precluded from indemnifying the violating officer or director. However, this recommendation was not adopted by the legislature.

An important new tool in the Division's arsenal is the right of the Division to conduct random investigations of associations.²⁰⁰ Such investigations may be instituted without reasonable cause to suspect that a violation of the rules has occurred.²⁰¹ After giving an association twenty days advance written notice, the Division may review the financial operations and other operational aspects of the association. If a review reveals evidence of irregularity, the Division may perform a compliance audit.²⁰² If upon completion of the audit, a violation of statute or rule is determined to exist, the Division may recover the fees and costs of the audit from the association regardless of whether the violations are voluntarily reconciled by the association. At the conclusion of its investigation the Division shall give the association a reasonable opportunity to cure any operational deficiency. If the association agrees to do so, no civil penalty will be levied for a non-recurring violation.²⁰³

To assist condominium owners and the directors in understanding their rights and responsibilities, the Division is mandated to provide training programs.²⁰⁴ To insure unit owners access to the Division, it is statutorily-mandated that a toll-free number be provided.²⁰⁵

To pay for all these additional services, the annual fee paid by each unit increases from \$1 to \$4 for a period of two years. Thereafter, the fee shall be \$3 per unit.²⁰⁶

199. FLA. STAT. §§ 718.501(1)(d)(2), (4) (1991). H.B. 841 being considered by the 1992 Legislature defines "willfully and knowingly" to mean the division informed the officer or board member that his action or intended action violated the law and that the board member refuses to comply with the requirement.

200. FLA. STAT. § 718.501(1)(k) (1991). H.B. 841 being considered by the Florida Legislature would repeal this provision.

201. *Id.* Critics of this provision question the right of any agency to appear on private property without probable cause. Some equate the Division's new authority to that enjoyed by the KGB in pre-detente Russia.

202. *Id.*

203. *Id.*

204. FLA. STAT. § 718.501(1)(l) (1991).

205. FLA. STAT. § 718.501(1)(m) (1991).

206. FLA. STAT. § 718.501(2)(a) (1991).

9. Non-Developer Disclosure

In an effort to afford all prospective condominium owners an opportunity to learn of their rights and responsibilities as condominium owners prior to being obligated to purchase, the buyer must receive at the seller's expense a current copy of the declaration of condominium, articles of incorporation, by-laws and rules and regulations, as well as the "Question and Answer Sheet"²⁰⁷ required by the Act.²⁰⁸ The buyer has the right to unilaterally void the contract within seven days of the receipt by the buyer of the aforesaid documents.²⁰⁹ The seller may obtain a set of documents from the Association.²¹⁰

10. Ombudsman²¹¹

In an effort to assist condominium unit owners seeking Division assistance in avoiding bureaucratic entanglements, an office of the Condominium Ombudsman is created.²¹² The ombudsman will act as a liaison between the Division and unit owners, assisting the unit owner when necessary in the preparation and filing of a complaint to be investigated by the Division.²¹³ In addition, the ombudsman is granted such powers as are necessary to carry out the duties of his office,²¹⁴ including but not limited to having access to and use of all files and records of

207. See FLA. STAT. § 718.504 (1991) (requiring a page entitled "Frequently Asked Questions and Answers," in the format required by the Division).

208. FLA. STAT. § 718.503(2)(b)1 (1991). This provision only applies to resale of a residential unit by a unit owner who is not a developer.

209. *Id.*

210. See FLA. STAT. § 718.111(15) (1991) (the association may charge its actual costs for preparing and furnishing these documents to those requesting same).

211. H.B. 841 being considered by the Florida Legislature may repeal this provision.

212. FLA. STAT. § 718.5015(1) (1991). The Ombudsman, who must be an attorney licensed to practice in Florida, will be appointed by and serve at the pleasure of the Joint Legislative Auditing Committee. FLA. STAT. § 718.5015(2) (1991). Although the Ombudsman's principal office will be in Leon County on the premises of the Division, the Ombudsman is to be independent of the Division. FLA. STAT. § 718.5015(1) (1991). The Ombudsman and his/her staff are prohibited from political involvements. FLA. STAT. § 718.5015(2) (1991).

213. The Condominium Study Commission considered and rejected a proposal which would have provided legal assistance to unit owners filing complaints with the Division.

214. FLA. STAT. § 718.5016 (1991).

the Division.²¹⁵ The ombudsman is also granted the power to prepare reports and make recommendations, prepare legislation, and propose orders to the Division, the Governor, the Advisory Council on Condominiums, the President of the Senate, and the Speaker of the House of Representatives on any matter within the Division's jurisdiction.²¹⁶

11. Advisory Council on Condominiums

A seven-member Advisory Council on Condominiums was created as a vehicle for receiving input from the public regarding issues of concern and recommendations for changes to the Condominium law.²¹⁷ In addition, the Advisory Council is given the responsibility for reviewing, evaluating and advising the Division concerning the revision and adoption of rules, as well as recommending improvements, if needed, to the Division education program.²¹⁸

C. *Miscellaneous*

In an effort to conform the definition of a "time share estate" within the Condominium Act to that used in the Time Share Act,²¹⁹ section 718.103(22) was rewritten to provide that a "time share estate" means any interest in a unit under which the exclusive right of use, possession or occupancy of the unit circulates among the various purchasers of a time share plan pursuant to chapter 721 on a recurring basis for a period of time.²²⁰

IV. CONCLUSION

The beauty of our laws is their ability to change to meet the needs of society. As new concepts have been coupled with the condominium

215. FLA. STAT. § 718.5016(1) (1991).

216. FLA. STAT. § 718.5016(2) (1991).

217. FLA. STAT. § 718.5019(1) (1991). Two members are to be appointed by the Speaker of the House, two appointed by the President of the Senate, and three appointed by the Governor. *Id.* At least one appointee must represent time share condominiums. *Id.* To insure continuity on the Board, a staggered appointment will be effectuated by having one appointee of the Governor, the Speaker and President serve one year terms, while the others serve a two year term. *Id.*

218. FLA. STAT. § 718.5019(2) (1991).

219. 1990 Fla. Laws. ch. 721.

220. FLA. STAT. § 718.103(22) (1991).

format, as our experiences have expanded, and as court interpretations have suggested the need, new legislation has been added to address operational problems and new areas of potential abuse. Legislation conceived twenty-eight years ago to recognize the condominium concept of property ownership has grown into a body of law governing almost every aspect of communal living. The result is a mechanism designed to insure and protect the viability of the condominium concept.

Up From *Carpenter*: Undue Influence in Will Contests

Judge John E. Fennelly*

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I. INTRODUCTION

Florida's law on undue influence in testamentary matters, like Caesar's Gaul, may be divided into three historical phases. In the first phase, Florida courts developed what might be called a totality of the circumstances test to determine the presence of undue influence exercised upon a testator. In the second phase, a burden-shifting evidentiary presumption was developed. The third phase, that began with the landmark *Carpenter*¹ case, saw a marked, fundamental change in the significance accorded the presumption of undue influence developed in the second phase. This article will trace the development of Florida's law of undue influence and examine the possible effect of Florida's evidence code on the strength of presumptions. Finally, this article will suggest that the *Carpenter* presumption has occupied too central a role in undue influence litigation and that both the Bench and Bar should reexamine the approach to undue influence developed in the first phase.

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1. *In re Estate of Carpenter*, 253 So. 2d 697 (Fla. 1971).

II. THE INITIAL PHASE

Florida courts initially developed a fact-specific test to determine the presence of undue influence. The 1919 case of *Newman v. Smith*² is illustrative of this approach. In *Newman*, the testator, shortly before his death, executed a will that left all his property to his second wife and disinherited his only child, a daughter.³ The facts of the case indicated that a prior will provided for an equal division of the estate between the daughter and the stepmother.⁴ Moreover, the testator had on numerous occasions expressed an intention to provide for his daughter.⁵ There was also considerable medical evidence concerning his mental capacity insofar as it related to his susceptibility to the influence of others.⁶ Additional evidence suggested that the stepmother, during the father's last illness and hospitalization, attempted to prevent the daughter from seeing her father.⁷ Finally, the evidence revealed a close, affectionate relationship between the daughter and the father,⁸ as contrasted with the less than cordial relations between the decedent and the stepmother.⁹ This antipathy also extended to the stepmother's family.¹⁰

The *Newman* court initially defined undue influence as "over-persuasion, coercion, or force that destroys or hampers the free agency and willpower of the testator."¹¹ The court also recognized that "undue influence can seldom, if ever, be established by direct evidence," but is often "conclusively shown by its results."¹² Undue influence, the court held, must "be proven when it appears the testator was of sound mind."¹³ The burden of proof can be satisfied if a "legitimate inference from the facts and circumstances in the case"¹⁴ supports such a conclusion. The *Newman* court found that the following factors in the case supported a finding of undue influence: 1) an entire change from for-

2. 82 So. 236 (Fla. 1918).

3. *Id.* at 237.

4. *Id.* at 238.

5. *Id.* at 242.

6. *Id.* at 242-45.

7. *Newman*, 82 So. at 249.

8. *Id.*

9. *Id.* at 242.

10. *Id.*

11. *Id.* at 246.

12. *Newman*, 82 So. at 251.

13. *Id.* at 246.

14. *Id.* at 251-57.

mer testamentary intentions; 2) an unnatural disposition of property; 3) the circumstances surrounding the execution of the will; 4) the susceptibility of the testator to influence; 5) the conduct of the stepmother in preventing the daughter from visiting her father; and 6) the poor relations between the wife and testator.¹⁵ The court found in this case what it characterized as "numerous indications of undue influence."¹⁶ *Newman* also illustrates the difficulty of the issue itself. The court's initial opinion which upheld the disputed will was withdrawn, a motion for rehearing granted,¹⁷ and a switch of one Justice resulted in a finding of undue influence.¹⁸

In a subsequent case, *Hamilton v. Morgan*,¹⁹ the decedent's children attacked their father's will on grounds of undue influence. That will, by its terms, virtually disinherited the children and left the bulk of the decedent's estate to his nephews.²⁰ The court once again stated that duly-executed wills should be given effect "unless it clearly appears that the free use of a sound mind by the testator was in fact prevented by deception, undue influence or other means . . . otherwise the right given by statute to dispose of property by will would be thwarted."²¹ The court, like the court in *Newman*, employed a fact-specific analysis that looked to "(1) the character of the transaction; (2) the mental condition of the parties; and (3) the relationship of the parties."²² The facts of the case revealed, in the court's words, that "family relations in the Hamilton home had long been turbulent and rent by domestic cyclones."²³ The decedent had been totally alienated from his children and had been ignored by them during the period shortly before his death when he was an invalid.²⁴ In the court's view, the evidence showed "conclusively a deliberate purpose on the part of the testator, actuated by resentment . . . to disinherit the contestants who had become estranged from and neglected him and to make the objects of his bounty those who had consoled and comforted him in the years of his

15. *Id.* at 251-52.

16. *Id.* at 251.

17. *Newman*, 82 So. at 246.

18. *Id.* at 252.

19. 112 So. 80 (Fla. 1927).

20. *Id.* at 82.

21. *Id.* at 81.

22. *Id.* at 83.

23. *Id.* at 81.

24. *Hamilton*, 112 So. at 81.

decline and misfortune.”²⁵ It is interesting that one of the beneficiary nephews was a physician and treated the decedent.²⁶ The court, however, apparently felt that this circumstance was of no consequence in view of the other evidence in the case. In addition, a close examination of the three-part test used by the court indicated that it was a shorthand method of categorizing evidence relevant to the issue of undue influence and the court used the categories in determining if undue influence was present.²⁷

In the 1932 case of *Gardiner v. Goertner*,²⁸ the court again employed a fact-specific approach that looked to the totality of the evidence to determine the presence of undue influence. The three-part test described in *Hamilton* was again used to categorize relevant evidence rather than as a presumption or litmus test. In *Gardiner*, the court reiterated the difficulties of proof by observing that “undue influence is usually not exercised openly in the presence of others so that it may be directly proved, hence it may be proved by indirect evidence of facts and circumstances from which it may be inferred.”²⁹ The court provided what may be characterized as relevant facts to be considered in determining the presence of undue influence.³⁰

The factors to be considered on the issue of undue influence included:

- (1) opportunity to exercise, (2) susceptibility of the testator, (3) a disposition to (by the beneficiary) exercise it, (4) a result that is indicative, (5) unnatural disposition, (6) persuasion, (7) solicitation (even if wife or husband), (8) other acts resulting from demonstrated undue influence, (9) apparent inequality or unreasonable testamentary disposition, (10) change in former testamentary dispositions, (11) interest or motive of a beneficiary, (12) circumstances attending execution of the will, (13) will being drawn by the beneficiary or at his direction, (14) will drawn by a beneficiary who stands in a confidential relation, and (15) the relations existing between the testator and the beneficiary.³¹

25. *Id.* at 82.

26. *Id.*

27. *Id.* at 83.

28. 149 So. 186 (Fla. 1933).

29. *Id.* at 190.

30. *Id.*

31. *Id.* at 190-91.

The *Gardiner* court, in recognizing this last factor, made reference to a presumption of undue influence where a confidential relationship exists between the beneficiary and the testator.³² A close reading of the case, however, supports a conclusion that this merely was dicta. In *Gardiner*, the supreme court adhered to and arguably refined the fact-specific totality of the circumstances test first used in *Hamilton*.

In an even later case, *In re Donnelly's Estate*,³³ the court again continued adherence to the fact-specific test. Adequate resolution, in the court's view, still required that:

A very wide range of testimony is permissible on the issue of undue influence. This is due to the fact that undue influence can seldom be shown except by circumstantial evidence. It results from the facts and circumstances and surroundings of the testator and his associations with the person or persons exercising the undue influence. For this reason, it is proper to consider the testator's dealings and associations with the beneficiaries; his habits, motives, feelings; his strength or weakness of character; his confidential family, social and business relations; the reasonableness or unreasonableness of the will; his mental and physical condition at the time the will was made; his manner and conduct; and generally every fact which will throw any light on the issue raised by the charge of undue influence.³⁴

As in *Gardiner*, the court referred to other states that utilized presumptions when a beneficiary stood in a confidential relationship to the testator.³⁵ The court did not, however, squarely address that issue.

In summary, the Florida Supreme Court initially used a fact-specific totality of the circumstances test to determine the presence of undue influence. This approach recognized the difficulties inherent in proving undue influence and allowed a searching inquiry into the character of the transaction, the mental condition of the testator and the relationship between the parties.³⁶ When using this test, a confidential relationship and active procurement of the will did not create a presumption of undue influence, but were used as relevant factors in the

32. *Id.* at 191.

33. *In re Donnelly's Estate*, 188 So. 108 (Fla. 1938).

34. *Id.* at 113.

35. *Id.* at 113-14.

36. *Id.*

evidentiary equation.³⁷ Thus, during this initial period, no presumption of undue influence based on a confidential relationship was developed or recognized.

III. THE PRESUMPTION EMERGES IN PHASE TWO

The second phase of Florida's law on undue influence began with the 1940 case of *In re Gottschalk's Estate*.³⁸ This case was the earliest case to squarely hold that a presumption of undue influence could arise when a specific factual pattern was demonstrated. In *Gottschalk*, a companion of the decedent attempted to obtain probate of a will in his favor.³⁹ The favorable will represented a total and radical change in the testatrix' previous will.⁴⁰ Not unsurprisingly, the new will omitted all family members, including her adopted daughter who had been the decedent's constant companion for almost 27 years.⁴¹ Chief Justice Terrell, writing for the court, observed:

When a total stranger moves into the home with an old lady, secures her confidence, and shows up after her death with a will to what she has that none of her lawful heirs know anything about, and which is surrounded by other suspicious circumstances, the burden is on him to show he came by it as the free voluntary act of the testatrix.⁴²

The *Gottschalk* court seemed to erect the presumption because "[t]he direct evidence in support of undue influence . . . is not as strong as such issues are sometimes supported."⁴³ The facts of the case would seem, however, to support the conclusion of undue influence even in the fact-specific approach used in the previously discussed cases. Factually, as indicated earlier, there was a complete change in testamentary scheme. The new disposition omitted the testatrix' "main sup-

37. For other Florida cases applying a fact-specific totality test, see *Marston v. Churchill*, 187 So. 762 (Fla. 1939); *Henson v. Deniston*, 169 So. 624 (Fla. 1936); *Theus v. Theus*, 161 So. 76 (Fla. 1935); *In re Starr's Estate*, 170 So. 620 (Fla. 1935); *Ziegler v. Brown*, 150 So. 608 (Fla. 1933).

38. 196 So. 844 (Fla. 1940).

39. *Id.*

40. *Id.* at 845.

41. *Id.*

42. *Id.* at 845 (emphasis added).

43. *Gottschalk*, 196 So. at 844.

port, natural beneficiary, and constant companion,"⁴⁴ and was, therefore, unnatural.⁴⁵ In the court's view, the later will was itself evidence of undue influence because it was executed secretly under suspicious circumstances.⁴⁶ The beneficiary's marriage proposal, in view of the wide disparity in ages, also was a factor of some significance in the court's opinion.⁴⁷ Finally, the court looked to the beneficiary's "ample opportunity to influence the testatrix."⁴⁸ Thus, it could quite convincingly be argued that considering the shorthand relationship of the parties, the character of the transaction and mental condition of the parties, the totality of the circumstances supported a finding of undue influence. The *Gottschalk* presumption itself, therefore, appeared to be fact specific and, unfortunately, provided no guidance with regard to which facts would raise the presumption.

Therefore, the *Gottschalk* presumption offered no guidance to trial courts or the Bar. Indeed, a broad reading of *Gottschalk* seems to support a conclusion that the fact-specific approach, if indicative of undue influence, was not elevated to a burden-shifting presumption. Unfortunately, the supreme court never addressed the questions raised by the *Gottschalk* decision. The court, instead of refining or defining the new presumption, was to render a decision at that time that would change the entire focus of Florida law on the issue of undue influence. That case, *In re Aldrich's Estate*,⁴⁹ will therefore require extended discussion with special emphasis on Chief Justice Brown's concurring opinion.

The court, in the first phase of *Aldrich*, affirmed per curiam, both the probate and circuit courts' finding of no undue influence.⁵⁰ This would have been unremarkable except for the court's next step. Affirmance, the court observed, was appropriate "even though the burden of proof on the issue of undue influence was technically on the proponents of the will, a confidential fiduciary relation of patient and his physician and his business manager existing between the testator and a leading beneficiary"⁵¹ Affirmance was appropriate due to record evidence that the beneficiaries "served the physical necessity of the testa-

44. *Id.* at 845.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Gottschalk*, 196 So. at 845.

49. 3 So. 2d 856 (Fla. 1941).

50. *Id.* at 857.

51. *Id.*

tor during a long illness before and after the will was executed and the testator had only collateral surviving relatives who had not rendered him service or attention."⁵² *Aldrich*, like *Gottschalk*, recognized a presumption of undue influence that appeared to be burden-shifting; i.e., requiring the proponent of the will to demonstrate the absence of undue influence.⁵³ The *Aldrich* presumption was, however, more clearly defined as it centered on a fiduciary benefitting from the relationship.⁵⁴ The court did not, unfortunately, stop there, but went on in a majority concurring opinion to sow seeds of confusion that would blossom until pruned by *Carpenter*.

The concurring opinion, by Chief Justice Brown, provided both a comprehensive discussion of prior case law on testamentary undue influence and a systematic exposition of an undue influence presumption based on a confidential relationship.⁵⁵

In his opinion, the Chief Justice conceded that prior Florida case law had not clearly recognized a presumption of undue influence based on possible abuse of a confidential relationship.⁵⁶ The *Gottschalk* presumption, to the Chief Justice, was "raised by a set of circumstances somewhat unusual" and not dispositive.⁵⁷ The Chief Justice also observed that prior case law had treated confidential relationships as only "a circumstance which may be considered on this issue."⁵⁸

From this historical vantage point, the Chief Justice then developed what he viewed as the correct test to support a presumption of testamentary undue influence.⁵⁹ That test was based on three primary sources: two treatises and Alabama case law.⁶⁰ A testamentary presumption of undue influence would arise from: 1) a confidential relationship between the testator and the beneficiary; 2) active procurement of the will by the beneficiary; and 3) substantial benefit to the beneficiary.⁶¹ The opinion also discussed the impact of the Probate

52. *Id.*

53. *Id.*

54. *Aldrich*, 3 So. 2d at 857.

55. *Id.*

56. *Id.* at 857-58.

57. *Id.* at 858.

58. *Id.*

59. *Aldrich*, 3 So. 2d at 861.

60. *Id.* at 858-61.

61. *Bancroft v. Otis*, 8 So. 286 (Ala. 1890); *Lyons v. Campbell*, 7 So. 250 (Ala. 1890); DANIEL H. REDFEARN, *WILLS AND ADMINISTRATION IN FLORIDA* (1933).

Code upon the proposed presumption.⁶² The applicable probate statute provided that:

In all proceedings contesting the validity of a purported will, . . . the burden of proof, in the first instance, shall be upon the proponent thereof to establish, prima facie, the formal execution and attestation thereof, whereupon the burden of proof shall shift to the contestant to establish the facts constituting the grounds upon which the probate of such purported will is opposed or revocation thereof is sought.⁶³

In his view, the presumption was consistent with the statute because it required the opponent of the will to establish the facts that supported the presumption itself.⁶⁴ The resulting presumption was, to Chief Justice Brown, "one of fact and not of law. Consequently this presumption may be rebutted by any evidence which shows that the testator acted freely and voluntarily in making his will and not under the coercion or the constraint of the person charged with undue influence."⁶⁵ Thus, the presumption did not in the strict sense effect the burden of proof, but rather operated on the burden of producing evidence which "rests throughout upon the party asserting the affirmative of the issue This burden of proof never shifts during the course of a trial"⁶⁶

The presumption could then be rebutted factually by an evidentiary showing that,

the testator had independent advice, or the opportunity to avail themselves of independent advice; or that the beneficiary was not present at the interview between the testator and the draftsman of the will, nor present at its execution; nor that the will as made was not an unnatural will, but such a will as the testator might have reasonably been expected to make under the circumstances or that the testator was of sound mind and discussed with his attorney or the draftsman of the will the amount and character of his property and the party or parties whom he wished to devise the said property to, and, their respective shares, in such a way as to show the testator was of sound mind and was able to and did, of his own

62. *Aldrich*, 3 So. 2d at 861.

63. *Id.* at 862.

64. *Id.*

65. *Aldrich*, 3 So. 2d at 858.

66. *Id.* at 861.

volition, designate the objects of his bounty, giving good reasons therefor, or that the disposition of his property as made by the will was a reasonable or natural one under all the circumstances of the situation.⁶⁷

Upon this showing the court could determine the issue "in light of all the evidence, as to whether the weight of the evidence did, or did not, show that the will was secured by the exercise of undue influence."⁶⁸

It would seem then that a fair reading of the concurring opinion would result in the conclusion that the proposed presumption was a Thayer or bursting bubble presumption.⁶⁹ The opinion apparently left intact the totality of the circumstances test utilized in earlier cases because, as indicated previously, rebuttal evidence required the court to determine the issue from all the evidence in the case and not from use of the presumption.⁷⁰ In terms of traditional Florida evidence law, the presumption, when unrebutted, compelled a finding of undue influence. If such evidence was introduced, however, the presumption vanished and the issue would be decided by a review of all the evidence.⁷¹

Subsequent decisions involving a presumption of undue influence based on a confidential relationship did not follow the approach outlined by the concurring opinion in *Aldrich*. The presumption was, as subsequent discussion will demonstrate, treated as one that shifted the burden of proof to the party who stood in a confidential relationship to the testator; i.e., as one of law not fact.⁷²

The 1941 case of *In re Eustis' Estate*⁷³ demonstrated *Aldrich's* immediate impact. In *Eustis*, the decedent's nephew, an attorney,

67. *Id.* at 861.

68. *Id.* at 862.

69. A Thayer or bursting bubble presumption bursts or vanishes from the case when contradictory evidence is introduced by the opponent. The underlying facts giving rise to the presumption will, however, still permit the fact-finder to draw a permissive inference. A Morgan or burden-shifting presumption places upon the adversary the burden of proving the non-existence of the presumed fact. This latter presumption can seriously change the course of a trial. See CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* 62-72 (2d ed. 1982); SPENCER A. GARD, *FLORIDA EVIDENCE* 768-80 (2d ed. 1980). The impact of Florida's Evidence Code on the presumption of undue influence that arises from benefit obtained by one in a relationship of trust and confidence to a decedent will be the subject of further discussion.

70. *Aldrich*, 3 So. 2d at 861.

71. *Id.* at 858.

72. *Id.*

73. 5 So. 2d 254 (Fla. 1941).

drafted the will and was a principal beneficiary.⁷⁴ The supreme court affirmed the trial court's findings of undue influence and observed, the "[l]egal presumptions that may have arisen against the appellee because of his fiduciary relations (attorney) to the testatrix were held by the lower court *to have been overcome* by the evidence as to the circumstances preceding and attendant upon the execution of the will"⁷⁵ Those circumstances included free intentions by the testatrix, communication of the contents to other persons before and after execution, a clear showing of competency of the decedent, and close relations between the testatrix and the nephew.⁷⁶ This language would support a conclusion that the presumption was indeed of the burden-shifting variety.

Aldrich and the presumption it created also played a prominent role in the 1945 case of *In re Peters' Estate*.⁷⁷ In *Peters*, the decedent's long-time physician was a principal beneficiary.⁷⁸ The evidence also established that the doctor, although present with others when the contents of the will was discussed by the testatrix, was not present when the will was drafted or executed.⁷⁹ The court approved the trial court's finding that mere presence when the will was discussed did not constitute active procurement.⁸⁰ Thus, the presumption did not arise. In addition, the court approved the trial court's determination that the facts were sufficient to *overcome* the presumption even if it was present.⁸¹ Those facts, in summary, were knowledge and approval of the contents by the decedent, disclosure of the will to her attorney, the relations existing between the decedent and her distant relatives, and the natural nature of the disposition.⁸²

*In re Palmer's Estate*⁸³ continued the *Aldrich* trend. The trial court in *Palmer* found factually that the proponent of the will occupied a confidential relationship with the decedent, actively participated in the drafting and execution of the will, and was a principal benefi-

74. *Id.*

75. *Id.* (emphasis added).

76. *Id.*

77. 20 So. 2d 487 (Fla. 1945).

78. *Id.* at 488.

79. *Id.* at 491-92.

80. *Id.* at 492.

81. *Id.* (emphasis added).

82. *Peters*, 20 So. 2d at 492. *Peters* is also notable because its definition of active procurement was later accepted by the *Carpenter* court.

83. *In re Palmer's Estate*, 48 So. 2d 732 (Fla. 1950).

ciary.⁸⁴ The trial court also determined that the testatrix' mental capacity was impaired and the beneficiary kept the disputed will exclusively in his possession until after the death of the testatrix.⁸⁵ Based on the foregoing factual determinations, the court determined a presumption of undue influence was established.⁸⁶ The presumption placed upon the will's proponent the burden "to produce evidence . . . to show that the will was executed freely and without . . . [undue] influence."⁸⁷ The Florida Supreme Court, citing Redfearn and *Peters*,⁸⁸ affirmed and found "such facts . . . would be universally held to give rise to a presumption that undue influence was executed on the testatrix . . . [and that] [i]t then *became the burden of the appellant* (proponent) *to prove* the absence of undue influence"⁸⁹

The post-*Aldrich* shift reflected in the previously described cases continued when district courts of appeal began to address the issue of undue influence. *In re Estate of Knight*,⁹⁰ a 1959 First District Court of Appeal decision, illustrated this development. In *Knight*, the trial court entered a summary judgment sustaining a disputed will.⁹¹ Evidence in the record supported a conclusion that the testator's brother who enjoyed a confidential relation with his deceased brother was both active in procuring the will and was a substantial beneficiary.⁹² In reversing, the First District cited *Aldrich* and *Palmer*, and held that under these facts, "a presumption of undue influence arises, and the burden rests upon him (the proponent) to *overcome* the presumption."⁹³ Thus, in the First District's view, "a summary judgment cannot be entered in favor of one who has the burden of *overcoming* the presumption of undue influence"⁹⁴

The Third District, in the 1962 case of *In re Estate of Reid*,⁹⁵

84. *Id.* at 733.

85. *Id.*

86. *Id.*

87. *Id.*

88. REDFEARN, *supra* note 61; *Peters*, 20 So. 2d 487.

89. *Palmer's*, 48 So. 2d at 733 (emphasis added).

90. 108 So. 2d 629, (Fla. 1st Dist. Ct. App. 1959).

91. *Id.* at 630.

92. *Id.*

93. *Id.* at 631 (emphasis added).

94. *Id.* (emphasis added). The *Knight* court also relied on the 1955 case on *Zinnser v. Gregory*, 77 So. 2d 611 (Fla. 1955). The court, in *Zinnser*, held that the presumption, while one of fact, did place upon the beneficiary the burden of showing undue influence was not exercised.

95. 138 So. 2d 342 (Fla. 3d Dist. Ct. App. 1962).

appeared to add an even heavier burden of proof upon a will proponent when the presumption was operative. In *Reid*, the decedent executed a will naming her attorney as a principal beneficiary.⁹⁶ The will was prepared and executed by the attorney's law partner.⁹⁷ The evidence also established that the attorney beneficiary socialized frequently with the decedent and took part in her business affairs.⁹⁸ He also received money from the decedent, who was many years his senior, for "escort" service.⁹⁹ Finally the evidence indicated the decedent viewed the attorney, to use a current phrase, as her significant other.¹⁰⁰

The Third District initially made reference to the presumption of undue influence created by three factors; a confidential relationship, active procurement, and a principal beneficiary. The court then seemingly expanded the presumption by observing "[a] much higher degree of proof is required to overcome an inference of undue influence where the testator is shown to have impaired mental powers or clouded intellect than where the testator is strong mentally and in good health."¹⁰¹ In the court's view, the evidence justified a conclusion that the foregoing situation was present and attendant upon the proffered will.¹⁰² Therefore, the testimony of Mr. Stafford denying the use of undue influence was apparently insufficient, as a matter of law, "to rebut the presumption . . . [created by] the confidential relationship"¹⁰³ This testimony was, in the court's view, "not enough to sustain the *great burden* the appellee had to carry to rebut the presumption of undue influence."¹⁰⁴

Florida decisions in this second phase expanded the presumption of undue influence, which was first defined in the *Aldrich* case. As indicated previously, the *Aldrich* court viewed the presumption as merely

96. *Id.* at 343.

97. *Id.*

98. *Id.* at 350.

99. *Id.*

100. *Reid*, 138 So. 2d at 350.

101. *Id.* at 349 (citing 57 AM. JUR. *Wills* § 356 (1948)).

102. *Id.*

103. *Id.*

104. *Id.* at 350-51 (emphasis added); see also *In re Estate of MacPhee*, 187 So. 2d 679 (Fla. 2d Dist. Ct. App. 1966). The presumption of undue influence from confidential relations, active procurement, and substantial benefit operates to place heavy burden on proponent to overcome presumption of undue influence. *In re Estate of Smith*, 212 So. 2d 74 (Fla. 4th Dist. Ct. App. 1968) (citing *Peters* and *MacPhee* with approval).

one that required production of evidence.¹⁰⁵ The presumption could be rebutted by any evidence that the testator acted freely. Evidence, if presented, would then require the court to decide the issue on all the evidence in the case. Thus, the presumption affected only the burden of producing evidence and allowed a party to make a prima facie case of undue influence. Thus, the burden of proof did not shift to the proponent of the will, but rather remained with the party seeking revocation at all times in the trial. These subsequent decisions, however, treated the presumption as one which shifted the burden of proof to the proponent of the will. This shift, unfortunately, occurred with little or no discussion and created an area of uncertainty in Florida law. It would remain for the *Carpenter* court to finally resolve the issue of the effect of the presumption on the burden of proof in will cases.¹⁰⁶

IV. CARPENTER AND ITS PHASE THREE PROGENY

Carpenter, decided in 1971, provided the first comprehensive discussion of the presumption of undue influence since *Aldrich*. Justice McCain, writing for the court, first pointed to the reason for the presumption by observing that,

the difficulty of obtaining direct proof in cases where undue influence is alleged [has permitted] will contestants to satisfy their burden initially by showing sufficient facts to raise a presumption of undue influence. If this is done, and the presumption remains un rebutted, the county judge is *required* to find undue influence and deny the will probate.¹⁰⁷

The opinion next provided a systematic and exhaustive definition of both confidential relationship and active procurement.¹⁰⁸

The opinion then turned to the effect of the presumption, once established, on the burden of proof.¹⁰⁹ The court initially observed that previous decisions "consistently held that the burden of proof shifts to

105. *Aldrich*, 3 So. 2d at 858.

106. *See Carpenter*, 253 So. 2d 697.

107. *Id.* at 701 (emphasis added). This is clearly cast in Thayer terms as it is based on access to evidence and not public policy grounds. The proponent is, on a common sense basis, the person in the best position to explain the reasons for the suspect disposition. This is entirely consistent with the concurrence in *Aldrich*.

108. *Id.* at 701-02.

109. *Id.* at 702.

the proponent when the presumption of undue influence arises."¹¹⁰ This effect was, in Justice McCain's view, at variance with the "general rule in respect to the effect of presumptions on the burden of proof"¹¹¹ To Justice McCain, a presumption that arises in the course of a case assists a party in discharging their particular burden of proof.¹¹² The adversary, in most instances, must then give an explanation so as to avoid the effect of the presumption.¹¹³ In this sense, most presumptions really affect the order of proof and not the burden of proof.¹¹⁴ In the case of a presumption that assists a plaintiff, the burden is on a defendant to produce evidence to rebut the effect of the presumption.¹¹⁵ The risk of non-persuasion; i.e., the strict burden of proof remains with the plaintiff throughout the trial.¹¹⁶

This, to the *Carpenter* court, created two types of presumptions; the general rule discussed above and the burden-shifting presumption applicable in will contest cases.¹¹⁷ In the court's view, this was incorrect on both policy and statutory grounds.¹¹⁸

From a policy standpoint, the court recognized the difficulty of proof of undue influence because "in will contests the testator is not available as a witness to tell his version of such dealings, that in fact usually the only person who is available to testify is the confidential adviser whose self-interest furnishes a motive for him to take advantage of his superior position."¹¹⁹ These considerations were not sufficient to justify burden-shifting presumption because "it is frequently as difficult to disprove undue influence as to prove it, the practical effect of shifting the burden of proof is to raise the presumption virtually to conclusive status and require a finding of undue influence"¹²⁰ This result was also undesirable because "much of the discretion of the trial judge to evaluate and weigh the evidence before him is lost and with it one of the most valuable services we call on trial judges to perform in

110. *Id.*

111. *Carpenter*, 253 So. 2d at 703.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Carpenter*, 253 So. 2d at 703.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 703-04.

non-jury cases."¹²¹

The court also felt this result was compelled by the intent of the applicable statute then in effect, Florida Statute section 732.31.¹²² That intent, in the court's view, required that "the burden of proof in will contests shall be on the contestant to establish the grounds constituting the facts upon which the probate of the purported will is opposed."¹²³

The practical effect of this approach was threefold:

First, the burden will be satisfied when the beneficiary comes forward with a reasonable explanation for his or her active role in the decedent's affairs. The precise nature of the explanation will vary depending on the facts giving rise to the presumption, and the sufficiency of the explanation to rebut the presumption will be for the county judge to determine subject to review by the appellate court. Second, when the burden is satisfied the presumption will vanish from the case and the county judge will be empowered to decide the case in accord with the greater weight of the evidence without regard to the presumption. Third, since the facts giving rise to the presumption are themselves evidence of undue influence, those facts will remain in the case and will support a permissible inference of undue influence, depending on the credibility and weight assigned by the trial judge to the rebuttal testimony.¹²⁴

Carpenter was, of course, a pre-Evidence Code case, but it is apparent that the court targeted the *Aldrich* presumption of undue influence as a Thayer or bursting bubble type of presumption. This is apparent from the effect of rebuttal testimony in a given case and from the basis the court gave for the presumption. The court, in reducing the effect given to *Aldrich*, was clearly concerned with the obvious difficulty of obtaining direct evidence of undue influence.¹²⁵ Thus, the presumption's basis is the superior knowledge of the beneficiary who occupied the confidential relationship, was active in the decedent's affairs, and who drew the benefit.¹²⁶ Viewed in this sense, the *Carpenter* court treated it as a device designed to facilitate determination of an action. In Evidence Code terms, the presumption in *Carpenter* did not involve public policy considerations at all. In rejecting a burden-shifting type

121. *Carpenter*, 253 So. 2d at 704.

122. *Id.* at 703-04.

123. *Id.*

124. *Id.* at 704.

125. *Id.* at 703-04.

126. *Carpenter*, 253 So. 2d at 704.

of presumption, the *Carpenter* court mentioned policy, but a close examination reveals that these factors such as access to proof are, to most commentators, ones designed to facilitate an action and are, thus, of the bursting bubble or Thayer type.¹²⁷

Carpenter, in effect, attempted to correct a perceived imbalance in Florida case law that had occurred after the presumption of testamentary undue influence was recognized and defined in *Aldrich*.¹²⁸ Viewed in this historical context, *Carpenter* is totally consistent with *Aldrich*. In addition, *Carpenter*, as *Aldrich*, recognized a permissible inference arising from the same three factors that gave rise to the presumption if contrary evidence was presented.¹²⁹ As indicated, the weight of the inference was again directed to the sound discretion of the trial court.¹³⁰

Taken as a whole, the *Carpenter* decision expresses a preference for a determination of undue influence from all the evidence in the case.¹³¹ The decision also can be viewed as one which places great reliance on the initial fact-finder.¹³² Viewed in this context, *Carpenter* marks, in my view, an attempted return to the initial approach discussed previously in this paper; the fact-specific test. This conclusion is further strengthened by the simple fact that no Florida case has ever rejected the approach approved and utilized in the pre-*Aldrich* cases.

In view of the *Carpenter* court's preference for a broadened role for the fact-finding process, one might have expected the confidential-relations presumption to occupy a less central role in subsequent undue influence decisions. This has not been the case. In addition, with one exception, appellate decisions have not addressed the impact of the Evidence Code on the role of the presumption in undue influence cases. The balance of the discussion will, therefore, be devoted to post-*Car-*

127. *Id.* at 703. Petitioners urged that policy considerations inherent in the difficulty of proof of undue influence dictate that the burden of proof should shift in this case. They note that in will cases the testator is not available as a witness to tell his version of such dealings. That, in fact, usually the only person who is available to testify is the confidential advisor whose self-interest furnishes a motive for him to take advantage of his superior position. This rationale, unlike the presumption of innocence or presumption of the validity of a second marriage, was centered on an access to evidence basis. Viewed in this context, it remained, to Justice McCain, a Thayer presumption.

128. *Id.* at 704.

129. *Id.*

130. *Id.*

131. *Carpenter*, 253 So. 2d at 704.

132. *Id.*

penter decisions and the Evidence Code as it relates to the presumption.

Clark v. Grimsley,¹³³ *In re Siddon's Estate*,¹³⁴ and *In re Estate of Van Aken*,¹³⁵ were early post-*Carpenter* cases involving the *Aldrich-Carpenter* presumption. In *Clark*, the testatrix, a 97-year-old woman confined to a nursing home, executed a will shortly before her death which left the bulk of her estate to one daughter. This disposition revoked a prior will that allowed the daughters to share equally.¹³⁶ There was also direct documentary evidence, consisting of letters written by the testatrix, of undue influence by the beneficiary daughter.¹³⁷ Additionally, the evidence clearly demonstrated the beneficiary daughter's involvement in the preparation and execution of the will.¹³⁸ Finally, the record demonstrated that the daughter, due to her dominant role in her mother's financial affairs, was in a "highly fiduciary capacity."¹³⁹ In the court's view, these unrebutted facts established a presumption of undue influence; thus, the court reversed and directed that the proffered will be denied probate.¹⁴⁰

The record in *Clark* also contained factors that under the pre-*Aldrich* fact-specific approach alone would have been probative of undue influence. Those factors included: the physical condition of the testatrix, the unnatural testamentary disposition, a change in testamentary scheme, solicitation of the challenged will by the beneficiary, persuasion by the beneficiary, will drawn for the beneficiary by a fiduciary, unequal disposition, circumstances surrounding execution, and finally the obvious interest of the beneficiary.¹⁴¹ Thus, apart from the presumption itself, the evidence pattern supported a finding of undue influence under the fact-specific approach. This aspect of the evidence, due to the emphasis placed on the presumption and its effect, received no discussion.

133. 270 So. 2d 53 (Fla. 1st Dist. Ct. App. 1972).

134. 297 So. 2d 54 (Fla. 3d Dist. Ct. App. 1974).

135. 281 So. 2d 917 (Fla. 2d Dist. Ct. App. 1973).

136. *Clark*, 270 So. 2d at 54.

137. *Id.* at 55.

138. *Id.* at 58.

139. *Id.*

140. *Id.* The *Clark* court, despite *Carpenter*, treated the presumption as burden shifting. In reaching this conclusion, the court relied on *Carpenter*, *Knight* and *Aldrich*. *Id.* at 58 n.10-12. *Knight*, discussed previously, so held; *Carpenter* clearly did not; *Aldrich*, when closely read, also did not. *Id.*

141. *Clark*, 270 So. 2d at 57.

In re Siddon's Estate provided yet another example of the continuing dominance of the presumption in probate litigation. The facts in *Siddons* established that the beneficiary-brother enjoyed a confidential relationship with his father, the decedent. The evidence also revealed that the beneficiary-brother's wife typed the will in question and secured the witnesses. Needless to say, the beneficiary-brother was a major devisee under the purported will.¹⁴²

The trial court, in its detailed findings, found the presumption operative but explained by the surrounding circumstances.¹⁴³ In affirming, the Third District Court of Appeal apparently¹⁴⁴ accepted the court's conclusion and affirmed.

A fact-specific analysis produces a less convincing picture. The following additional factors, apart from the presumption, were also present: an opportunity to exercise undue influence existed because the decedent lived with the beneficiary; an unnatural disposition occurred when the beneficiary profited at the expense of brothers and sisters; unusual circumstances surrounded the execution where the beneficiary both arranged for and obtained witnesses; and the will was drawn at the direction of the beneficiary who was in a confidential relationship.¹⁴⁵

The court found that the record also revealed that the decedent was cared for in his last illness by the beneficiary and his wife. Further, the decedent was described as a strong-willed, opinionated and self-determined character.¹⁴⁶ In addition, the evidence revealed that the testator-father retained the will and that all involved knew of the will's existence and its provisions.¹⁴⁷

Once again, however, the presumption occupied center stage to the exclusion of evidentiary factors that were indicative of possible undue influence apart from the presumption. In addition, those factors indicative of a reasonable explanation, while mentioned, do not receive a sys-

142. *Siddon's*, 297 So. 2d at 55.

143. *Id.* at 57.

144. The inexplicably characterized opinion states that the actions of the beneficiary and his wife in preparing the will and arranging for its execution are perfunctory and not active procurement. Therefore, in the Third District Court of Appeal's view, the presumption was not operative. As further discussion will demonstrate, under a fact-specific analysis, these facts were of great significance.

145. *Siddon's*, 297 So. 2d at 55-57.

146. *Id.* at 57.

147. *Id.* Under the fact-specific approach, these latter facts would, of course, be relevant on the issue of undue influence.

tematic analysis.

In re Estate of Van Aken, noted above, continued the post-*Carpenter* trend.¹⁴⁸ In *Van Aken*, the facts revealed that the beneficiary was active in the decedent's affairs, arranged for execution of the will, dictated its terms, obtained the attorney who drafted it and was, of course, the sole beneficiary.¹⁴⁹ The Second District Court of Appeal had no difficulty in determining that the confidential relation presumption was present and that evidence of family discord was an insufficient explanation.¹⁵⁰

What is again significant about the opinion is the lack of discussion concerning factors that would clearly support a conclusion of undue influence even if the presumption were not present. Those factors were abundant and consisted of: 1) opportunity—the beneficiary lived with the testator; 2) susceptibility—the testator was described as a sick, depressed man who had not recovered from the death of his wife; 3) unnatural disposition—his children were excluded; 4) change in former testamentary dispositions—children and grandchildren were beneficiaries under prior will; and 5) obvious motive of the beneficiary. Furthermore, the record reveals that after execution of the questioned will the beneficiary took possession of it.¹⁵¹ Under a fact-specific approach, even without the presumption, the evidence of undue influence was overwhelming.

The pattern has continued in more recent cases. The 1979 Third District case of *In re Estate of Robertson*¹⁵² provided yet another example. Both the trial and appellate courts' decisions centered on the presence or absence of the presumption. The facts in *Robertson* established that shortly before her death, the decedent executed a will that excluded two grandchildren and left the bulk of her estate to the remaining grandchild.¹⁵³ The evidence clearly established that while the beneficiary-granddaughter had a confidential relationship with dece-

148. See *In re Estate of Van Aken*, 281 So. 2d 917 (Fla. 2d Dist. Ct. App. 1973). The *Van Aken* court, as did the *Clark* court, also apparently misread *Carpenter*. The court described the presumption as placing the burden of "overcoming the presumption" of undue influence on the proponent of the will. *Id.* at 918.

149. *Id.* at 917-18.

150. *Id.* at 918.

151. *Id.*

152. *In re Estate of Robertson*, 372 So. 2d 1138 (Fla. 3d Dist. Ct. App. 1979); see also *In re Estate of Lomax*, 395 So. 2d 286 (Fla. 3d Dist. Ct. App. 1981).

153. *Robertson*, 372 So. 2d at 1139.

dent, there was no active procurement of the will by the beneficiary.¹⁵⁴ Therefore, both the trial and appellate court found the presumption inapplicable to the case.¹⁵⁵

Once again, salient factors indicative of undue influence received no extended analysis or discussion. Similarly, countervailing factors that contraindicated a finding of undue influence were not analyzed. In addition to a confidential relationship, there was evidence of a change in testamentary scheme, an unnatural disposition, and an opportunity to exercise undue influence. Moreover, the record is silent as to the decedent's relationship with excluded grandchildren, containing no explanation for exclusion of the other grandchildren.¹⁵⁶

The record also contained evidence showing that the will in question was the product of the decedent's own choice in that she selected the attorney, dictated its terms, and was fully competent. The questioned will was also publicly made and its execution was videotaped. Finally, the will was kept in the possession of the attorney and the beneficiary was unaware of its contents until the death of her grandmother.¹⁵⁷ The result in *Robertson* is undoubtedly correct, but once again demonstrated the continued dominance of the presumption.

Williamson v. Kirby,¹⁵⁸ a 1980 decision authored by Justice Grimes, also illustrated both the dominance of the presumption and the continuing difficulties that its proper application engenders. In *Williamson*, a 90-year-old woman conveyed, for no consideration, her home to a woman who stood in a confidential relationship to her.¹⁵⁹ The trial court found, in detailed findings, that the evidence demonstrated undue influence both from the presumption and as a whole.¹⁶⁰

The record amply demonstrated that the trial court applied a totality of the circumstances, fact-specific approach, in addition to the presumption. The evidence convincingly demonstrated that under both a totality test and a presumption approach, the trial court's conclusion was supported by competent substantial evidence.¹⁶¹

Justice Grimes, writing for the court, approved the trial court's finding that the presumption was applicable. Justice Grimes then set

154. *Id.* at 1141-42.

155. *Id.* at 1142.

156. *Id.* at 1141-42.

157. *Id.* at 1142.

158. 379 So. 2d 693 (Fla. 3d Dist. Ct. App. 1980).

159. *Id.* at 694.

160. *Id.* at 695.

161. *Id.*

forth his view as to the effect of the presumption on a given case by stating that

the beneficiary then has the burden of explaining his active involvement in the preparation of the will [or gift]. He does not have the burden of disproving undue influence. If the explanation is reasonable, the presumption vanishes and it becomes the court's responsibility to determine whether the contestant has established undue influence by the great weight of the evidence.¹⁶²

The opinion, in view of the trial court's specific findings on the evidence as a whole, arguably reweighed the evidence and substituted the view of the panel for the findings of the trial court. This conclusion is supported by the trial court's extensive factual findings apart from the presumption.

In addition, the opinion ignored the permissive inference of undue influence that remained when the presumption was rebutted. As indicated earlier in this discussion, *Carpenter* clearly permitted a permissive inference of undue influence to be drawn by the fact-finder even when the presumption is rebutted. *Williamson* would, then, appear both to misapply *Carpenter* and engage in unwarranted appellate fact-finding.¹⁶³

Three more recent decisions illustrated that the presumption continued its role as the prominent factor in probate litigation in which undue influence was an issue.

*Elson v. Vargas*¹⁶⁴ involved a housekeeper who was made sole beneficiary of her employer's estate.¹⁶⁵ The trial judge found factually that the *Aldrich-Carpenter* presumption was applicable, but that the beneficiary had demonstrated a reasonable explanation for involvement in the decedent's affairs.¹⁶⁶ In affirming, the Third District Court of Appeal noted that while this was a "close case,"¹⁶⁷ the trial court's finding of no undue influence, which was based on the housekeeper's explanation for her role in the decedent's affairs, was supported by record

162. *Id.*

163. *See also* *Allen v. Estate of Dutton*, 392 So. 2d 132, 135 (Fla. 5th Dist. Ct. App. 1981) ("When that happens, the presumption vanishes, and the trial court is left to decide the case in accordance with the greater weight of the evidence.").

164. 520 So. 2d 76 (Fla. 3d Dist. Ct. App. 1988).

165. *Id.* at 77.

166. *Id.* at 78.

167. *Id.*

evidence.¹⁶⁸

*Fogel v. Swann*¹⁶⁹ involved testamentary provisions and gifts made by the decedent to her sister and brother-in-law.¹⁷⁰ The will in question was prepared at the direction of the brother-in-law, who was the decedent's attorney. There was also record evidence that established that the will represented a change in testamentary scheme occurring shortly before her death.¹⁷¹ The Third District approved the trial court's factual determination that the close family relationship between the sister and the decedent provided an evidentiary basis for a determination that undue influence was not present.¹⁷²

In *Sun Bank v. Hogarth*,¹⁷³ the trial court found that the challenged will was the product of undue influence.¹⁷⁴ The record contained numerous indicia of undue influence apart from the presumption. These factors, applying a fact-specific approach, would have supported a conclusion of undue influence even absent the presumption. However, neither the trial court's nor the appellate court's opinions discussed this possibility; rather the case was decided on the basis of the presence and effect of the *Aldrich-Carpenter* presumption.¹⁷⁵

These latest cases demonstrated that the historical trend begun by *Aldrich* has continued to the present. The presumption, therefore, continues to dominate to the exclusion of other evidentiary factors. This over-emphasis has, in my view, stilted Florida case law on this issue and in some instances produced unfortunate results.

V. A CRITICAL LOOK AT *CARPENTER* AND THE CODE

Carpenter was, of course, decided prior to enactment of the Evidence Code. In view of Codal provisions governing presumptions, it is necessary to discuss the possible treatment that may be given to the presumption in the future. That issue remains an open question at this juncture. What follows, therefore, is an analysis of the *Carpenter* presumption from the Evidence Code perspective.

The Code provides for two types of rebuttable presumptions in

168. *Id.*

169. 523 So. 2d 1227 (Fla. 3d Dist. Ct. App. 1988).

170. *Id.* at 1228.

171. *Id.*

172. *Id.* at 1229-30.

173. 536 So. 2d 263 (Fla. 3d Dist. Ct. App. 1988).

174. *Id.* at 265.

175. *Id.* at 266-67.

civil cases. The first affects the burden of producing evidence and is designed to facilitate the determination of a proceeding. When un rebutted, it requires the fact-finder to find the presumed fact. If rebutted, however, the presumption vanishes from the case.¹⁷⁶ This type of presumption is described as a Thayer or bursting bubble presumption and, as indicated, operates in a given case so as to place upon the party best able to furnish it the burden of producing evidence to rebut the presumed fact.¹⁷⁷ Even after being rebutted, however, a bursting bubble or Thayer presumption permits the fact-finder to draw a permissive inference.

The second type of presumption, which by definition involves public policy considerations, operates in a much different manner.¹⁷⁸ The second type of presumption shifts the burden of proof to the party against whom the presumption operates. Under this type of presumption, the fact-finder must be convinced that the presumed fact does not exist.¹⁷⁹ The Code further provides that unless "otherwise provided by Statute, a presumption established primarily to facilitate the determination of the particular proceeding in which the presumption is applied rather than to implement public policy is a presumption affecting the burden of producing evidence."¹⁸⁰

Gard, noted previously, has described the operation and effect of Thayer presumptions in the following manner:

Presumptions which owe their existence only to facilitating the determination of the action actually can be expected to have very little to support them on the basis of strong probative value of the basic facts. Quite the opposite is true of those presumptions which rest on basic facts so strong as to promote a public policy principle arising from experience with human conduct.¹⁸¹

Gard then noted prophetically, "It will be up to the courts to sort out the presumptions"¹⁸² The Thayer presumption can be viewed as a utilitarian device while the Morgan presumption is one reflective

176. FLA. STAT. § 90.302(1) (1989).

177. See EHRHARDT, *supra* note 69, at § 302.1; GARD, *supra* note 69, at § 3:05.

178. FLA. STAT. § 90.302(2) (1989).

179. See EHRHARDT, *supra* note 69, at § 304.1; GARD, *supra* note 69, at §§ 3:01-:03.

180. FLA. STAT. § 90.303 (1989).

181. GARD, *supra* note 69, at § 3:05.

182. *Id.*

of societal values that require protection.

A close examination of *Carpenter* reveals that its author viewed the presumption of undue influence as a procedural utilitarian device. Justice McCain clearly indicated that a burden-shifting presumption would be an anomaly in Florida case law. He was also concerned that a policy presumption would be virtually un rebuttable. Finally, McCain saw the beneficiary accused of undue influence as the person usually uniquely situated to explain his role with the decedent and thus rebut the presumption.¹⁸³ This view was also consistent with the historical development of the presumption post-*Aldrich*. That development reflected that the presumption, without apparent explanation or analysis, underwent a metamorphosis from a procedural device to a statement of public policy; that is, from a utilitarian device to a doctrinal imperative.

To use a reverse flip, *Carpenter* viewed the presumption as a butterfly which became a caterpillar. This view is also consistent with the opinion's *Sotto Voce* major theme. That theme expresses a clear preference for comprehensive fact finding in contrast to decisions based on a rigid, inflexible and, in McCain's view, largely unwarranted legal device.¹⁸⁴

The statutory construction basis advanced in *Carpenter* for a Thayer-type presumption appears, in light of the Code today, to be more questionable. As noted by both Ehrhardt and Gard, the Code envisions a judicial determination of the basis and operation of presumptions. At least one post-Code case has attempted to classify the *Aldrich-Carpenter* presumption along lines envisioned by the Code.

Judge Glickstein, writing for a Fourth District panel, attempted to address the basis for the presumption of undue influence in the 1983 case of *In re Estate of Davis*.¹⁸⁵ In *Davis*, the panel held that on public policy grounds, "[t]he presumption [of undue influence] in this case was non-vanishing because, we believe, a strong social policy exists when the issue is the alleged exercise of undue influence by one enjoying, as here, a confidential relationship with a decedent."¹⁸⁶ Subsequently, the Fourth District Court of Appeal receded from *Davis* in a somewhat cryptic opinion which merely held the correct and applicable principles of law were announced in *Carpenter* and followed by the

183. *Carpenter*, 253 So. 2d at 703.

184. See generally *id.* at 702.

185. 428 So. 2d 774 (Fla. 4th Dist. Ct. App. 1983).

186. *Id.* at 776.

trial court.¹⁸⁷

It becomes necessary, therefore, to examine the presumption in view of the Evidence Code. *Carpenter*, in my opinion, clearly viewed the presumption as a proof facilitation device. This, in turn, is based on the common sense proposition that the beneficiary who enjoyed the relationship and procured the will is in the best position to explain those events and to give the reasonable explanation. Although *Carpenter* speaks somewhat in policy terms, the *Carpenter* decision as well as the *Aldrich* decision, rested on the notion that the beneficiary was in the best position to explain the circumstances of the bequest.¹⁸⁸

The public policy grounds supporting a burden-shifting presumption also appear obvious. The law abhors coercion and the basic public policy considerations must reject testamentary dispositions that are the result of coercion. Additionally, public policy considerations peculiar to a confidential relationship are also operative. It is well settled law that such a relationship imposes the highest duty on the dominant party in the relationship. These policy considerations would seem to dictate that, on policy grounds, the presumption of undue influence should operate to shift the burden of proof onto the party who stood in such a relationship to the decedent. This position is further buttressed by a factor somewhat unique to Florida, its large elderly population. Unfortunately, in many instances due to illness, death of a spouse, or isolation from extended families in their native states, elderly Floridians are vulnerable to improper influence in testamentary dispositions. Countervailing considerations do, however, exist.

The public policy of Florida has long supported the right of a person to freely devise his or her property in any way that person desires. A burden-shifting presumption possibly could be antithetical to that policy. The very breadth of *Carpenter's* definition of a confidential relationship and active procurement make the presumption a rather easy one to raise in a given case. Thus, the *Carpenter* court's concern with the presumption becoming virtually conclusive appears legitimate.

Finally, also militating against a burden-shifting presumption is

187. *In re Estate of Davis*, 462 So. 2d 12 (Fla. 4th Dist. Ct. App. 1984). Judge Glickstein's concurrence in *Davis I* provides an excellent and comprehensive discussion of the purpose and effect of presumptions in general and of the presumption of undue influence in particular. *Davis II* also appears in conflict with another Fourth District opinion also authored by Judge Glickstein, *Insurance Company of Pennsylvania v. Estate of Guzman*, 421 So. 2d 597 (Fla. 4th Dist. Ct. App. 1982). *Guzman* recognized the necessity of evaluating existing presumptions in light of the Code.

188. *See Carpenter*, 253 So. 2d at 703; *Aldrich*, 3 So. 2d at 856.

another sad reality of life: family estrangement. Not uncommonly, elderly people may for one reason or another become alienated from those who the law might regard as the natural objects of their bounty and turn to a particularly trusted friend or relative for assistance and support. This is particularly true in times of illness or disability. The foregoing would seem to be valid public policy considerations in opposition to a burden-shifting presumption. Thus, it could be argued that policy considerations are in rough equipoise. In such a situation, according to Gard, neither presumption should prevail.¹⁸⁹ In the context of this discussion, then, the Evidence Code may not resolve this issue. Resolution, in my view, lies with a proper reading of *Carpenter* and a return to the more comprehensive approach to fact finding that was employed in the pre-*Aldrich* and pre-*Carpenter* decisions.

The *Aldrich-Carpenter* presumption of undue influence has become a shibboleth in Florida law. As indicated, it has itself exercised undue influence over the Bench and the Bar. In this sense, *Carpenter* was profoundly correct. The subject presumption grew without analysis from a sound procedural device that permitted the fact-finder to draw a permissive conclusion based on experience to an evidentiary runaway freight train that obliterated the finely crafted decisions that were developed prior to the historical detour beginning with *Aldrich*.

Oliver Wendell Holmes observed that the distinctions of the law are founded on experience, not logic.¹⁹⁰ Experience in this case demonstrates that a case-specific approach provides the analytical format that *Carpenter* does not provide; i.e., what constitutes a reasonable explanation for a suspect devise. The fact-specific pre-*Aldrich* approach will also broaden the evidentiary equation in undue influence cases so as to focus on all relevant factors that should be considered in determining whether undue influence invalidates a testamentary disposition. It will also improve the accuracy of case-by-case determinations by putting more focus on the total evidence picture and less on a procedural device designed to facilitate the proceedings.

VI. CONCLUSION

The *Aldrich-Carpenter* presumption is an excellent procedural device that can assist the fact-finder in determining the issue of undue influence by requiring that the beneficiary who stood in a confidential

189. GARD, *supra* note 69, at § 3:55.

190. OLIVER WENDELL HOLMES, *THE COMMON LAW* (1949).

relationship to the decedent provide a reasonable explanation for the devise in question. The beneficiary is obviously in the best position to do so. At present, however, the presumption occupies too central a role in undue influence cases. To correct this imbalance, Florida courts should once again use the earlier fact-specific approach to determine if, apart from the presumption, undue influence exists in a given case. This would improve the accuracy of probate proceedings in which the issue of undue influence is present.

Notes and Comments

Alimony Modification: Awards Based on Ability to Pay Without Showing Increased Need

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I. INTRODUCTION

When a marriage is dissolved, and an absolute divorce is granted, all rights and duties based upon that marriage end—except for alimony.¹ This single marital obligation continues beyond divorce when

1. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 620 (1988). In its technical sense, "alimony" means nourishment or sustenance, and has for its sole object the provision of food, clothing, shelter, and other necessities for the wife. See *Fort v. Fort*, 90 So. 2d 313 (Fla. 1956); *Bredin v. Bredin*, 89 So. 2d 353 (Fla. 1956); *Floyd v. Floyd*, 108 So. 896 (Fla. 1926); see also 25 FLA. JUR. 2D *Family Law* § 433 (1981).

all other obligations have ceased.³

Historically, England and America have differed in their approaches to alimony and divorce. In England, the ecclesiastical courts only granted divorces *a mensa et thoro*, partial divorces, which authorized spouses to live apart, but did not free them from the marriage bond.³ The alimony awarded by these courts merely constituted recognition and enforcement of the husband's duty to support the wife which continued after judicial separation.⁴ In contrast, American petitions for absolute divorces are usually granted.⁵ Even though the United States still follows the English model for alimony, requiring one spouse to financially aid the other,⁶ changes in statutory and constitutional law, the influence of the women's rights movement, and the changes in the economic position of women have been reflected in new rules governing the support obligations of spouses.⁷ To facilitate the determination of

2. CLARK, *supra* note 1, at 642.

3. *Id.* at 619; *see also* 2 JOEL PRENTISS BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 857 (1891) (no court in England had jurisdiction to dissolve marriages until 1858).

4. CLARK, *supra* note 1, at 619; *see also* Killian v. Lawson, 387 So. 2d 960 (Fla. 1980) (a husband has a common law duty to support his wife); Floyd v. Floyd, 108 So. 896, 898 (Fla. 1926) ("Alimony is based on the common-law obligation of the husband to support the wife."); Davies v. Davies, 113 So. 2d 250 (Fla. 3d Dist. Ct. App. 1959) (money required to be paid by a man to his former wife for her sustenance derives from the legal duty to support his wife which he assumed when they married); 25 FLA. JUR. 2D *Family Law* § 433 (1981).

5. CLARK, *supra* note 1, at 620. However, the purpose for awarding alimony in an absolute divorce is less clear because a divorce acts to free two people from the marital bond. *Id.* In many instances, the final decree for a dissolution of marriage marks the beginning of one spouse's obligation to pay alimony to the other spouse. *Id.*

6. *Id.* at 619.

7. *See* Anderson v. Anderson, 333 So. 2d 484 (Fla. 3d Dist. Ct. App. 1976) (the horse and buggy days are over and women now have a place in the business community.); Sherman v. Sherman, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.) (Barkdull, C.J., dissenting), *review denied*, 282 So. 2d 877 (Fla. 1973). In 1975, 48.3% of married women in the 25-34 age group participated in the labor force. THE STATISTICAL ABSTRACT OF THE UNITED STATES 384 (1990). In 1988, that figure was 68.6%. *Id.* The corresponding figures for women who were either widowed, divorced or married (spouse absent) were 67.5% in 1975 and 76.3% in 1988. *Id.*

In fact, in Florida, the Dissolution of Marriage Act of 1971 expressly provided that "[i]n a proceeding for dissolution of marriage, the court may grant alimony to either party, . . . [and] [i]n determining a proper award, . . . [t]he court may consider any factor necessary to do equity and justice between the parties." FLA. STAT. § 61.08 (1971). In contrast, the Uniform Marriage and Divorce Act states:

The court may grant a maintenance order for either spouse only if it finds

who shall receive alimony and to what extent it should be awarded, alimony is divided into the following categories: 1) temporary alimony,⁸ 2) rehabilitative alimony,⁹ and 3) permanent alimony.¹⁰ However, only discussions which concern permanent alimony are the subject of this comment.

While many wives still do not work, those who do most often do not earn as much as their husbands.¹¹ Therefore, as a practical matter, most support litigation is brought by the wife against her husband.¹² For convenience in terminology, the following discussion refers to the husband's duty of support. Of course, the principles outlined apply equally to the less frequent suit by a husband.¹³

Doubts about how much alimony should be given¹⁴ or about how

that the spouse seeking maintenance: (1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

UNIFORM MARRIAGE AND DIVORCE ACT § 308(a) (1987).

8. Temporary alimony is an allowance made to a spouse for maintenance during the pendency of an action. *See, e.g., Floyd*, 108 So. at 898; *see also* 24 AM. JUR. 2D *Divorce and Separation* § 521 (1983).

9. "Rehabilitative alimony is a form of alimony designed to place the dependent spouse in an income generating position, which would [eventually] free the obligor spouse from [alimony] obligation[s]" 24 AM. JUR. 2D *Divorce and Separation* § 521 (1983); *see also* *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980) ("The principle purpose of rehabilitative alimony is to establish the capacity for self-support of the receiving spouse . . .").

10. Permanent alimony is an allowance for the support and maintenance of a spouse during his or her lifetime. *Cann v. Cann*, 334 So. 2d 325, 328-29 (Fla. 1st Dist. Ct. App. 1976); *see also* 24 AM. JUR. 2D *Divorce and Separation* § 624 (1983) (permanent alimony is used primarily for the purpose of distinguishing that allowance from temporary alimony allowed during the pendency of a suit).

11. CLARK, *supra* note 1, at 253; *see* THE STATISTICAL ABSTRACT OF THE UNITED STATES 455 (1990) which states that the mean earnings of married husbands in the 25-34 year age group in 1987 was \$25,238; however, the corresponding figure for married women in that age group was \$13,077. *Id.*

12. CLARK, *supra* note 1, at 253.

13. *Id.*

14. *See, e.g., Ray v. Ray*, 247 So. 2d 473 (Fla. 3d Dist. Ct. App. 1971) (the amount of permanent alimony to be awarded in a divorce proceeding lies within the sound discretion of the trial court); *see also* 25 FLA. JUR. 2D *Family Law* § 469 (1981) (collected cases); Jay M. Zitter, Annotation, *Excessiveness or Adequacy of Amount of Money Awarded as Permanent Alimony Following Divorce*, 28 A.L.R.4TH 786 (1984).

long the payments should continue after divorce¹⁵ have been the subject of much litigation. A complex issue is raised when, after divorce, the obligor spouse's fortunes greatly improve.¹⁶ The question here is whether the receiving spouse should get an increase in alimony based on this fact alone. Some cases answer this question in the affirmative.¹⁷ However, this article advocates that those cases were wrongly decided. A receiving spouse should not be awarded an upward modification in her alimony simply because the obligor spouse has benefitted from increased financial wealth since the parties' divorce. Once the marital bond is broken and the relationship between the parties end, the receiving spouse does not have a right to claim an amount which would maintain her *above* that lifestyle which she was accustomed to during the marriage.¹⁸

In contrast to the author's viewpoint on whether alimony should be increased based solely on the obligor spouse's increased ability to pay, is the recently decided Florida Supreme Court case, *Bedell v. Bedell*.¹⁹ In *Bedell*, the parties were divorced after thirteen years of marriage.²⁰ At the time of the dissolution, Mr. Bedell had opened his first medical office. Then, eleven years after the divorce, Mrs. Bedell filed a petition in the trial court seeking an upward modification of her alimony based solely on the fact that her former husband had an increased ability to pay.

15. See, e.g., *Friedman v. Friedman*, 366 So. 2d 820 (Fla. 3d Dist. Ct. App. 1979) (former husband's petition seeking modification of divorce decree and terminating periodic alimony upon showing that former wife had become self sufficient); see also Comment, *Divorce—Alimony—Death of Divorced Husband Terminates his Obligation to Pay Alimony*, 67 HARV. L. REV. 1074, 1075 (1954) (as a general rule, alimony terminates on the husband's death unless there is a provision in the settlement agreement or in the decree that expressly states otherwise).

16. CLARK, *supra* note 1, at 662.

17. See, e.g., *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980).

18. An exception to this would be a situation in which the wife financially supported the husband while he attended school for specialized training during their marriage, and the parties divorced before the obligor spouse reached his financial potential. In this situation, the wife should be entitled to share in the husband's success, because her efforts contributed to that success which he now enjoys. See *Moss v. Moss*, 264 N.W.2d 97 (Mich. Ct. App. 1978); *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982); *Dewitt v. Dewitt*, 296 N.W.2d 761 (Wis. Ct. App. 1980).

19. 583 So. 2d 1005 (Fla. 1991).

20. *Id.* at 1006.

Thus, *Bedell* addressed the issue of whether an upward modification of alimony should be granted when based solely upon an increase in the payor's ability to pay without the recipient spouse proving increased or continuing need that was not initially satisfied by the original divorce decree.²¹ The Florida Supreme Court held that a significant increase in the financial ability of the obligor spouse to pay may, standing alone, justify an order of increased alimony.²²

The purpose of this comment is to critique the Florida Supreme Court's holding in *Bedell*. Emphasis is placed on Florida statutory and case law; however, other jurisdictions are referenced in order to oppose Florida's position. To this end, the comment is divided into five sections. The first section discusses permanent alimony because an understanding of permanent alimony is necessary for the discussion of *Bedell* which follows.²³ The second section discusses the bases upon which alimony modification may be sought.²⁴ The third section presents a chronology of prior Florida cases which lead to the conflict resolved by the Florida Supreme Court in *Bedell*. The fourth section of this comment is a critical analysis of the Florida Supreme Court's rationale as applied in *Bedell*. The final section concludes and discusses whether *Bedell* has established a uniform standard which the lower courts must follow when presented with an alimony modification issue, or whether the court sidestepped the issue and failed to resolve the conflict.

II. ALIMONY

When a marriage ends, one spouse may be required to financially support the other spouse via permanent alimony.²⁵ This obligation owed by a husband to his former wife was initially regarded by the courts as a personal duty owed to society.²⁶ An award of permanent alimony²⁷ by

21. *Id.*

22. *Id.* at 1007.

23. The *Bedell* controversy arose out of a permanent alimony award which was granted to Mrs. *Bedell* at the time of the divorce.

24. For an in depth discussion of what constitutes "changed circumstances" for purposes of alimony modification, see Carol Gilliam Green, Note, *Domestic Relations: Modification of Future Alimony Payments Due to Changed Circumstances*, 20 WASHBURN L.J. 66 (1980); 24 AM. JUR. 2D *Divorce and Separation* §§ 699-745 (1983).

25. For definition of permanent alimony, see *supra* note 10.

26. *Howard v. Howard*, 118 So. 2d 90, 94 (Fla. 1st Dist. Ct. App. 1960). *But see, e.g., Anderson v. Anderson*, 333 So. 2d 484, 485 (Fla. 3d Dist. Ct. App. 1976) ("The necessity of insuring that the divorced wife could not become a public

the trial court does not become a vested interest to receive alimony²⁸ and it is always subject to the jurisdiction of the court for modification.²⁹ Because the recipient of permanent alimony does not have an inherent vested right to receive alimony, the question of whether permanent alimony shall be awarded at all, and if so, what the proper amount of the award shall be, rests within the sound discretion of the trial court.³⁰

Many Florida courts have stated that a divorced wife is entitled to live in a manner reasonably commensurate with the standard of living established during the course of the marriage.³¹ Because many women sacrifice their own careers so that their husbands may maintain theirs, and tend to the needs of the family and the family home, this author agrees that a divorced wife should be maintained in the lifestyle which she enjoyed while the parties were married. However, the amount of alimony allowed should not be such that one spouse passes from misfor-

charge—is a thing of the past.”) (quoting *Anderson v. Anderson*, 194 So. 2d 906, 908-09 (Fla. 1967) (Roberts, J., dissenting)). Prior to 1971, section 61.08 only awarded alimony to the wife: “In every judgment of divorce in an action by the wife, the court shall make such orders about . . . alimony . . . to be made to her, and . . . the security to be given therefor, as from the circumstances of the parties and the nature of the case is equitable.” FLA. STAT. § 61.08 (1969). However, The Dissolution of Marriage Act of 1971 changed so that “[i]n a proceeding for dissolution of marriage, the trial judge may grant alimony to either party” FLA. STAT. § 61.08 (1971).

27. Permanent alimony is permanent only in the respect that it is a final provision for maintenance, contained either in a separate maintenance order or in the final judgment for dissolution of marriage. 24 AM. JUR. 2D *Divorce and Separation* § 624 (1983).

28. *O’Neal v. O’Neal*, 410 So. 2d 1369, 1373 (Fla. 5th Dist. Ct. App. 1982); *see also* *Hunt v. Hunt*, 394 So. 2d 564 (Fla. 5th Dist. Ct. App. 1981) (a wife does not have a vested right in her husband’s earnings forever).

29. *See, e.g.,* *Chastain v. Chastain*, 73 So. 2d 66 (Fla. 1954) (modification should be based on a clear showing of changed circumstances and the financial ability of the husband); *Ludacer v. Ludacer*, 211 So. 2d 64, 65 (Fla. 2d Dist. Ct. App. 1968) (“The amount of alimony . . . is, in every case, a matter of continuing jurisdiction.”).

30. *Accord* *Cyphers v. Cyphers*, 373 So. 2d 442 (Fla. 2d Dist. Ct. App. 1979); *Shultz v. Shultz*, 290 So. 2d 146 (Fla. 2d Dist. Ct. App. 1974); *Ray v. Ray*, 247 So. 2d 473 (Fla. 3d Dist. Ct. App. 1971); *McGarry v. McGarry*, 247 So. 2d 13 (Fla. 2d Dist. Ct. App. 1971); *see* *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980) (“Judicial discretion is defined as [t]he power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.”); *see also* *Patrick v. Patrick*, 399 So. 2d 72 (Fla. 5th Dist. Ct. App. 1981) (amount of monthly alimony award is within discretion of trial court).

31. *E.g., O’Neal*, 410 So. 2d at 1371.

tune to prosperity, and the other spouse passes from prosperity to misfortune.³² "As a general [rule], the amount awarded as permanent alimony must be fair and just under all circumstances of the case."³³ In situations where both parties maintained careers during the marriage and neither party was exclusively dependent on the income of the other, alimony should be denied.³⁴

However, in determining those cases in which it would be fair and just for one spouse to receive permanent alimony, two factors must be present.³⁵ First, it is necessary that one spouse demonstrate a need for the funds.³⁶ Second, the other spouse must have the financial ability to supply the needed funds.³⁷ Of the two factors listed above, the receiving spouse's need is the most significant because regardless of whether the other spouse has the financial wealth to pay a reasonable amount of alimony, the needy spouse is clearly not entitled to receive it unless her resources are not enough to maintain her in the same lifestyle that she was accustomed to during the marriage.³⁸ For example, in *Anderson v.*

32. *Canakaris*, 382 So. 2d at 1204.

33. 24 AM. JUR. 2D *Divorce and Separation* § 653 (1983); see FLA. STAT. § 61.08(2) (1989) ("The court may consider any factor necessary to do equity and justice between the parties.").

34. For example, in *Campbell v. Campbell*, the evidence showed that the former wife was able to support herself adequately and to a degree comparable with the standard of living enjoyed by the parties during their marriage. 432 So. 2d 666, 669 (Fla. 5th Dist. Ct. App. 1983), *review denied*, 453 So. 2d 1364 (Fla. 1984).

35. See FLA. STAT. § 61.08(2)(d) ("In determining a proper award of alimony, the court shall consider . . . [t]he financial resources of each party."); 25 FLA. JUR. 2D *Family Law* § 454 (1981).

36. 25 FLA. JUR. 2D *Family Law* § 454 (1981); see *O'Neal v. O'Neal*, 410 So. 2d 1369 (Fla. 5th Dist. Ct. App. 1982) (permanent alimony is used to provide the former wife with the necessities of life as was established by the marriage between the parties); *Johnson v. Johnson*, 386 So. 2d 14 (Fla. 5th Dist. Ct. App. 1980) (permanent alimony award to wife was proper where she had been a housewife during the parties twenty year marriage and did not work outside the home); *Cyphers v. Cyphers*, 373 So. 2d 442 (Fla. 2d Dist. Ct. App. 1979) (amount of alimony award was not excessive where wife was not in a position to support herself without assistance from her former spouse); *McAllister v. McAllister*, 345 So. 2d 352 (Fla. 4th Dist. Ct. App. 1977) (alimony is predicated on the needs of the wife).

37. *Chastain v. Chastain*, 73 So. 2d 66 (Fla. 1954) (in determining ability to pay, the court must consider the nature of the obligor spouse's capital assets as well as his income); *O'Neal v. O'Neal*, 410 So. 2d 1369 (Fla. 5th Dist. Ct. App. 1982) (the obligor spouse must be able to meet the needs of the recipient spouse); *McAllister v. McAllister*, 345 So. 2d 352 (Fla. 4th Dist. Ct. App. 1977) (alimony is predicated on the husband's ability to pay it); 25 FLA. JUR. 2D *Family Law* § 454 (1981).

38. See CLARK, *supra* note 1, at 647-48.

Anderson, the court stated:

In determining the question of what alimony, if any, should be awarded to the wife in a divorce proceeding, [the wife's] monetary need must first be met by her own resources—her wage, earning capacity, and her separate estate—and only then, if they are not adequate, may the husband be called upon to provide her with such additional funds as from the circumstances of the parties³⁹

Florida Statute section 61.08 further provides that in addition to the financial circumstances and needs of the parties, the trial court may take into consideration any factor necessary to do equity and justice between the parties, including such factors as the length of time the parties have been married, the standard of living established during the marriage, age, health and the conduct of the parties.⁴⁰ Because every

39. *Anderson v. Anderson*, 333 So. 2d 484, 486 (Fla. 3d Dist. Ct. App. 1976).

40. See FLA. STAT. § 61.08(1)(2) (1989) which provides:

- (1) The court may consider the adultery of a spouse . . . in determining . . . the amount of alimony, if any, to be awarded.
- (2) In determining a proper award of alimony, . . . the court shall consider all relevant economic factors, including but not limited to:
 - (a) The standard of living established during the marriage.
 - (b) The duration of the marriage.
 - (c) The age and the physical and emotional condition of each party.
 - (d) The financial resources of each party.
 - (e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
 - (f) The contribution of each party to the marriage

The court may consider any other factor necessary to do equity and justice between the parties.

See also *Canakaris v. Canakaris*, 382 So. 2d 1197, 1204 (Fla. 1980) (award of alimony was proper given the income of the parties, the length of the marriage, the standard of living enjoyed by the parties, and the education of the wife); Ira Mark Ellman, Note, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989). However, The Uniform Marriage and Divorce Act which primarily considers the factors only of the proposed recipient spouse:

- (b) The maintenance order shall be in amounts . . . [as] the court deems just, without regard to marital misconduct, and . . . considering relevant factors including:
 - (1) the financial resources of the party seeking maintenance . . . ;
 - (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
 - (3) the standard of living established during the marriage;
 - (4) the duration of the marriage;

case revolves around a unique set of facts, the consideration of these additional factors help assure that justice between the parties will be attained in each case.

III. CHANGED CIRCUMSTANCES

Subsequent to a final judgment for dissolution of marriage which includes an alimony award, either party may petition for modification based upon a change in circumstance.⁴¹ "Changed circumstances may warrant modification of future payments on the theory that alimony is a substitute for support, and support [which is] subject to modification, alimony should [also] be [modifiable]."⁴² The authority to modify permanent alimony awards based upon the requisite showing of changed circumstances is usually within the sound discretion of the trial court.⁴³ Likewise, in Florida, changed circumstances, may, as a matter of law, warrant a modification of the amount of existing alimony payments, either upward or downward, according to the particular facts of each case.⁴⁴ Even though it is not expressly stated in section 61.14, there is a

(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

UNIFORM MARRIAGE AND DIVORCE ACT § 308(b) (1987).

41. See FLA. STAT. § 61.14(1) (1989). The term "change of circumstance" is defined as a condition used to show a need for modification of a support order. BLACK'S LAW DICTIONARY 231 (6th ed. 1990).

42. Note, *supra* note 24, at 69.

43. The authority to grant permanent alimony awards is given to the trial court by statute in many states. *E.g.*, COLO. REV. STAT. § 14-10-122 (1973); CONN. GEN. STAT. ANN. § 46b-86 (1986); FLA. STAT. § 61.14(1) (1989) ("The court has jurisdiction to make orders as equity requires . . ."); KAN. STAT. ANN. § 60-1610 (Supp. 1986); MINN. STAT. ANN. § 518.64 (Supp. 1987); TENN. CODE ANN. § 36-5-101 (Supp. 1986); WIS. STAT. ANN. § 767.32 (Supp. 1986); see also CLARK, *supra* note 1, at 655. *But see* Pope v. Pope, 342 So. 2d 1000, 1001 (Fla. 4th Dist. Ct. App. 1977) ("A petition to modify an award of alimony . . . may not be denied when the change is clearly shown.") (quoting Chord v. Chord, 209 So. 2d 281 (Fla. 3d Dist. Ct. App. 1968)).

44. Rogers v. Rogers, 229 So. 2d 618, 620 (Fla. 2d Dist. Ct. App. 1969); see, *e.g.*, Schlesinger v. Emmons, 566 So. 2d 583 (Fla. 2d Dist. Ct. App. 1990) (where former wife's need was not originally met, great improvement in former husband's income due to inheritance warranted an upward modification); Waskin v. Waskin, 484 So. 2d 1277 (Fla. 3d Dist. Ct. App. 1986) (reduction of former husband's financial condition resulting from voluntary act did not warrant a downward modification of his

general agreement among the courts that to warrant modification, the changed circumstances must be substantial⁴⁵ and permanent.⁴⁶ Courts will not ordinarily modify an alimony decree based on a mere expectation that circumstances will change in the future.⁴⁷

Many courts have struggled with the concept of what constitutes a substantial change so as to warrant a modification of the alimony decree. Since each case is unique, a court's decision on whether to modify an alimony award lies within the particular facts of each case. Some of the more common grounds for modification in Florida include changes in the recipient spouse's needs; reduction of the obligor spouse's income; and an increase in the obligor spouse's income without a corresponding increase in the need of the recipient spouse.

A. *Changes in the Recipient Spouse's Needs*

If the needs of the recipient spouse have increased since the divorce, her alimony may be increased provided that the obligor spouse has the present financial ability to meet those increased needs.⁴⁸ The

alimony obligations).

45. See, e.g., *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (Once awarded, permanent alimony is subject to modification upon a substantial change of circumstances.); *Bloemendaal v. Bloemendaal*, 275 So. 2d 30 (Fla. 4th Dist. Ct. App. 1973); *Cheves v. Cheves*, 269 So. 2d 414 (Fla. 2d Dist. Ct. App. 1972); Note, *supra* note 24, at 69; J. Matthew Carey, Note, *Reduction in Alimony as a Result of Changes in Financial Condition: A Guide for the Practitioner*, 15 J. FAM. L. 300, 306 (1977) ("The determination of substantiality . . . must be made by evaluating the collective impact of the alleged change on both parties . . .") (emphasis in original). The Uniform Marriage and Divorce Act provides for modification "only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." UNIFORM MARRIAGE AND DIVORCE ACT § 316(a) (1987). Furthermore, the spouse petitioning for modification of the alimony decree has the burden of showing a "substantial change in the material circumstances since the decree was entered." 24 AM. JUR. 2D *Divorce and Separation* § 711 (1983).

46. See, e.g., *Henderson v. Henderson*, 463 So. 2d 485 (Fla. 2d Dist. Ct. App. 1985); *Thibodeau v. Thibodeau*, 461 So. 2d 1035 (Fla. 2d Dist. Ct. App. 1985); *Bish v. Bish*, 404 So. 2d 840 (Fla. 1st Dist. Ct. App. 1981); Note, *supra* note 45, at 307.

47. 24 AM. JUR. 2D *Divorce and Separation* § 712 (1983); see *Penland v. Penland*, 442 So. 2d 1054 (Fla. 1st Dist. Ct. App. 1983) (alimony may not be modified for anticipated changes in circumstances).

48. *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957); see *Pope v. Pope*, 342 So. 2d 1000 (Fla. 4th Dist. Ct. App. 1977); *Howard v. Howard*, 118 So. 2d 90 (Fla. 1st Dist. Ct. App. 1960); M. L. Cross, Annotation, *Change in Financial Condition or Needs of Husband or Wife as Ground for Modification of Decree for Alimony or*

increased need may be due to ill health,⁴⁹ a general increase in the cost of living,⁵⁰ and other similar factors.⁵¹ "In assessing the recipient's need for increased alimony, the court should not be limited to the bare necessities of life, but rather should consider the recipient's reasonable needs in relation to the obligor spouse's income, just as in the case when alimony is initially being granted."⁵² Therefore, if the receiving spouse is no longer able to maintain the lifestyle she has been accustomed to on the present alimony received from the obligor spouse, then an upward modification in her alimony should be awarded by the trial court.⁵³

However, where the former wife's increased need is "due to a voluntary change in her way of life, the courts have been reluctant to grant her an increase in alimony."⁵⁴ In situations where the recipient spouse purposefully increased her standard of living, such as when the alimony recipient obtains employment and becomes self supporting, she should, at the very least, be required to provide that amount which is above the standard of living she enjoyed during the marriage.⁵⁵ This situation was illustrated in *Anderson v. Anderson* where the former husband filed a petition for modification of the divorce decree, seeking to be relieved from the order requiring him to pay alimony on the

Maintenance, 18 A.L.R.2D 10, 59 (1951).

49. *McArthur*, 95 So. 2d at 524.

50. *Powell v. Powell*, 386 So. 2d 1214, 1215 (Fla. 3d Dist. Ct. App. 1980) ("[A] rise in the cost of living is a change of circumstances which may be properly considered by a trial judge in increasing the financial obligations of a husband . . . [where his] ability to pay has also increased."); see Annotation, *supra* note 48, at 10. A.L.R.2D 10 (1951).

51. See, e.g., *Howard*, 118 So. 2d 90.

52. CLARK, *supra* note 1, at 661.

53. For example, in *Wolfe v. Wolfe*, the court stated that "[i]f the party seeking a modification of alimony cannot 'go it alone,' if he or she is unable to 'be in a position reasonably to continue to maintain the lifestyle to which the parties had become accustomed during the marriage,' the petition for modification should be granted." 424 So. 2d 32, 35 (Fla. 4th Dist. Ct. App. 1982) (quoting *Lee v. Lee*, 309 So. 2d 26, 28 (Fla. 2d Dist. Ct. App. 1975)).

54. CLARK, *supra* note 1, at 661; see, e.g., *Sistrunk v. Sistrunk*, 235 So. 2d 53 (Fla. 4th Dist. Ct. App. 1970).

55. CLARK, *supra* note 1, at 661. *Contra Punie v. Punie*, 291 So. 2d 23 (Fla. 3d Dist. Ct. App. 1974) (It was not an abuse of discretion for the trial court to deny the former husband a reduction in his alimony obligation, because even though the financial circumstances of the former wife had improved, the husband's ability to pay had improved even more substantially than the wife's.).

ground that his former wife had become self supporting.⁵⁶ The trial court denied his petition, and the Third District Court of Appeal affirmed.⁵⁷

The husband subsequently petitioned unsuccessfully to the Supreme Court of Florida for review.⁵⁸ Then, approximately ten years after filing his first petition for modification, the former husband filed a second petition asking the court to reduce or terminate his alimony obligation.⁵⁹ It is from Justice Roberts' dissent⁶⁰ that the Third District Court of Appeal, in reviewing the former husband's second petition for modification, adopted the following language regarding the capability of the wife for self support:

[T]he marriage status, once achieved by the wife, does not carry with it the right forever after to be supported by her former husband in veritable ease and comfort, regardless of her capabilities for self support. The horse and buggy era when the husband's vow to take care of his wife 'till death do us part' was accepted by both parties as a sacred promise and an essential part of the marriage contract—required, as well, by the mores of the society of that era and the necessity of insuring that the divorced wife could not become a public charge—is a thing of the past.⁶¹

The order denying the former husband's second request for termination of his obligation to pay alimony was reversed on the ground that the former wife had become self supporting, even though he had a much larger income.⁶²

56. *Anderson v. Anderson*, 180 So. 2d 360, 362 (Fla. 3d Dist. Ct. App. 1965).

57. *Id.* at 363.

58. *Anderson v. Anderson*, 194 So. 2d 906 (Fla. 1967) (dismissed for want of conflict jurisdiction).

59. *Anderson v. Anderson*, 333 So. 2d 484, 486 (Fla. 3d Dist. Ct. App. 1976).

60. Even though Mr. Anderson's first petition was dismissed for want of conflict jurisdiction, Justice Roberts filed a dissenting opinion. *Anderson*, 194 So. 2d 906 (Roberts, J., dissenting).

61. *Anderson*, 333 So. 2d at 485 (quoting *Anderson*, 194 So. 2d at 908 (Roberts, J., dissenting)).

62. *Id.* at 488. "Assuming, [however], that a reduction [or termination] of alimony payments is proper where the [recipient] spouse has secured employment, the court ordinarily will not reduce the payments in the exact amount of earnings, [because] that may take away an incentive to work." 24 AM. JUR 2D *Divorce and Separation* § 715, 707 (1983); see Annotation, *supra* note 48, at 63-7.

B. *Reduction in the Obligor Spouse's Income*

A change in the financial condition of the obligor spouse, if substantial, often constitutes a change in circumstance so as to warrant a modification of an alimony award.⁶³ Florida's modification statute provides that if "the financial ability of either party changes, . . . either party may apply to the circuit court . . . for an order decreasing or increasing the amount of . . . alimony."⁶⁴ When an obligor spouse's earnings are reduced to such a point that he is unable to comply with the alimony payments, an order for a reduction or termination of alimony obligations may be granted.⁶⁵

However, an abatement of the obligor spouse's earnings must not have been caused by his own willful actions.⁶⁶ "[T]he clean hands doctrine prevents a court of equity from relieving a former husband of his obligation to pay alimony to his former wife where the decrease in the former husband's financial ability to pay has been brought about by the former husband's voluntary acts."⁶⁷ Thus, an obligor spouse who volun-

63. Note, *supra* note 24, at 75; see James R. Higgins, Jr., *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711, 730 (1979); Annotation, *supra* note 48, at 16.

64. FLA. STAT. § 61.14(1) (1989).

65. See *Rieder v. Rieder*, 157 So. 2d 93 (Fla. 3d Dist. Ct. App. 1963).

66. *E.g.*, *Waskin v. Waskin*, 484 So. 2d 1277, 1278 (Fla. 3d Dist. Ct. App. 1986) (ex-husband's act of hiring someone to rid his ex-wife did not result in a change of circumstance so as to modify the alimony award when he incurred great expenses in defending the criminal charge against him); *Coe v. Coe*, 352 So. 2d 559 (Fla. 2d Dist. Ct. App. 1977) (economic hardship due to increased spending by the obligor spouse is not sufficient to relieve him from his alimony obligation); *Kalmutz v. Kalmutz*, 299 So. 2d 30 (Fla. 4th Dist. Ct. App. 1974) (reduction of alimony was not granted to former husband, a physician, who did not lack the requisite earning capacity, but allowed his practice to close down to avoid his alimony obligation); see Note, *supra* note 24, at 76; 24 AM. JUR. 2D *Divorce and Separation* § 712 (1983); M. L. Cross, Annotation, *Husbands Default, Contempt, or Other Misconduct as Affecting Modification of Decree for Alimony, Separate Maintenance, or Support*, 6 A.L.R.2D 835 (1949).

67. *Waskin*, 484 So. 2d at 1277. However, a problem arises when the obligor spouse reaches an age where he voluntarily terminates himself from employment in pursuit of permanent retirement from the workplace. The issue of whether the postjudgment retirement of a spouse who is obligated to make alimony payments pursuant to a dissolution of marriage decree may be considered as a change of circumstance in which the alimony decree may be modified, has been a subject of conflict among the Florida district courts of appeal. *E.g.*, *Pimm v. Pimm*, 568 So. 2d 1299 (Fla. 2d Dist. Ct. App. 1990); *Ward v. Ward*, 502 So. 2d 477 (Fla. 3d Dist. Ct. App. 1987).

In *Ward*, the former husband, age 63, sought a reduction in his alimony obligation since he had retired from his long-held job and his retirement necessarily resulted in a

tarily reduces his income may be forced to continue the lifestyle that existed at the time of the divorce in order to comply with his alimony obligations.⁶⁸ However, the obligor spouse should not be penalized if he, in good faith, no longer wishes to maintain that lifestyle, and instead wants to lead a less lucrative life which emphasizes personal val-

substantial decrease in his income. 502 So. 2d at 477. The Third District Court of Appeal held that "while Ward was . . . entitled to retire from his more than forty years of steady employment, he was not entitled to have his former wife defray the cost of his retirement through a reduction of his long-standing obligations to her." *Id.* at 478. The court noted that at the time of Ward's voluntary retirement, he was fully capable of working. *Id.* Furthermore, the court stated that the obligor spouse may have the amount of his obligation reduced only when the inability to pay is affected by circumstances beyond the obligor spouse's control—such as ill-health or where the decision to retire was mandated by his employer. *Id.*

In *Pimm v. Pimm*, the court refused to follow the ruling in *Ward* that, as a matter of law, an obligor spouse "cannot rely on the reduced income at retirement as a change in circumstances that may be considered on a petition for modification of alimony." *Pimm*, 568 So. 2d at 1300. Instead, the court held that an obligor spouse's voluntary retirement is a factor to be considered in determining whether the obligor spouse is entitled to a downward modification of his alimony obligation. *Id.* at 1301. The court reasoned that even if the parties had remained married, the 65 year old husband more than likely would have retired, as often people do, and they would have been expected to live on a reduced income. *Id.* at 1300. In criticizing the holding in *Ward*, the court stated that to follow the *Ward* decision would "place many supporting spouses in the position of being unable to retire at any age so long as their alimony obligations remained unchanged." *Id.*

In acknowledging the conflict between the *Ward* decision and the *Pimm* decision, and in finding the affects of a spouse's voluntary retirement a subject of great public importance in the state of Florida, the *Pimm* court certified the following question to the Florida Supreme Court:

IS THE POSTJUDGMENT RETIREMENT OF A SPOUSE WHO IS OBLIGATED TO MAKE SUPPORT OR ALIMONY PAYMENTS PURSUANT TO A JUDGMENT OF DISSOLUTION OF MARRIAGE A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED TOGETHER WITH OTHER RELEVANT FACTORS AND APPLICABLE LAW UPON A PETITION TO MODIFY SUCH ALIMONY OR SUPPORT PAYMENTS?

Id. at 1301.

Oral arguments concerning this issue were heard by the Florida Supreme Court on September 5, 1991. Its decision is now pending. See *Pimm v. Pimm*, No. 76,885 (Fla. Oct. 12, 1991).

68. Note, *supra* note 24, at 76; see also David A. Giacalone, *The Drop Out Ex-Husband's Right to Reduce Alimony and Support Payments*, 1 Fam. L. Rep. (BNA) 4065 (1975) (more Americans are choosing a career and lifestyle to better suit their personal values).

ues over material ones.⁶⁹ Therefore, a self-induced decline in the obligor spouse's income should, only upon a substantial showing of good faith or cause therefor, constitute a change in circumstance so as to provide a basis for modifying the alimony award.

C. *Increase in Obligor Spouse's Income Without Increase in Recipient Spouse's Need*

Although a downward modification of alimony may be awarded if the obligor spouse's financial condition worsens, does it follow that alimony should be increased if the obligor spouse should suddenly prosper?⁷⁰ The answer to this question should be no. However, Florida's modification statute⁷¹ reads in pertinent part:

When the parties enter into an agreement for payments for . . . alimony, . . . or when a party is required by court order to make any payments, and the circumstances or the *financial ability of either party changes*, . . . *either party may apply* to the circuit court . . . for an order decreasing or *increasing* the amount of . . . *alimony*, and the court has jurisdiction to make orders as equity requires⁷²

It appears from the modification statute's plain language that an increase in the financial ability of the obligor spouse is sufficient enough to support a modification of alimony in Florida.⁷³ Recently, however, Florida courts have continued to disagree on this issue when interpreting the meaning of the modification statute.

1. Florida Supreme Court

In *McArthur v. McArthur*, the Florida Supreme Court suggested

69. *Id.*

70. CLARK, *supra* note 1, at 662. This was the question posed before the Florida Supreme Court in *Bedell*. See 583 So. 2d 1005 (Fla. 1991).

71. FLA. STAT. § 61.14(1) (1989).

72. *Id.* (emphasis added).

73. See *id.* The Uniform Marriage and Divorce Act is silent on the issue of whether a modification can be granted based on a showing of a change in the financial ability of either party. Section 316(a) provides "[e]xcept as otherwise provided . . . any decree respecting maintenance or support may be modified . . . *only* upon a showing of changed circumstances" UNIFORM MARRIAGE AND DIVORCE ACT § 316(a) (1987) (emphasis added).

that an increase in the former husband's financial condition may, by itself, warrant an upward modification in alimony payments to his former wife.⁷⁴ The former wife filed a petition for an increase in alimony alleging, among other things, that the former husband's income had greatly increased.⁷⁵ Even though the former wife sought an increase in alimony based upon a change in circumstance of both parties, the supreme court expressly stated that the former wife could "have filed a petition for an increase in alimony on the basis of the change in [the former husband's] financial condition"⁷⁶

The supreme court, however, in ultimately deciding this case, found that there had been a change of circumstance as to both parties.⁷⁷ This case, therefore, represents the traditionally accepted situation of a "changed circumstance."⁷⁸

2. Second District Court of Appeal

The second district's position on the issue of whether an increase in the obligor spouse's financial ability is, by itself, sufficient enough to warrant an upward modification in the alimony decree is well illustrated by *Terry v. Terry*⁷⁹ and *Lenton v. Lenton*.⁸⁰

In *Terry*, the Second District Court of Appeal stated that there had been a sufficient change in the former husband's financial condition so as to warrant an increase in the former wife's alimony.⁸¹ The court

74. *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957).

75. *Id.* at 522. The statutory basis for the former wife's petition for modification of alimony was FLA. STAT. § 61.15 (1955), the predecessor to Florida's current modification statute, FLA. STAT. § 61.14 (1989). Section 61.15 contained essentially the same language as the current modification statute.

76. *McArthur*, 95 So. 2d at 524.

77. *See id.* The Florida Supreme Court stated:

It seems to us that the changes in circumstances in the financial condition of Mr. McArthur and Mrs. McArthur's condition of health and inability to work in themselves constitute sufficient cause to justify an increase in the amount of alimony which she should receive. The further change in Mr. McArthur's financial condition . . . might perhaps justify even a greater increase in the sums which she should receive.

Id.

78. *See CLARK, supra* note 1, at 660; Annotation, *supra* note 48, at 59.

79. *Terry v. Terry*, 126 So. 2d 890 (Fla. 2d Dist. Ct. App.), *review denied*, 133 So. 2d 321 (Fla. 1961).

80. *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980).

81. *Terry*, 126 So. 2d at 892.

further noted that the increase in the former husband's financial condition "must necessarily [have been] contemplated by the language of [the modification statute]."⁸² However, it is apparent from the facts in *Terry* that the former wife's needs had increased since the final divorce decree.⁸³ The parties incorporated into their final divorce decree an agreement made between them whereby the former husband would pay his former wife \$375.00 per month in alimony. Subsequent to their agreement, the former husband's salary had increased from \$600.00 to \$1,000.00 per month and he was also deriving other income from various investments. The former wife stated in her petition for modification that her needs had increased, and that her existing alimony award was inadequate to meet those needs.⁸⁴ As in *McArthur*,⁸⁵ it is clear that the change in the former husband's financial ability to pay did justify an upward modification in the alimony payments because the former wife also expressed a corresponding need for the additional funds.

However, in *Lenton*, the former wife petitioned for modification of her alimony because of a "dramatic improvement in her former husband's financial condition."⁸⁶ The trial court denied the former wife's request for an upward modification, based on the fact that her financial needs had not changed since the dissolution of marriage.⁸⁷ In reversing the trial court's decision, the Second District Court of Appeal stated that "[a] change in circumstances of only one of the parties is sufficient to justify a modification of alimony."⁸⁸

Nevertheless, the facts in *Lenton* clearly show that the former wife's needs were not initially met by the original divorce decree, because the husband had submitted an inaccurate financial affidavit upon which the award of alimony was based.⁸⁹ The former wife accepted a

82. *Id.*; see also *McArthur*, 95 So. 2d at 524.

83. *Terry*, 126 So. 2d at 891.

84. *Id.*

85. *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957).

86. *Lenton*, 370 So. 2d at 31.

87. *Id.*

88. *Id.*; see *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), *review denied*, 282 So. 2d 877 (Fla. 1973); see also *Rogers v. Rogers*, 229 So. 2d 618 (Fla. 2d Dist. Ct. App. 1969) (alimony decree can be modified based on a change of the former wife's circumstances without a corresponding change in the former husband's financial ability).

89. At the time of the divorce, the former wife needed \$1,650 per month from the former husband to maintain the standard of living the parties enjoyed during their marriage. *Lenton*, 370 So. 2d at 31. In reliance on the former husband's inaccurate financial affidavit, the former wife agreed to accept \$500 per month for alimony. *Id.*

decrease in her standard of living, because her former husband apparently did not have the financial means to maintain her in the lifestyle that she had been accustomed to during the marriage.⁹⁰ The Second District Court of Appeal stated that a recipient spouse should not be held to an agreement where the obligor spouse's financial limitations were not accurate.⁹¹ Because the needs of the former wife were not initially met by the original divorce decree, and had continued to be unmet at the time of her request for modification, the upward modification based on an increase in the former husband's ability to pay was justified.

3. Fourth District Court of Appeal

The leading case in the fourth district on the issue of whether a substantial increase in the former husband's financial condition can, standing alone, warrant a modification of the alimony decree, is *England v. England*.⁹² In denying the former wife's request for an increase in permanent periodic alimony, the trial court found that the former husband had the ability to pay additional support, but concluded that there was no showing of a substantial change of circumstance on the wife's part so as to warrant a modification.⁹³

However, the Fourth District Court of Appeal, in reversing the lower court's decision, stated that "to succeed in a motion to increase an alimony award, it is only necessary for a petitioner to prove *either* an increase in need or the ability to pay."⁹⁴ From this, it would appear that a court does not have to look at the needs of the recipient spouse when determining whether to grant an upward modification. An increase in the ability of the obligor spouse to pay would be enough of a showing to warrant a modification. However, the court contradicted its earlier statement by stating "[o]f course, alimony should not be increased absent a demonstration of need for increased support and the other spouse's ability to respond to that need."⁹⁵

In the court's view, there was no question that the facts reflected both, a substantial increase in the former wife's need for alimony and a

90. *Id.*

91. *Id.*

92. *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988).

93. *Id.* at 701.

94. *Id.* (emphasis added).

95. *Id.* at 700.

substantial increase in the former husband's ability to pay alimony.⁹⁶ Therefore, the court ultimately decided this case based on the change of circumstance as to both parties.⁹⁷ Under these facts, the upward modification was proper.

4. Third District Court of Appeal

In interpreting Florida's modification statute,⁹⁸ case law in the third district has been erratic.⁹⁹ The inconsistent laws in this district are well illustrated by three cases.

In *Sherman v. Sherman*, the question presented to the court was whether "[permanent] periodic alimony can be increased upon a petition for modification when the only change of circumstance shown was a substantial increase in the earnings of the former husband."¹⁰⁰ Upon the authority of Florida's modification statute,¹⁰¹ the Third District Court of Appeal held that the question presented must be answered in the affirmative.¹⁰² However, a strong dissenting opinion written by Chief Judge Barkdull stated in part:

I have strong convictions that the former wife in the instant matter is not entitled to a raise in alimony [P]eriodic alimony is to be awarded for the purpose of permitting the former wife to live in the manner and custom established by the husband. [Here, the original alimony award] was commensurate with the scale of living maintained by the [former husband] during the time the parties were man and wife Following the majority's opinion to a logical conclusion, a former wife receiving periodic alimony could hold her former husband to an increase in alimony upon increased earnings at any time during the remainder of his life. I do not think the courts should condone such action.¹⁰³

As will become evident, Judge Barkdull's dissent was to be followed by

96. *Id.* at 701.

97. *See England*, 520 So. 2d at 701.

98. *See* FLA. STAT. § 61.14(1) (1989).

99. *See Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), *review denied*, 282 So. 2d 877 (Fla. 1973). *But see Powell v. Powell*, 386 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1980).

100. *Sherman*, 279 So. 2d at 888.

101. *See* FLA. STAT. § 61.14(1) (1989).

102. *Sherman*, 279 So. 2d at 888.

103. *Id.* at 889 (Barkdull, C.J., dissenting).

other court decisions involving this issue.

Seven years later, in *Powell v. Powell*, the third district receded from its prior decision in *Sherman*.¹⁰⁴ The court noted in a footnote “[o]f course, an increase in the husband’s ability *would not itself justify an upward modification of alimony* if the wife’s needs are already fully met either by the existing award or otherwise.”¹⁰⁵ However, the court’s award of an upward modification of alimony rested on the finding that there had been a material increase in the former wife’s needs.¹⁰⁶ Furthermore, the former husband stipulated that his ability to pay had materially changed for the better.¹⁰⁷ Therefore, this case suggests that before an upward modification in alimony can be granted, the recipient spouse must demonstrate that either her needs were initially unmet by the original divorce decree and continue to be unmet, or that a substantial change in her needs has taken place since the original award.¹⁰⁸

Likewise, the third district’s decision in *Frantz v. Frantz*¹⁰⁹ represents a continued shift away from the *Sherman*¹¹⁰ decision. In *Frantz*, the court affirmed the lower court’s decision to deny the former wife an increase in alimony.¹¹¹ The court essentially adopted the footnote in *Powell*,¹¹² by holding that “an increase in the husband’s ability to pay would not itself justify an upward modification of alimony if the former wife’s needs are already fully met . . . by the existing award.”¹¹³ Several of the Florida cases analyzed in this comment state that an upward modification in alimony can be granted if there is a substantial change in the financial ability of only one party; namely an increase in the obligor spouse’s ability to pay.¹¹⁴ However, these courts justified

104. *Powell v. Powell*, 386 So. 2d 1214, 1216 (Fla. 3d Dist. Ct. App. 1980).

105. *Id.* at 1216 n.6.

106. *Id.* at 1215.

107. *Id.* at 1216 n.4.

108. *See Powell*, 386 So. 2d 1214.

109. *Frantz v. Frantz*, 453 So. 2d 429 (Fla. 3d Dist. Ct. App.) *review denied*, 459 So. 2d 1040 (1984).

110. *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.) *review denied*, 282 So. 2d 877 (Fla. 1973).

111. *Id.* at 430.

112. *See supra* text accompanying note 105.

113. *Id.*

114. *See, e.g.,* *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957); *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980); *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), *review denied*, 282 So. 2d 877

their decisions to grant modification on the basis of the recipient spouse's demonstrated need for the increased funds.¹¹⁵

The question, therefore, is still open as to whether a recipient spouse can request and receive an upward modification in her alimony based solely on the obligor spouse's increase in his financial ability to pay. On May 30, 1991, with the decision in *Bedell v. Bedell*,¹¹⁶ the Supreme Court of Florida directly confronted this issue.

IV. *BEDELL V. BEDELL*

A. *Facts*

In 1962, Diane Bedell and Robert Bedell were married. During the parties' eleven year marriage, Mrs. Bedell did not work outside the home, while Mr. Bedell attended medical school and subsequently obtained a medical degree. The marriage was dissolved in July, 1975, and at that time Mr. Bedell had just opened his first medical office. Under the terms of the final judgment, which incorporated a settlement agreement, Mrs. Bedell received \$415 per month in permanent alimony.¹¹⁷ Thereafter, on July 12, 1986, Mrs. Bedell filed a petition for modification in the trial court, seeking an increase in her alimony.

B. *The Lower Courts*

After a non-jury trial, the trial court entered an order denying Mrs. Bedell's request for an upward modification in her alimony.¹¹⁸ Mrs. Bedell's primary contention for seeking an increase in her alimony

(Fla. 1973); *Terry v. Terry*, 126 So. 2d 890 (Fla. 2d Dist. Ct. App.), *review denied*, 133 So. 2d 321 (1961).

115. See *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957); *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980); *Terry v. Terry*, 126 So. 2d 890 (Fla. 2d Dist. Ct. App.), *review denied*, 133 So. 2d 321 (Fla. 1961). *But see* *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), *review denied*, 282 So. 2d 877 (Fla. 1973).

116. *Bedell v. Bedell*, 583 So. 2d 1005 (Fla. 1991).

117. Furthermore, Mrs. Bedell received \$250 per month in child support for each of her two children. *Id.* at 1006. In 1977, Mrs. Bedell relinquished custody of the two children to the husband and at that time, Mr. Bedell ceased making the child support payments to Mrs. Bedell. *Id.*

118. *Bedell v. Bedell*, 561 So. 2d 1197, 1181 (Fla. 3d Dist. Ct. App. 1989), *juris. accepted*, 569 So. 2d 444 (1990).

was that the cost of living had increased since the time that she and Mr. Bedell were divorced.¹¹⁹ The trial court found that Mrs. Bedell “failed to demonstrate that she had been detrimentally effected by the rise in the cost of living or that such a rise has caused an increase in her need.”¹²⁰ Mrs. Bedell appealed to the Third District Court of Appeal.¹²¹

The third district considered Mrs. Bedell’s appeal en banc because of the conflict of decisions within the district.¹²² Mrs. Bedell argued that she was entitled to an increase in alimony as a matter of law under Florida’s modification statute, and that this entitlement was based solely on the husband’s stipulated substantial upward shift of his financial capacity since the final judgment.¹²³

The court admitted that the “[modification] statute authorizes a recipient spouse to apply for an increase in alimony when the financial ability of the obligor spouse changes for the better.”¹²⁴ However, the court noted that it was “not required by the statute to grant such a motion.”¹²⁵ The court reasoned that the recipient spouse’s needs are the controlling factor in determining an alimony modification, and to hold otherwise would grant that spouse a continued interest in the former spouse’s good fortune.¹²⁶ The court recognized that the exception to the

119. Answer Brief of Respondent at 5-6, *Bedell v. Bedell*, 583 So. 2d 1005 (Fla. 1991) (No. 75894) [hereinafter Answer Brief].

120. Initial Brief of Petitioner at 2, *Bedell v. Bedell*, 583 So. 2d 1005 (Fla. 1991) (No. 75894) [hereinafter Initial Brief].

121. *Bedell*, 561 So. 2d at 1181.

122. *Id.* at 1180; see *Frantz v. Frantz*, 453 So. 2d 429 (Fla. 3d Dist. Ct. App.), review denied, 459 So. 2d 1040 (Fla. 1984); *Powell v. Powell*, 386 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1980); *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), review denied, 282 So. 2d 877 (Fla. 1973).

123. *Bedell*, 561 So. 2d at 1181; see FLA. STAT. § 61.14(1) (1989) The Third District Court of Appeal and the Supreme Court of Florida analyzed *Bedell* under FLA. STAT. § 61.14 (1985). However, FLA. STAT. § 61.14 (1989) contains essentially the same language. Therefore, the 1989 version of Florida’s modification statute will be the one cited to by the author.

124. *Bedell*, 561 So. 2d at 1181.

125. *Id.*

126. *Id.* at 1182 (citing *Irwin v. Irwin*, 539 So. 2d 1177, 1178 (Fla. 5th Dist. Ct. App. 1989)). The court stated:

[W]here the financial needs of the recipient spouse, as established by the standard of living maintained during the marriage, have not substantially increased since the final judgment, the trial court is justified in denying a motion to modify upward the alimony award, even though there has been a substantial increase in the financial circumstances of the paying spouse.

rule that the recipient spouse must demonstrate an increased need before a request for an upward modification can be considered is,

the rare case where the recipient spouse's needs, as established by the standard of living maintained during the marriage, were not, and could not be initially met by the original divorce decree due to the then existing financial inability of the paying spouse to meet those needs, which needs continue to remain unmet at the time the modification is sought.¹²⁷

In affirming the trial court's decision, the district court acknowledged that its decision stood in conflict with the decision in *Sherman*,¹²⁸ but in support of Judge Barkdull's dissenting opinion in that case.¹²⁹ Thereafter, the Supreme Court of Florida decided to review the case.¹³⁰

C. *Supreme Court of Florida*

On appeal, Mrs. Bedell argued that the Third District Court of Appeal's restrictive interpretation of the modification statute was directly contrary to the express language contained in the statute.¹³¹ In opposition, Mr. Bedell argued that if a modification can be granted as a matter of law, based on a change in the financial ability of either party, namely the obligor spouse, without considering equity principles, then there would no longer be any such thing as a divorce.¹³² Instead, former spouses would continue to be required to share their increased income with their ex-spouses, without limitation, for all time.¹³³

The Florida Supreme Court began its analysis by acknowledging

Id.

127. *Bedell*, 561 So. 2d at 1182.

128. *Sherman*, 279 So. 2d 887.

129. *Bedell*, at 1183; see *supra* text accompanying note 103.

130. *Bedell*, 583 So. 2d 1005. The Supreme Court of Florida accepted *Bedell* for review because the decision rendered by the Third District Court of Appeal in that case directly conflicted with the language stated in *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988) and *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980). *Id.*

131. Initial Brief, *supra* note 120, at 16. In determining the legislative intent of a statute, the general rule is, "when the words of a statute are clear and unambiguous, judicial interpretation is not appropriate" *Citizens of Fla. v. Public Serv. Comm.*, 435 So. 2d 784, 786 (Fla. 1983).

132. Answer Brief, *supra* note 119, at 13.

133. *Id.*

that alimony modification may be granted when the circumstances or the financial ability of either party changes.¹³⁴ The court observed the line of Florida cases that represented the proposition that the recipient spouse's need, as established by the standard of living during the marriage, should be the first determination made, and only then, if a substantial need had been shown, could the obligor spouse's ability to pay be considered.¹³⁵ The court then noted that "at least two courts have held that in order to succeed with a motion to increase an alimony award, it is only necessary for a petitioner to prove either an increase in need or an increase in the ability to pay."¹³⁶ In interpreting the preceding two lines of authority in light of the modification statute's intent,¹³⁷ the court stated that they were not irreconcilable, and that the solution lied between the two positions.¹³⁸

In analyzing the legislature's intent, the supreme court stated that the "[modification] statute gives an ex-spouse an [unconditional] right to file a petition for an increase in alimony where the circumstances or the financial ability of either party has changed."¹³⁹ However, the court construed the statute's provision for equitable jurisdiction to mean that a court is not required to grant an increase in alimony simply upon a showing of a substantial increase in the financial ability of the obligor spouse, because equity dictates whether such a modification should be ordered.¹⁴⁰ Thus, "a substantial increase in the financial ability of the paying spouse, standing alone, may justify but does not require an order of increased alimony."¹⁴¹

By using the language "may justify" in their holding, the supreme court equivocated on this issue. The supreme court further stated that it "would expect that a raise in alimony would be ordered when no

134. *Bedell*, 583 So. 2d at 1007 (citing FLA. STAT. § 61.14(1) (1985)).

135. *Bedell*, 583 So. 2d at 1007; *see, e.g., Irwin v. Irwin*, 539 So. 2d 1177 (Fla. 5th Dist. Ct. App. 1989); *Bess v. Bess*, 471 So. 2d 1342 (Fla. 3d Dist. Ct. App.), *review denied*, 476 So. 2d 672 (Fla. 1985), *review denied*, 482 So. 2d 347 (Fla. 1986); *Frantz v. Frantz*, 453 So. 2d 429 (Fla. 3d Dist. Ct. App.), *review denied*, 459 So. 2d 1040 (Fla. 1984); *Powell v. Powell*, 386 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1980).

136. *Bedell*, 583 So. 2d at 1007; *see England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980).

137. *See* FLA. STAT. § 61.14(1) (1989).

138. *Bedell*, 583 So. 2d at 1007.

139. *Id.*

140. *Id.* *See* FLA. STAT. § 61.14(1) (1989) which provides that in a proceeding for modification "the court has jurisdiction to make orders as equity requires"

141. *Bedell*, 583 So. 2d at 1007.

increased need was shown only in extraordinary cases where the equitable considerations were particularly compelling."¹⁴² However, the court failed to state the type of extraordinary cases that would be "particularly compelling" enough to warrant an increase in alimony when no concomitant increased need was shown.

Finally, the court concluded that based on these facts, the wife was entitled to an increase in her alimony because she "clearly demonstrated an increased need."¹⁴³ In so holding, the court accepted Mrs. Bedell's testimony that the original alimony award was sufficient only because she was receiving \$500 per month for child support in addition to alimony.¹⁴⁴ In addition, the court also accepted her argument that because the cost of living had gone up since the divorce, her standard of living had gone down and she was not living in the manner she was accustomed to during the marriage.¹⁴⁵ Therefore, a substantial increase in Mrs. Bedell's needs coupled with Mr. Bedell's ability to pay justified an upward modification of alimony.¹⁴⁶

V. CONCLUSION

In rendering its decision in *Bedell*, the Supreme Court of Florida evaded the application of its own precedent on the issue of whether an upward modification in alimony could be granted based on the sole fact that the obligor spouse had an increased ability to pay. The court did not base its decision upon the stipulated finding that the obligor spouse had a substantial increase in his income. To the contrary, in ultimately deciding on whether to grant an upward modification, the court found that a need was demonstrated by the recipient spouse.¹⁴⁷

This decision sends a confusing message to the lower Florida courts. A clear precedent has not been set because the Florida Supreme Court did not take a firm stand on the very issue that brought *Bedell* to the supreme court. Therefore, the inconsistency among the decisions rendered from the various district courts in Florida will most likely continue. It is conceivable that an obligor spouse may be required to pay an additional sum to a spouse who has not demonstrated a substan-

142. *Id.*

143. *Id.* at 1008.

144. *Id.*

145. *Id.*

146. *Bedell*, 583 So. 2d at 1008.

147. *Id.*

tial need solely based on his increase in income. Perhaps *Pimm v. Pimm*, which is now pending before the Florida Supreme Court, will decide this issue.¹⁴⁸

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148. See *Pimm v. Pimm*, No. 76, 885 (Fla. Oct. 12, 1990). The issue before the supreme court in *Pimm* is factually converse to *Bedell*. Compare with *Pimm v. Pimm*, 568 So. 2d 1299 (Fla. 2d Dist. Ct. App. 1990). *Pimm* involves whether an obligor spouse who retires and, therefore, no longer has an income can reduce or terminate his alimony obligation based on that fact alone, and without a corresponding showing that the recipient spouse's need has decreased. see also *supra* discussion at note 67.

*St. Johns County v. Northeast Florida Builders Association and Florida School Impact Fees: An Exercise in Semantics**

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I. INTRODUCTION

Beautiful beaches and the tropical climate of Florida have lured many new residents to this paradise over the past two decades.¹ Esti-

* The author expresses his gratitude to the firms of Akerman, Senterfitt & Eidson and Michael M. McMahon and Gregory J. Kelly, Esqs. for the case briefs and essential reports and for providing an understanding of underlying concepts.

1. The Department of Commerce, Bureau of the Census, estimated the projected population growth to be highest from 1988 to 2000 in the following states:

<u>State</u>	<u>% Population Growth</u>
Arizona	23.1
Nevada	21.1
New Mexico	20.6
Florida	20.3
Georgia	19.4
Alaska	19.3

Although Florida is not the highest in percentage of population growth among the states, the raw numbers of population increases in Florida effect county operations.

This comment is centered around St. Johns County, Florida. The Bureau of the Census has estimated the population change in St. Johns County to be:

<u>1960 (Census)</u>	<u>1970 (Census)</u>	<u>1980 (Census)</u>	<u>1989 (Est.)</u>
30,034	31,035	51,303	84,389

mates for the year 2000 indicate no relief for Florida, with a projected increase of 2,639,000 people.² State taxes, bonds and funds³ have supported infrastructure improvements necessitated by such population growth in the past. However, regulations and impact fees⁴ are tools of the present,⁵ used to shift the cost of these improvements to those who

% 3.3*

% 65.3*

% 64.5*

* Percent change in population between the represented years.

2. Calculated from the percentage estimates of the United States Bureau of the Census.

3.

(1) The district school fund shall consist of funds derived from the district school tax levy; state appropriations; appropriations by county commissioners; local, state, and federal school food service funds; any and all other sources for school purposes; national forest trust funds and other federal sources; and gifts and other sources.

St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 641 (Fla. 1991) (quoting FLA. STAT. § 236.24(1) (1989)).

4. Impact fees are defined as:

[The] charges or fees levied by a governmental unit against new development for the purpose of acquiring or recovering some or all of the cost of providing the public infrastructure facilities needed to support the new growth or development paying the fees. They are variously referred to as impact fees, capital recovery fees, capital contributions, development share charges, municipal utilities system charges, *access fees*, and a host of other aliases. The name is never important. The fees are defined, as a practical matter, by their purpose and effect.

. . . .
 . . . [The] fee system is devised . . . [to require] each unit of growth or development to pay its pro-rata share of the cost of providing the public works facilities necessary to support the new development. Any fee structure designed to accomplish this specific purpose is an impact fee.

E. Allen Taylor, Jr., *How to Develop and Use Impact Fees Successfully*, 1988 INST. ON PLAN., ZONING, & EMINENT DOMAIN § 11.02 (emphasis added); see also Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 417 (1981) (Impact fees are defined as "charges levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development.") (emphasis added).

5. See, e.g., *Eager v. Florida Builders Ass'n v. Florida Keys Aqueduct Auth.*, 580 So. 2d 771 (Fla. 3d Dist. Ct. App. 1991) (system development fees were charged for both "new and existing customers who modify, add or construct facilities which impose a potential demand on the water system"); *City of Hallandale v. ACMAR Eng'g Corp.*, 560 So. 2d 802 (Fla. 4th Dist. Ct. App. 1990) (holding "that a building permit does not provide a developer with a vested right to avoid [a] later enacted [impact or reserve capacity] fee"); *Babcock Co. v. State, Land & Water Adjudicatory*

created their demand—developers⁶ trying to accommodate new residents.

The issues in *St. Johns County v. Northeast Florida Builders Ass'n*,⁷ are centered around the constitutional validity of the St. Johns County Educational Impact Fee Ordinance.⁸ In 1986, the St. Johns County School Board requested that educational facilities be included in the county's impact fee program.⁹ Thereafter, the Educational Impact Fee Ordinance was designed to generate revenue from developers, and in turn from residents, who "may reasonably be expected to place students in the public schools of St. Johns County"¹⁰ The ordinance stated that the funds collected were to be used to "construct, expand and equip the educational sites and educational capital facilities necessitated by new development."¹¹ This revenue generated from the impact fee would be placed in a special trust fund to defray the costs of

Comm'n, 558 So. 2d 76 (Fla. 1st Dist. Ct. App. 1990) (transportation impact fees); *City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641 (Fla. 3d Dist. Ct. App. 1989) (holding constitutional rights of the developer were not violated by the assessment of "developmental impact fees" for sewer, solid waste and traffic control); *City of Ormond Beach v. County of Volusia*, 535 So. 2d 302 (Fla. 5th Dist. Ct. App. 1988) (holding municipal ordinance exempting properties in municipality from county road impact fee was invalid). See generally Jerome G. Rose, *Development Fees-To What Extent May Municipalities Shift the Costs of Public Improvements to New Developments*, 16 REAL EST. L.J. 356 (1988).

6. "It is a person's status (as the developer of dwelling units that require additional public facilities capacity) that triggers the requirement to pay impact fees" Petitioners' Initial Brief at 14, *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635 (Fla. 1991) (No. 75,986) [hereinafter Petitioners' Brief].

7. *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635 (Fla. 1991).

8. *St. Johns County, Fla., Ordinance 87-60* (Oct. 20, 1987).

9. Petitioners' Brief, *supra* note 6, at 4.

10. This ordinance provided that either the developer or residents can be fee-payers because the ordinance defines a fee-payer as "a person commencing a land development activity which *may reasonably be expected to place students in the public schools of St. Johns County* and which requires the issuance of a building permit for a residential building or structure or permit for residential mobile home installation." *St. Johns County, Fla., Ordinance 87-60 § 5(A)* (Oct. 20, 1987) (emphasis added). In addition, section 8(A) states: "The person applying for the issuance of a building permit for accessory structures, *additions to and remodeling of existing structures*, . . . shall pay the fee" *St. Johns County, Fla., Ordinance 87-60 § 8(A)* (Oct. 20, 1987) (emphasis added) (the ordinance does not differentiate between whether the developers or resident homeowners pay the fee).

11. *St. Johns County*, 583 So. 2d at 637 (citing *St. Johns County, Fla., Ordinance 87-60 § 10(B)* (Oct. 20, 1987)).

increasing educational facility capacity needed to support the additional students.¹² All funds collected that were not expended within a six year period would be refunded to the property's current landowner.¹³

In June of 1988, the Northeast Florida Builders Association brought suit to declare the St. Johns County Educational Impact Fee ordinance unconstitutional.¹⁴ In April of 1990, the Fifth District Court of Appeal affirmed the lower court's decision that the ordinance was unconstitutional.¹⁵ Judge Harris, speaking for the majority of the Fifth District, stated that the ordinance "violate[d] the free public school provision, because as enacted, the impact fee [was] nothing more than a *user fee*."¹⁶ The court then certified the issue of new development funding of new school construction to the Florida Supreme Court.¹⁷ Subsequently, in August of 1991, the Florida Supreme Court, in reversing the Fifth District, decided that the St. Johns County Educational Impact Fee Ordinance for new school facility construction did not violate the "constitutional mandate for free public schools."¹⁸

The certified question, insufficiently answered by the Florida Supreme Court and addressed by this comment, was whether impact fees, levied for the construction of new school facilities, were a form of constitutional regulatory device or just another twist on taxation?¹⁹ This comment advocates that the Florida Supreme Court did not sufficiently analyze the problems posed by this question. Rather, the court semanti-

12. St. Johns County, Fla., Ordinance 87-60 § 9 (Oct. 20, 1987).

13. *Id.*, § 11(B).

14. Petitioners' Brief, *supra* note 6, at 1 (motions for summary judgment were filed and the appeal decided in favor of the Northeast Florida Builders Association).

15. St. Johns County v. Northeast Fla. Builders Ass'n, 559 So. 2d 363, 363-64 (Fla. 5th Dist. Ct. App. 1990), *rev'd*, 583 So. 2d 635 (1991).

16. *Id.* at 363 (emphasis added).

17. *Id.*

18. The question certified to the Florida Supreme Court as one of great public importance was: "[W]hether St. Johns County could impose an impact fee on new residential construction to be used for new school facilities." *St. Johns County*, 583 So. 2d at 636 (emphasis added). The supreme court determined that the "ordinance did not create an unlawful delegation of power," and upheld the validity of the ordinance subject to the removal of section 7(b) and a county-wide agreement to the ordinance. *Id.* at 639-42.

19. This question is asked by many authors reviewing the constitutionality of impact fees in general. *See, e.g.*, Juergensmeyer & Blake, *supra* note 4, at 422-27; John M. Payne, *Housing Impact Fees*, 20 REAL EST. L.J. 75 (1991); Rose, *supra* note 5, at 358-59; Taylor, *supra* note 4, at § 11.04(1).

cally manipulated the language of a newly accepted method of raising revenue to cope with other services²⁰ in order to accommodate new school facility construction.

This comment is divided into four parts. First, part I is a discussion of relevant case history on impact fees and their effect on the Florida Supreme Court's decision in *St. Johns County*.²¹ Part II then addresses some of the constitutional challenges presented by this case. The principal argument is that the St. Johns County Educational Impact Fee is an unconstitutional tax masqueraded as a land use regulation, and therefore, that it violates the constitutional mandate for a "uniform system of free public schools."²² In particular, part II argues that the removal of section 7(B)²³ from the St. Johns County Ordinance²⁴ will not, in and of itself²⁵, cure the constitutional defects²⁶ ad-

20. Examples of service increases are the expansion for sewer and waste disposal, roads, emergency medical services, police and fire protection. See generally Juergensmeyer & Blake, *supra* note 4, at 417.

21. *St. Johns County*, 583 So. 2d 635.

22. "Section 1. System of public education. - Adequate provision shall be made by law for a uniform system of free public schools and for the *establishment*, maintenance and operation of institutions of higher learning and other public education programs that the *needs of the people may require*." FLA. CONST. art. IX, § 1 (emphasis added).

23. Section seven titled, "Computation of the Amount of Educational Facilities Impact Fee" states in part:

B. If a feepayer opts not to have the impact fee determined according to paragraph (A) of this section, then the feepayer shall prepare and submit to the St. Johns County School Board an independent fee calculation study for the land development activity for which a building permit or permit for mobile home installation is sought. The student generation and/or educational impact documentation submitted shall show the basis upon which the independent fee calculation was made. The St. Johns County School Board may adjust the educational facilities impact fee to that deemed to be appropriate given the documentation submitted by the feepayer. The County Administrator shall make the appropriate modification upon notice of such adjustment from the School Board.

St. Johns County, Fla., Ordinance 87-60 § 7(B) (October 20, 1987).

24. *Id.*

25. In addition to section 7(B), sections 7(A)(5), (A)(6) and 5(D) offer a similar constitutional defect; they resemble a user fee:

(A)(5) If the type of development activity that a building permit is applied for is not specified on the above fee schedules, the County Administrator shall use the fee applicable to the most nearly comparable type of land use on the above fee schedules. The County Administrator shall be guided in the selection of a comparable type by information provided by

dressed by the Fifth District Court of Appeal.²⁷ Part III deals with the need for adopting a “less intrusive alternative means”²⁸ component to the “dual rational nexus test”²⁹ used by the Florida Supreme Court to evaluate this impact fee. Part IV reviews and analyzes the St. Johns County Ordinance³⁰ with special attention to the test adopted and ap-

the School Board of St. Johns County. If the County Administrator determines that there is no comparable type of land use on the above fee schedule then the County Administrator shall request a determination by the School Board of the appropriate fee.

(A)(6) In the case of change of use, redevelopment, or expansion or modification of an existing use which requires the issuance of a building permit or permit for mobile home installation, the impact fee shall be based upon the net positive increase in the impact fee for the new use as compared to the previous use. The County Administrator shall be guided in this determination by student generation statistics provided by the St. Johns County School Board.

(5)(D) “Land Development Activity Which May Reasonably Be Expected To Place Students in the Public Schools of St. Johns County” means any change in land use or any construction or installation of residential buildings or structures or *any change in the use of any structure that will result in additional students in the public schools of St. Johns County.*

St. Johns County, Fla., Ordinance 87-60, §§ 7(A)(5), 7(A)(6), 5(D) (October 20, 1987) (emphasis added).

26. See *supra* note 10.

27. *St. Johns County*, 559 So. 2d at 364.

28. See John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139 (Winter 1987).

29. *St. Johns County*, 583 So. 2d at 637.

30. The ordinance reads as follows:

An ordinance relating to the regulation of the use and development of land in St. Johns County, Florida; imposing an impact fee on land development in St. Johns County for providing new schools and related facilities necessitated by such new development; stating the authority for adoption of the ordinance; providing definitions; providing findings and declarations of the board of county commissioners; providing for the payment and time of payment of an educational facilities impact fee; providing a method of payment of the fee; providing for the remittal of fees collected and their expenditure by the school board of St. Johns County for educational capital purposes; providing for refund of unexpended funds; providing for exemptions and credits; providing for severability; providing for penalties; providing an effective date.

St. Johns County, Fla., Ordinance 87-60 (October 20, 1987) (preamble) (titled as the Educational Facilities Impact Fee Ordinance).

plied by the court, the effect of footnote six³¹ on the constitutional validity of the ordinance and the effect this ordinance will have on other counties throughout the state.³²

II. FLORIDA IMPACT FEES

Based on recent Bureau of Census reports, Florida municipalities have felt the effect of population increases in many areas of land development. Florida courts have already addressed the needs of growing communities for the funding of additional infrastructures such as water and sewer systems,³³ roads,³⁴ parks³⁵ and other recreational facilities, through impact fees. However, the imposition of an impact fee via a county ordinance, for the explicit use of constructing new school facili-

31. *St. Johns County*, 583 So. 2d at 640 n.6. The court in this footnote suggests that age limitations or restrictions entered into by a mutual covenant, as exhibited by the condominium owners in *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346, 350 (Fla. 1979) (where age limitations were for minors under the age of twelve), would not undermine the position taken by the court. *Cf. St. Johns County*, 583 So. 2d at 640.

The Florida Supreme Court's position in their objection to section 7(B) of the St. Johns County Educational Impact Fee Ordinance was that it "permits households that do not contain public school children to avoid paying the fee . . . [and would] have the potential of being user fees . . . thereby colliding with the constitutional requirement of free public schools." *Id.* It is difficult, if not impossible, to harmonize this position with the position of the court in footnote six. The only distinction between the court's previous position in objecting to the section 7(B) adult retirement facilities exemption, and the one mentioned in footnote six, is the unchangeable future position of the residence agreement to the land use restriction; i.e., a school child can not later occupy this residence which is subject to the land use restriction. However, these distinctions only strengthen the position that the impact fees are simply user fees directed "primarily [at] those households that *do* contain public school children . . ." *Id.* (emphasis added).

32. Based on figures from the United States Bureau of the Census, counties such as Osceola with a 98% increase estimated for the period from 1980 to 1989, and other counties with large population percentage changes, will be effected by this decision.

33. *See Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979); *see also City of Tarpon Springs v. Tarpon Springs Arcade Ltd.*, 585 So. 2d 324 (Fla. 2d Dist. Ct. App. 1991).

34. *See Home Builders & Contractors Ass'n v. Board of County Comm'rs*, 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983), *review denied*, 451 So. 2d 848 (Fla. 1984); *see also Broward County v. Janis Dev. Corp.*, 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975).

35. *See Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th Dist. Ct. App.), *petition denied*, 440 So. 2d 352 (Fla. 1983).

ties, is an issue of first impression³⁶ in Florida.

Impact fees have gained acceptance in Florida because of their ability to shift the cost of public service improvements and new construction from the municipality to the developer.³⁷ The intended purpose of many impact fees is to achieve a perfect society, where all its citizenry are paying their "fair share"³⁸ of public services used as calculated by some type of "magic meter."³⁹ Obviously, use of such a

36. *St. Johns County*, 583 So. 2d at 638.

Although municipality designed impact fees are new to the South, the first impact fee was a 1957 New Jersey fee imposed for new school facility construction. Taylor, *supra* note 4, at § 11.03. Albeit the court in *Daniels v. Borough of Point Pleasant*, 129 A.2d 265 (N.J. 1957), decided the invalidity of the impact fee on grounds that assistance for increased municipality population "must come not from the municipality nor from the courts but from legislature[;]" its ironic that this comment is also based on an impact fee for new school facility construction and the competing philosophies behind who should bear the burden of increased facility costs. *Id.* at 268.

37. Although the county's intent has been characterized as shifting the economic burden from the municipality to the developer, in actuality, the cost is passed through to the intended user. This actual intent of the ordinance is evident by the underlying meaning of sections 5(D) (where only those additions are charged which would change the *land use by generating additional students in public school*), 7(A)(6) (where impact fees for modification of existing structures "shall be based upon the net positive increase in the impact fee for the *new use as compared to the previous use*") and 11(B) (which shows an understanding that the impact fee was passed on to the purchase price of the home and should be refunded to the then "current landowner"). *St. Johns County, Fla., Ordinance 87-60, §§ 5(D), 7(A)(6), 11(B)* (Oct. 20 1987) (emphasis added); *see, e.g., Dunedin*, 329 So. 2d at 321 (The court stated "[t]he cost of new facilities should be borne by *new users . . .*") (emphasis added).

38. "Fair Share" can best be explained by the name given to the Palm Beach County Ordinance for road improvements: Fair Share Contribution for Road Improvements Ordinance. *See Palm Beach County Ordinance 79-7* (1980); *cf. St. Johns County*, 583 So. 2d at 640 (where the intended purpose of the *St. Johns County Ordinance* is "to regulate the use and development of land so as to assure that new development bears a proportionate share of the cost of capital expenditures necessary to provide public educational sites and facilities in *St. Johns County*").

39. The term "magic meter," put forth by counsel for the Builders, is an important concept in understanding the underlying theory of impact fees. In the area of public services, the ideal situation would be the ability of having a "magic meter" calculating the amount of services used by each member of the community. For example, if every time you ran your car on a public road the "magic meter" began to tic off usage time, the county could accurately assess a person's road usage and send them a bill. If every time a person flushed their toilet the meter ran on their usage of the sewage system, they could then be assessed a pro rata share of the cost. Interview with Michael McMahan, Counsel for the Builders in *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635 (Fla. 1991) (July 29, 1991).

meter is impossible. However, this is exactly what impact fees are designed to model—the perfect fee assessment.

The purpose of the St. Johns County ordinance parallels a model impact fee by attempting to distribute the cost of increasing the capacity of school facilities to those who have created their need.⁴⁰ Although this is a politically laudable gesture by the county, the developers contend that it is at odds with the Florida constitutional mandate for public free schools⁴¹ and is therefore inconsistent with the county's power to raise revenue.⁴²

The Fourth District Court of Appeal in *Home Builders & Contractors Ass'n v. Board of County Commissioners*,⁴³ has credited Florida home rule powers⁴⁴ as offering adequate authority for county governing bodies to implement impact fees. In fact, many counties throughout Florida have now designed ordinances or regulations to levy impact fees on developers.⁴⁵ This article focuses primarily on the St. Johns County Educational Impact Fee Ordinance 87-60 as an example of these impact fees.

The main assertion in opposition to the constitutionality of the St. Johns County Educational Impact Fee Ordinance was that it bears a keen resemblance to a user fee.⁴⁶ The principal case relied on by the

40. Previous impact fees have been predicated on direct ties between the need and demand created by new growth. *See* Rose, *supra* note 5, at 356.

41. *See* FLA. CONST. art. IX, § 1; *see also* Scavella v. School Bd., 363 So. 2d 1095 (Fla. 1978).

42. *St. Johns County*, 583 So. 2d at 641.

43. *Home Builders & Contractors Ass'n v. Board of County Comm'rs*, 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983).

44. FLA. STAT. § 125.01(1) (Supp. 1990).

Home rule power is the power vested in cities and towns as "an inherent right of local self-government" which is supported by the local government's ability to best protect their own needs. 1 MCQUILLIN MUN. CORP. §§ 1.40, .42 (3d ed. 1987). Although there is no clear distinction between state and local activity, the effect of rapidly increasing local populations necessitates the need for increased local control, because any "appropriate regulation . . . varies in accordance with the density, geographical location, physical conditions, the needs and conveniences to be furnished and the means to secure them, and the standards of the inhabitants as well." *Id.*, § 1.64. Accordingly, local government's right of home rule power may be the best manner for serving the people of that particular region.

45. *E.g.*, Palm Beach County Ordinance 79-7 (1980) (Fair Share Contribution for Road Improvements Ordinance); *see* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 607 (Fla. 4th Dist. Ct. App. 1983) (development of county level parks).

46. A user fee is defined as "[c]harges imposed on persons for the use of a particular facility." BLACK'S LAW DICTIONARY 1543 (6th ed. 1990).

Florida Supreme Court was *Contractors & Builders Ass'n v. City of Dunedin*,⁴⁷ which stands for the proposition that funds collected by impact fees must be "limited to meeting the costs of expansion."⁴⁸ Although correctly cited for this proposition, the case stands for a much larger principle; there is "nothing wrong with transferring to the new user of a municipality [service] a fair share of the [additional] costs [increased capacity] of the system involves."⁴⁹ This principle is the common thread that weaves through all of the cases involving impact fees, complicating the distinction between "impact fee" and "user fee."

As a user fee, even the county would have to agree with the Fifth District Court of Appeal that the fee violated the free public school mandate.⁵⁰ However, the county identifies the Educational Facilities Ordinance as a "development exaction"⁵¹ and not a "user fee," with the distinction that the fee is for increasing facility capacity, not actual use.⁵² The reality is that developers of new residential areas are being charged an additional fee,⁵³ apart from the future payment of ad valorem taxes.⁵⁴ The distinction should not lie in whether one is being charged for the use of a facility or the expansion of the facility's capacity.⁵⁵ Rather, it should be determined by a test applicable to the specific parameters of the needed services created by the new development.

The Fourth District Court of Appeal in *Broward County v. Janis Development Corp.*⁵⁶ set the stage for the development of impact fee

47. 329 So. 2d 314.

48. *St. Johns County*, 583 So. 2d at 637 (citing *Dunedin*, 329 So. 2d at 320).

49. *Dunedin*, 329 So. 2d at 317-18.

50. *St. Johns County*, 559 So. 2d at 363.

51. Petitioners' Brief, *supra* note 6, at 17.

52. *Id.* at 18.

53. Assuming that the impact fee is initially charged to the developer will, by the very nature that "subdividing is a profit-making enterprise," be passed onto the homebuyers. See *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 868 (Fla. 3d Dist. Ct. App. 1976).

54. Ad valorem taxes can be defined as "[a] tax levied on property or an article of commerce in proportion to its value, as determined by assessment or appraisal." See BLACK'S LAW DICTIONARY 51 (6th ed. 1990).

55. The impact fees for roads, schools, public buildings, police, fire, emergency medical services, and parks estimated in the Methodology Study, are the totals for each specific structural unit. These fees represent a proportional share of the cost to provide additional facilities. See *St. Johns County Impact Fee Methodology*, prepared by Dr. J. Nicholas (Dr. J. Nicholas was the county consultant developing these impact fees.) [hereinafter *Methodology Study*].

56. *Broward County v. Janis Dev. Corp.*, 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975).

parameters. In *Janis Development*, the court rejected an impact fee for road construction because the "fee was simply an exaction of money to be put in trust for roads, which must be paid before developers may build" without stipulating the use for which the funds are collected.⁵⁷ This same court later, in *Palm Beach County*,⁵⁸ affirmed the validity of an impact fee ordinance for road improvements, recognizing that the ordinance followed the lessons expressed by the court in *Dunedin*⁵⁹ regarding the defects in the *Janis Development*⁶⁰ ordinance. The Fourth District Court stated that a proper impact fee is a fee that assures the cost of the improvements will exceed the funds collected, and that those funds will be used to benefit the new development.⁶¹ However, the Florida Supreme Court is now faced not with road improvements or water and sewer connections, but new school facilities.

In the area of education, the generation of funds for new school facilities should come from the populace as a whole, because in actuality it is the populace as a whole which will benefit. However, the St. Johns ordinance divides the paying population into two constituents: first, the residents of the new development; and second, only the residences that would "reasonably" require the service.⁶² Under previous fee adjudications, the theory of having the new user pay a "fair share

57. *Id.* at 375.

58. *Palm Beach County*, 446 So. 2d at 145.

59. 329 So. 2d at 320-21.

60. *Id.* at 318.

61. *Palm Beach County*, 446 So. 2d at 145.

62. *See, e.g.*, St. Johns County, Fla., Ordinance 87-60 § 5(D) (Oct. 20 1987) (where the ordinance defines some land development activity under the criteria of whether "that [development] will result in additional students in the public schools.").

In addition, in the *City of Tarpon Springs v. Tarpon Springs Arcade Ltd.*, 585 So. 2d 324, the Second District Court of Appeal is now considering under a Water and Sewer Impact Fee, the problems that arise because "the ordinance fails to direct the building official as to the method and manner in which credits are to be allowed or applied in determining whether there is or is not a fee due for the new or expanded use of a remodeled structure" *Id.* at 326-27. It is quite possible that if section 5(D) of the St. Johns County ordinance was permitted to remain, problems would arise in determining what constitutes the meaning of what "will result in additional students in the public schools," as well as being violative as a direct user fee.

It is this author's opinion that section 5(D) is as detrimental to the validity of the ordinance as the court feels 7(B) is, where "impact fees have the potential of being user fees that will be paid primarily by those households that do contain public school children, thereby colliding with the constitutional requirement of free public schools." *St. Johns County*, 583 So. 2d at 640.

of the costs which new use of the system involves,"⁶³ was appropriate. However, this is not the case where school facilities are concerned. Impact fees for educational facilities are different from all others because of Florida's constitutional mandate for a "uniform system of free public schools,"⁶⁴ and the scope of the proposed infrastructure project.⁶⁵

III. CONSTITUTIONAL LEGITIMACY OF ORDINANCE 87-60

The main constitutional challenge presented by the St. Johns County Educational Facilities Impact Fee Ordinance⁶⁶ is whether it violates the mandate for a "uniform system of *free public schools*."⁶⁷ The application of this ordinance, irrespective of the language in which it is couched,⁶⁸ is violative of the constitutional mandate for a uniform system of free public schools. There is virtually no difference, except semantically, between access to public schools being dependent upon the payment of tuition, or the payment of a fee prior to all construction that would place a student in the public school.⁶⁹ The basis for this

63. *Dunedin*, 329 So. 2d at 318.

64. FLA. CONST. art. IX, § 1; cf. Juergensmeyer & Blake, *supra* note 4, at 440 (stating "[a]lthough a *distinction could be made between sewer and water facilities and education . . . all are necessary services normally provided by local governments.*") (citation omitted) (emphasis added).

65. It is a fundamental premise that, as municipalities grow, there is a continual need for the new public improvements as well as for maintenance and expansion of existing infrastructure and public facilities. Local jurisdictions have traditionally been responsible for the provision of major infrastructure improvements such as roads, schools, parks, sewage, and drainage facilities. Financing of these improvements has come from general revenues, most notably the real property tax, and through issuance of general obligation bonds which are repaid from local property tax revenues.

Delaney et al., *supra* note 28, at 140.

66. St. Johns County, Fla., Ordinance 87-60 § 2(A) (Oct. 20, 1987) (the ordinance shall be known and may be cited as the "St. Johns County Educational Facilities Impact Fee Ordinance").

67. FLA. CONST. art. IX, § 1 (emphasis added).

68. Justice Harris of the Fifth District Court of Appeal stated that even though the ordinance is "couched in the broad language of an impact fee, it is ultimately assessed only against those households that have children in public school." *St. Johns County v. Northeast Fla. Builders Ass'n, Inc.*, 559 So. 2d 363, 364 n.2 (Fla. 5th Dist. Ct. App. 1990), *rev'd*, 583 So. 2d 635 (Fla. 1991) (where in footnote two, Justice Harris offered his objection to section 7(B), listing examples such as *retirement homes*, *nursing homes* and families with children in private schools).

69. *Cf. St. Johns County*, 583 So. 2d at 639.

constitutional challenge is created by the interpretation given to the meaning of "free public schools."

The concerted understanding is that "free" was intended to mean that a child will not be prevented from attending a public school because his or her tuition had not been paid.⁷⁰ The line between paying for a present use and paying for a future use is thin, and should not be the justification for determining that the impact fee is not a user fee. A question posed by this interpretation is: How far from the schoolhouse door is the county permitted to charge a fee?⁷¹ One conceivable answer to this question is determined by how far removed payment of the fee is from being attributed to the homeowner. From this answer it is arduous to offer opposition to Justice Harris' logical conclusion in the Fifth District Court's decision that: "Whether the money is paid directly to the school board as tuition or to the county commission and delivered to the school board when the family of public school children build or buy [or remodel] a home in the district seems to have little practical distinction."⁷² Although the Florida Supreme Court stated that "St. Johns County [had] initiated a comprehensive study of whether to impose impact fees to finance additional infrastructure,"⁷³ the methodology study examined by the court only appraised one method of meeting the needed increase in facility capacity, impact fees, and did not address other "alternative financing mechanisms."⁷⁴

A facilities task force was appointed by the Commissioner of Education in 1989 to examine the projected education capital outlay needs for Florida up to the year 2000.⁷⁵ Specifically outlined was the possibil-

70. Although counsel for the county states this is not the effect of the ordinance, because "[t]he parent [will be] in the 'pokey' but the child will be in school at no charge," counsel for the Homebuilders' believes "imprisonment of a parent is a price no child should have to pay." Petitioners' Brief, *supra* note 6, at 21; Answer Brief of Respondents at 24, *St. Johns County*, 583 So. 2d 635 (Fla. 1991) (No. 75,986) [hereinafter Respondents' Brief].

71. This is one of the many questions raised while discussing the case with Mr. McMahon. Interview with Michael P. McMahon, Counsel for the Builders in *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635 (Fla. 1991) (July 29, 1991).

72. *St. Johns County*, 559 So. 2d at 365.

73. *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635, 637 (Fla. 1991).

74. Facilities Task Force, *A Report to the Commissioner*, at 7 (February 1990) (available at the office of Commissioner of Education) [hereinafter Facilities Task Force].

75. *Id.*

ity of providing "alternative funding mechanisms"⁷⁶ to meet capital outlay needs. One of these alternative mechanisms, and the first goal addressed by the Task Force, was the "maximizing of all existing resources"⁷⁷ as a means of reducing capital outlay needs rather than simply determining a method for funding new school construction. In *St. Johns County*, there was no indication that the Florida Supreme Court reviewed this study or any study emphasizing a reduction in capital outlay needs. In contrast, there is a methodology study which addresses a singular means for responding to population growth through mathematical calculations of student population and the required facility square footage to meet these student needs.⁷⁸ The court should not be attempting to determine that impact fees are acceptable methods of "provid[ing] the *capacity* to serve the educational needs of . . . [the] dwelling units,"⁷⁹ without first determining whether the municipality attempted to maximize the potential of their present facilities.⁸⁰

Whether or not St. Johns County has effectively attempted to maximize facility use should become a factor in determining the validity of the ordinance. Paralleling the logic used by the Florida Supreme Court in rejecting the Homebuilder's contention that this impact fee is nothing more than a tax, is the argument rejecting the imposition of impact fees to resolve the need for "units of new residential development"⁸¹ as "too simplistic."⁸² The court should balance the ability of alternative methods for funding capital outlay projects and not simply alternative methods of funding these projects.⁸³

Equally important to the logic of the Florida Supreme Court's decision in approving this ordinance⁸⁴ is that the fee is charged to the

76. *Id.* (letter from Chairman, D. Burke Kibler, III of the Task Force to the Commissioner of Education).

77. *Id.* at 12.

78. Methodology Study, *supra* note 55, at 20-24.

79. *St. Johns County*, 583 So. 2d at 638-39 (emphasis added).

80. Facilities Task Force, *supra* note 74, at 12-14.

81. *Id.*

82. *Id.* at 3.

83. The Facilities Task Force met in 1989 to research the occurring school funding crisis. The Task Force was organized to recommend funding alternatives for public education capital outlay needs. See Facilities Task Force, *supra* note 74. One of the alternatives recommended to the Commissioner of Education was to consider maximizing the potential use of the present facilities, an alternative that should have been addressed by the court. *Id.*

84. *St. Johns County*, 583 So. 2d at 642 (with the exception of section 7(B), and then not unless all municipalities have entered into interlocal agreements, no fee can be

developer and not the homeowner or facility user.⁸⁵ The county contends that the homeowner is not economically affected because the housing market sets the price of the homes.⁸⁶ Alternatively, if the impact fee is passed on to the homeowner the ordinance could be deemed a user fee, and therefore violative of the constitutional mandate for "free public schools."⁸⁷ As a result, the court recognized the proposed concerns that the ordinance resembles a user fee,⁸⁸ and considered the severance of section 7(B) to cure the constitutional defect.

Section 7(B) threatened the validity of the ordinance, because it enabled the impact fee to be directed at the homes of potential users of the school facility, and not charged indirectly to the units within the development as a whole.⁸⁹ Severance of section 7(B) would also effect the intended purpose of this ordinance: shifting the cost of newly created needs to those who created the needs; namely, the developers. Although the county's position is that "a fair reading of Section seven (B) . . . does not provide for the kind of case by case exemption pointed to by the Fifth District Court,"⁹⁰ the Florida Supreme Court viewed this section as exempting those who could show that they will not impact school facilities, and therefore, required severance of the section.⁹¹

charged).

85. Cf. St. Johns County, Fla., Ordinance 87-60 § 11(B) (Oct. 20, 1987) (the ordinance states that if the funds collected are not expended for school facility construction, they will be returned to the present landowner). This statement strengthens the argument that the impact fee has been passed to the landowner.

86. The petitioners' initial brief in this case states that "logic, common sense and practical economics suggest that if impact fees are passed through to anyone by a developer, the likely "pass-through" will be the raw land owner . . ." Petitioners' Brief, *supra* note 6, at 15 n.13.

87. Respondents' Brief, *supra* note 70, at 12 n.10 (stating from the record that "empirical studies conclude that impact fees are ultimately paid by the home buyers.").

88. *St. Johns County*, 583 So. 2d at 640. "[S]even (B) permits households that do not contain public school children to avoid paying the fee. This means that the impact fees have the potential of being user fees that will be paid primarily by those households that do contain public school children, *thereby colliding with the constitutional requirement for free public schools.*" *Id.* (emphasis added).

89. *State ex rel. Clark v. Henderson*, 188 So. 351, 352 (1939). "The Constitution establishes a fundamental policy of making the *populace as a whole* bear the expense of an educational system which directly and primarily benefits the *populace as a whole.*" Respondents' Brief, *supra* note 70, at 14 (emphasis added).

90. Petitioners' Brief, *supra* note 6, at 19.

91. *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635, 640 (Fla.

Severance of section 7(B) from the ordinance resulted in the Florida Supreme Court's perception that "[w]e believe the ordinance, absent section seven (B), constitutes a workable scheme within the legislative intent."⁹² However, in footnote six, which states "[w]hile not necessary to the validity of the ordinance, we should not find objectionable a provision that exempted from the payment of an impact fee permits to build adult facilities in which, because of land use restrictions, minors could not reside,"⁹³ the court demonstrated that it was not sure of the definition of this "workable scheme." The court's logic used to find section 7(B) unconstitutional should have also worked to conclude that the court's position on adult facilities was objectionable, and therefore unconstitutional. An appropriate finding would be that, because the entire county would benefit from an educated community, the county as a whole should generate the required revenue.

It is understandable that the court feels a homeowner who will never impact the educational system should not be required to pay the educational facility impact fee.⁹⁴ However, this is contrary to the court's previous position which rejected the Homebuilders' argument "that because many of the new residents will have no impact on the public school system, the impact fee is nothing more than a tax insofar as those residences are concerned."⁹⁵ Covenants and land use restrictions placed on the residency of school aged children should not affect the fee⁹⁶ under the court's theory of the case, because the fee is directed at the developer, not the homeowner. Consequently, footnote six addresses a single group who would be offended by this ordinance,⁹⁷ and as a result, is destructive to the court's logic that impact fees are

1991).

92. *Id.* at 640.

93. *Id.* at 640 n.6.

94. An inference drawn from footnote six is that because of land use restrictions, there can be no minor residents and therefore there will be no impact on the public educational system. *Id.*

95. *Id.* at 638; *see, e.g.,* Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140, 144 (Fla. 4th Dist. Ct. App. 1983) (where the court dealt with an amount and use of funds which "smacked more of revenue raising which is descriptive of a tax."); *See generally* Juergensmeyer & Blake, *supra* note 4, at 423-24 (revenue raised for the expansion of municipal facilities or services is usually classified as a tax).

96. *See* McLain Western #1 v. County of San Diego, 194 Cal. Rptr. 594 (Ct. App. 1983) (where the court said it is fair to assess developers of retirement communities).

97. *St. Johns County*, 583 So. 2d at 640 n.6 (retirement home purchasers).

not user fees.

The Florida Supreme Court's logic becomes conflicting where, in one discussion the developer is acknowledged as the only entity being effected by the impact fee,⁹⁸ and then in another argument the homeowner is acknowledged as being effected.⁹⁹ A major premise underlying the claim that only the developer is effected, is the theory that the price of a home is determined by the market, with no affect by impact fees. This theory conflicts with the language of the ordinance which provides for the "impact fee" to be refunded to the current landowner immediately after six years¹⁰⁰ if the funds have not been used for new facility construction.¹⁰¹ Consequently, the ordinance indicates that the landowner, and possibly the homeowner, is the fee-payer.¹⁰² The potential abrogation of constitutional rights in *St. Johns County* requires the court to redefine the ordinance's general meaning of "fee-payer."¹⁰³

Section five of the St. Johns County ordinance illustrates a rela-

98. The impact fee is paid by the developer at the permit stage, which is designed to "provide the capacity to serve the educational needs of all . . . units." *Id.* at 638-39.

99. Acknowledging that a homeowner is affected by the imposition of the impact fee is expressed with disapproval in the court's discussion over the validity of section 7(B), *id.* at 640, and again in footnote six with the non-objection to an exemption provision for adult communities, *id.* at 640 n.6.

100. St. Johns County, Fla., Ordinance 87-60 § 11(B) (Oct. 20, 1987).

101. "Any refunds not expended . . . following six (6) years from the date the educational facilities impact fee was paid shall, upon application from the then *current landowner*, be returned to such *landowner* with interest at the rate of six percent (6%) per annum . . ." *Id.* (emphasis added). Returning these unused funds to the current landowner implies an understanding that the educational impact fees were indirectly paid by the current landowner. This theory runs contrary to the logic expressed by the county and that of Justice Sharp (dissenting), that a "way must be found to constitutionally require those who wish to expand Florida's residential facilities [*developer*] to shoulder a fair share of the resulting increase in costs of schools." Petitioners' Brief, *supra* note 6, at 43 (citing *St. Johns County*, 559 So. 2d at 366 (Sharp, J., dissenting)) (emphasis and modification in original).

In addition, section 12(A)(1), Exemptions and Credits of the Ordinance, states that exemptions for expansion of existing buildings *only* occurs "where *no* additional public school enrollment will be produced over and above that produced by the existing use." St. Johns County, Fla., Ordinance 87-60 §§ 12(2)—(4) (Oct. 20 1987) (emphasis added). Section 12(A)(1) seems to address the logic that the ordinance is intended to be addressed *not* at developers, but at those units which will be intended *users* or makers of the need for new service increases.

102. However, the developer is not excluded from being the fee-payer at the end of six years if the land is not sold.

103. St. Johns County, Fla., Ordinance § 5(A) (Oct. 20, 1987).

tionship between a development activity and the fee-payer, in particular, section 5(A) makes reference to "a land development activity which may reasonably be expected to place students in the public schools."¹⁰⁴ This is further defined in section 5(D) as "any change in the use of any structure that will result in additional students in the public schools of St. Johns County."¹⁰⁵ The implication is that a homeowner remodeling his existing home will be charged this fee *if* additional public school students will result. This example shows that it is possible that: 1) the fee-payer is the homeowner, and 2) the impact fee is related to the attendance of additional students¹⁰⁶ and therefore, the fee would be paid *only* "by those households [where remodelling would produce additional] . . . public school children."¹⁰⁷ According to the court's position, these elements would have "the effect of converting the educational facilities impact fee into a user fee"¹⁰⁸ As such, this educational impact fee is violative of the constitutional mandate for free public schools and beyond the county's power to enact land use regulations, as provided by the Florida Legislature.¹⁰⁹

The Florida Legislature has authorized the implementation of "comprehensive planning programs to guide and control future development."¹¹⁰ Pursuant to the Local Government Comprehensive Planning and Land Development Act ("Growth Management Act"),¹¹¹ the Florida Supreme Court has indicated that the legislative intent is to "facilitat[e] the adequate and efficient provision of schools," in particular the county's involvement in financing.¹¹² Granted, the Growth Management Act defines its intent as "encourag[ing] the most appropriate use of . . . resources, consistent with the public interest"¹¹³ This definition is an example of the legislature's awareness of the need for

104. *Id.*

105. *Id.*, § 5(D).

106. *Cf. St. Johns County*, 583 So. 2d at 639.

107. *Id.* at 640 (emphasis added) (the term "additional" was added to the quote by this author to represent the particular example; however, it does not detract from the court's view that if a fee is directed at the user it will be violative of the constitutional mandate for free public schools).

108. *Id.*

109. FLA. STAT. § 163.3161 (1989).

110. *Id.*, § 163.3161(2).

111. *Id.*, § 163.3161.

112. *St. Johns County*, 583 So. 2d at 642 (citing FLA. STAT. § 236.012(4) (1989)).

113. FLA. STAT. § 163.3161(3).

maximizing the capacity of the present school facilities. Therefore, the Florida Supreme Court should examine other methods of "increasing school facility capacity" which would also address Justice Sharp's view that "this state [would face] potential fiscal and social catastrophe . . ." if impact fees for schools were found unconstitutional.¹¹⁴ The problem facing the court in determining the best alternative to the imposition of impact fees is that the dual rational nexus test does not require this examination by the court.

The Florida Supreme Court in *St. Johns County* cited the elements of the dual rational nexus test as: 1) "a reasonable connection between the need for additional schools and the growth in population that will accompany new development,"¹¹⁵ and 2) "a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision."¹¹⁶ Although the court stated that the ordinance met the first prong of the dual rational nexus test, because "the fee [was] designed to provide the capacity to serve the educational needs of all . . . dwelling units [built],"¹¹⁷ the ordinance failed the second prong, because "there was no restriction on the use of the funds to ensure they [would] be spent to benefit those who have paid the fee."¹¹⁸ The dual rational nexus test lacked the ability to insure that "recommended ways to maximize utilization of existing facilities"¹¹⁹ has occurred. Furthermore, the inclusion of a "less intrusive alternative means" component, established in the needs-nexus analysis, would perform this function and is the appropriate test for the validation of educational impact fees.

IV. ANALYZING ORDINANCE VALIDITY

A. Reasonable Relationship to Dual Rational Nexus Tests

The Third District Court of Appeal in *Wald Corp. v. Metropolitan Dade County*¹²⁰ analyzed the acceptability of two previously ap-

114. *St. Johns County v. Northeast Fla. Builders Ass'n*, 559 So. 2d 363, 364 (Fla. 5th Dist. Ct. App. 1990), *rev'd*, 583 So. 2d 635 (Fla. 1991) (Sharp, J., dissenting).

115. *St. Johns County*, 583 So. 2d at 638.

116. *Id.* at 637.

117. *Id.* at 638-39.

118. *Id.* at 639.

119. Facilities Task Force, *supra* note 74, at 1.

120. *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863 (Fla. 3d Dist.

plied tests for determining the constitutional validity of subdivision exactions. These were the "reasonable relationship" and "specifically and uniquely attributable" tests.¹²¹ The "reasonable relationship" test states that the subdivision exaction requirement be "reasonably related to the needs of the municipality;" however, the "specifically and uniquely attributable" test further narrows this requirement to one being "specifically and uniquely attributable to the subdivider's activity."¹²² The Third District Court of Appeal outlined the weaknesses of both tests.¹²³

These tests interchange the burden of proving the nexus between the new development and the needs created among the developer and the municipality. The inadequacies of these tests originate from their inherent inflexibility. While the reasonable relationship test affords municipalities almost unchecked powers to impose fees, the "specifically and uniquely attributable" test would require verification that the development is the single reason for the shortage in school facility capacity, and therefore, unreasonable burdening of the municipality.¹²⁴

The court in *Wald* was confronted with an ordinance which conditioned the approval of future development plans on the dedication of land to be used for a canal system.¹²⁵ Although the Third District Court of Appeal stated that this subdivision requirement would be valid under either the "reasonable relationship" test or "specifically and uniquely attributable" test,¹²⁶ the court, in a well prepared evaluation of these two tests, determined that a new "rational nexus approach provides a more feasible basis for testing subdivision dedication requirements"¹²⁷ One reason the court found this analysis attractive was because it "balanced the prospective needs of the community and the property rights of the developer [and] . . . treated the business of subdividing as a profit-making enterprise"¹²⁸

Likewise, the Fourth District Court of Appeal in *Hollywood, Inc.*

Ct. App. 1976).

121. *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 176 N.E.2d 799, 801 (Ill. 1961) (specifically and uniquely attributable test); *Ayres v. City Council of Los Angeles*, 207 P.2d 1, 8-9 (Cal. 1949) (reasonable relationship test).

122. *Wald*, 338 So. 2d at 866.

123. *Id.*

124. *Id.* at 866-67.

125. *Id.* at 864.

126. *Id.* at 865.

127. *Wald*, 338 So. 2d at 868.

128. *Id.*

v. Broward County,¹²⁹ in deciding the constitutionality of an ordinance effecting the county park system, advanced the present form of the dual rational nexus test applied in *St. Johns County*.¹³⁰ In *Hollywood*, the court addressed a subdivider's challenge to an ordinance requiring either the dedication of land, or the payment of a fee in lieu of land dedication for a county park program.¹³¹ The court held that the "exactions are shown to offset, not exceed, reasonable needs sufficiently attributable to the new subdivision residents . . . [and that the] capital assets will sufficiently benefit those new residents."¹³² However, there are important factual distinctions between the land dedication exaction in *Wald*, and the monetary educational impact fee addressed by the court in *St. Johns County*.¹³³ The differences between subdivision dedications and impact fees are important. Two reasons need to be explored: 1) land is unique, and 2) dedicating land draws a "proper distinction[] between the individual property-holder and subdivider."¹³⁴

First, the land in question might be so unique that even the alternatives to land dedication offered by the ordinance in *Hollywood*, payment of a fee in lieu of the dedication,¹³⁵ would not be acceptable. For example, the land dedicated for new school facility construction should be central to its related community, enabling students to attend school without traveling extensive distances. Second, the benefits of property subdivision accruing to a subdivider may require the dedication of land to maintain a balance between the community and subdivider, differentiating between the treatment of individual land owners and profit-making enterprises.¹³⁶ The test used by a court in determining the validity of impact fees should be flexible enough to allow the municipality room to provide for its growing community; however, it should be strict enough to insure that the proper method is chosen. In order to provide for the flexibility required, the dual rational nexus test must be further developed.

Further development of this test requires a determination as to whether the ordinance is classified as a "development exaction" or

129. *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. 4th Dist Ct. App. 1983).

130. *St. Johns County*, 583 So.2d at 637.

131. *Hollywood*, 431 So. 2d at 610.

132. *Id.* at 614.

133. *St. Johns County*, 583 So. 2d at 637.

134. *Wald Corp.*, 338 So. 2d at 868.

135. *Hollywood*, 431 So. 2d at 607.

136. *Id.* at 610.

“user impact fee.”¹³⁷ This classification methodology supports a balance between the equities of the developer and the municipality, by incorporating and evaluating the type, size and cost of the construction proposed. The effect of the classification is important to the obligations and standards applied to the parties by this proposed “needs-nexus analysis.”¹³⁸ The definitions for subdivision exactions and user impact fees in the needs-nexus analysis are the following:

1. *Subdivision Exaction*—Traditional construction, dedication, or in-lieu-fee payment for site-specific needs imposed at the time of subdivision. These improvements are usually categorized as being “minor” in scope and cost, and are typically provided on-site. Examples include subdivision streets, sidewalks, trails, utility easements, and open space.

2. *User Impact Fee*—More recent device to fund major, off-site infrastructure expansion imposed at the building permit stage. Examples include expansion or improvement of sewage treatment facilities, landfills, primary roadways, *schools*, and active recreational parks.¹³⁹

The definition suggested for a “user impact fee” conforms to the situation found in *St. Johns County*. Although the court there did not distinguish between subdivision exactions and user impact fees when evaluating the application of the dual rational nexus test, it is an essential component for determining the validity of the ordinance.¹⁴⁰ The Florida Supreme Court should re-evaluate the application of the dual rational nexus test in the area of education because of the significant substantive differences between the definitions of user impact fees and subdivision exactions. It is this conflict in definition substance which highlights

137. The Petitioners’ initial brief defines the important distinctions between “user” fees and “development exactions” as follows: “A user fee assumes that capacity is available and imposes a fee for using the capacity. A development exaction is predicated on the fact that capacity is not available (Section 163.3202(2)(g), Fla. Stat. (1989)) or the developer should be given the alternative of financing an increase in facilities capacity.” Petitioners’ Brief, *supra* note 6, at 18.

138. Authors Delaney, Gordon and Hess, are concerned about the inability of courts to distinguish clearly between the tests available. *See* Delaney et al., *supra* note 28. The needs-nexus analysis is a test unifying the “reasonable relationship,” “specially and uniquely attributable,” and “rational nexus” tests for determining the validity of impact fees. *Id.*

139. *Id.* at 139 (emphasis added).

140. *Id.* at 141.

the need for test reform.

B. *The Need for Test Reform: "Needs-Nexus Analysis"*

The "needs-nexus analysis"¹⁴¹ is the appropriate test for analyzing the public educational impact fee proposed by the St. Johns County Ordinance. Because impact fees which focus on educational facilities reflect complications unique to themselves,¹⁴² the test applied by the court should reflect an understanding of these problems.¹⁴³ The "needs-nexus analysis" was designed to examine the validity of both "subdivision exactions" and "user impact fees."¹⁴⁴ This test categorizes new school facility construction as a user impact fee because of the large estimated project size, and the fact that the fee is exacted at the permit stage, rather than at subdivision.¹⁴⁵ However, since the need for in-

141. See generally Delaney et al., *supra* note 28.

142. FLA. CONST. art. IX, § 1 (Constitutional mandate for "uniform system of free public schools").

143. See Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 992 n.3 (1989) ("Many states have resolved these conflicts by adopting some *variation* of the rational nexus rule") (emphasis added).

In addition, although the United States Supreme Court has not expanded the definition of fundamental rights beyond that which is explicitly or implicitly guaranteed by the Constitution, where the Court in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), held that the differences in expenditures per student from local property tax funding is constitutional where the procedure is rationally related to a legitimate state interest, it has considered that issues of public education to require more than the mere rationality review applied to social welfare interests. See *Plyer v. Doe*, 457 U.S. 202, 221 (1982). In *Plyer*, the level of scrutiny of a Texas statute denying the funding for public education of illegal aliens was elevated to protect against the denial of an education:

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.

Id.

Because the Florida Supreme Court has recognized a distinction between impact fees for sewer and water facility connections and education, *St. Johns County*, 583 So. 2d at 638, the court should reevaluate the applicability of the dual rational nexus test.

144. Delaney et al., *supra* note 28, at 139.

145. *Id.* (The Educational Impact Fee proposed in St. Johns County contains elements of both the subdivision exaction determination where the need is "attributable to [the] subdivision," and also resembles the definition of a user impact fee offered by

creased new school facilities has been created by the subdivision for the subdivision, as opposed to the creation of an area wide need, the *St. Johns County* ordinance also parallels the needs-nexus test's definition of a subdivision exaction.¹⁴⁶ Therefore, further development of the dual rational nexus test should compile elements from tests considering both categories: subdivision exactions and user impact fees.

The needs-nexus analysis for subdivision exactions is similar to the dual rational nexus test applied by the supreme court in *St. Johns County*.¹⁴⁷ Further development of the dual rational nexus test would require three steps. First, determine whether the need for additional school facilities is generated by the growth in population created by the new development. Second, ascertain whether there is a reasonable connection between the fee imposed and the service rendered to the development. Third, determine if there are any "less intrusive means available"¹⁴⁸ by closely examining legislative intent.

The policy presented by this additional third element is to require the exploration of *all* possible methods of financing such large infrastructure projects, as well as alternative methods for reducing the need for additional new school facilities.¹⁴⁹ The municipality should not implement a revenue raising tool merely because it is unlikely to raise outrage by municipal residents. Impact fees are directed at a silent

the needs-nexus test.).

146. *Id.* at 158-59.

147. Although the court stated: "In essence, [we] approved the imposition of impact fees that meet the requirements of the dual rational nexus test adopted by other courts in evaluating impact fees," the court made no study of its own into the validity of the test. *St. Johns County*, 583 So. 2d at 637. The court articulated the requirements as: 1) the demonstration of a rational nexus between additional facility needs and the growth in population created by the new developments; and 2) a rational nexus between the "expenditure of funds collected and the benefits accruing to the subdivision." *Id.* See generally Delaney et al., *supra* note 28, at 152-53; Juergensmeyer & Blake, *supra* note 4, at 431-33.

148. Delaney et al., *supra* note 28, at 161 (examples for "less intrusive alternatives" are increasing the general tax rate or by the use of general obligation bonds). In addition, the Facilities Task Force addressed issues for maximizing present facilities, none of which are politically palatable decisions. See Facilities Task Force, *supra* note 74, at 12.

It is noted that the three elements defined for the needs-nexus test suggested by this Comment are a compilation of the components of the nexus prongs offered for both subdivision exactions and user impact fees with the burden of proof on the government. It would be the government's burden to show that less intrusive alternatives are not available. See Delaney et al., *supra* note 28, at 158-59.

149. Facilities Task Force, *supra* note 74.

constituency,¹⁵⁰ those not yet part of the local voting population,¹⁵¹ and therefore, are politically aesthetic. The addition of the less intrusive alternative element would require the court to further scrutinize the previous elements as well as research the effectiveness, not only of the impact fee, but of alternative methods for financing or reducing the need for new school facilities.¹⁵²

150. Delaney et al., *supra* note 28, at 161.

151. [O]wners of undeveloped land, developers, and consumers of new development are poorly represented minorities. Their votes are few; many of them have no vote at all, as they are not (or are not yet) residents of the [municipality]; their campaign contributions and lobbying efforts are ineffectual. The homeownership majority has every incentive to minimize its own tax burden by developing a source of municipal revenue, the burden of which falls on these groups.

Note, *supra* note 143, at 1007; see also Daniel W. Sweet & Lee P. Symons, *Pennsylvania's New Municipalities Planning Code: Policy, Politics, and Impact Fees*, 94 DICK. L. REV. 76, 91-2 (1989) stating:

The political question most aptly formulated with respect to impact fees and related exactions is as follows: "It is easy to understand the genesis for this type of regulation. After all, elected officials would prefer to tax those who do not vote. But it is hard to justify this type of requirement as a matter of law. A decision by a municipal governing body to impose the cost of the new fire house on the new residents, via zoning regulations, is in effect a taxation decision." . . . The current Pennsylvania practice of monetary exactions is questionable, both as a matter of law and as a matter of public policy. These ad hoc deals possess tremendous potential for abuse and corruption. Impact fee legislation, which is based upon studies by planners employed by the municipalities that desire to enact the ordinances, threatens to subtly disguise nonuniform taxation.

(quoting 1 R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 3.3.17 (1981)).

In 1987, the California Newhall School District submitted a resolution for a "special tax" to fund capital outlay projects and which included the addition of school-impact fees. *California Bldg. Indus. Ass'n v. Newhall School Dist.*, 253 Cal. Rptr. 497 (Ct. App. 1988). "Not surprisingly, the special taxes were overwhelmingly supported by district voters not subject to the new exaction." Daniel J. Curtin Jr. & Michael P. Durkee, *'Special' Tax is Still a Tax*, 102 L.A. DAILY J. 5 (January 6, 1989) (emphasis added); See, e.g., CAL. CONST. art. VIIIA (Proposition 13, passed June 6, 1978, requires a two-thirds voter approval on resolutions).

152. In examining the "less intrusive alternatives available," the authors of the need-nexus analysis offer the following questions to be considered by a court in their examination:

-What is the amount of the fee and its likely impact upon the ultimate consumer when passed through by the developer?

. . . .

-How healthy is the municipality's assessable base? Is it growing or

V. CONCLUSION

The Florida Supreme Court contends that the legislature did not

eroding?

-Is the municipality's tax rate low in comparison to similar situated political subdivisions?

-What is the municipality's bond rating? Will increased taxes or borrowing to fund public improvements jeopardize it?

-Has the municipality's current capital improvements program (CIP) kept pace with previous programs? How does the current CIP compare to its predecessors in relation to the current size of the municipality and growth trends?

-Is the municipality's existing housing stock sufficiently diverse and inclusive to accommodate a variety of income groups including low and moderate-income families?

-Is the fee, in reality, a double tax on the consumer? In other words, is the new-home purchaser, who, like existing residents, pays deductible property taxes for services, and also must pay a nondeductible impact fee for the same service (though the increased price of the home), essentially paying twice?

Delaney et al., *supra* note 28, at 161-62 (quoting BUILDER AND ASS'N SERVICES DIV., NATIONAL ASS'N OF HOME BUILDERS, IMPACT FEES: A DEVELOPER'S MANUAL at 4) (emphasis added).

An additional question posed by these authors is:

-Is the affected property being credited for providing common facilities that the municipality has provided without charge to other properties in the service area?

See Delaney et al., *supra* note 28, at 162 (quoting Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903-05 (Utah 1981)).

In addition to these questions suggested by Delaney, Gordon and Hess, the court should consider these additional questions:

-What was the Education Estimating Conference's forecasts (for a period of 10 years prior to 1989) on "student enrollments, fixed capital outlay needs, and Florida Education Finance Program formula needs," as the conference determined was needed for the state planning and budgeting system?

See, e.g., Facilities Task Force, *supra* note 74 (where a facilities task force was appointed by the Commissioner of Education in 1989 to determine the "projected capital outlay needs of the State of Florida to the year 2000."); see FLA. STAT. §§ 216.134(1), .136(4)(a) (1989 & Supp. 1990).

-Was a separate account to be known as the "*Special Facility Construction Account*," established as part of the Public Education Capital Outlay and Debt Service Trust Fund to "*provide necessary construction funds to school districts which have urgent construction needs but which lack sufficient resources at present, and cannot reasonably anticipate sufficient resources within the period of the next 3 years, for these purposes from cur-*

intend to limit the ability of municipalities to meet the needs of its growing community. However, this ability is not without clarification. The supreme court, in the subsequent clarification of their opinion, should have considered the constitutional validity of section 7(A)(5), section 5(D) and the context of footnote six. Inclusion of a less intrusive means component to the dual rational nexus test will assist the court in examining acceptable alternatives prior to the levying of impact fees.

It seems that all logical paths for the understanding of infrastructure fees define them as either a tax or user fee, or at least the court has not outwardly suggested another. In the area of education, an analogy to either of these definitions is fatal to the constitutional validity of a related impact fee. The distinction between a fee levied for service use, and the fee levied to increase capacity to serve lies only in semantics. The St. Johns County Educational Impact Fee closely resembles a user fee for all the reasons presented in this comment, and therefore, it violates the constitutional mandate for free public schools. Fees for educational facilities are far different from other forms of on or off site facility improvements. Within the field of education, we must consider individual rights founded upon the Florida Constitution and apply a higher standard of analysis.

Concomitant to the contention that the St. Johns County Educational Impact Fee is nothing more than a user fee, this comment contends that the dual rational nexus test is inappropriate in analyzing the constitutional validity of educational impact fees. A requirement for determining whether there are any "less intrusive alternatives" should be preeminent in determining the validity of ordinances which either threaten a constitutional imperative, or are directed at a silent constitu-

rently authorized sources of capital revenue?"

FLA. STAT. § 235.435(2)(a) (1989) (emphasis added).

And finally, what is the current status and availability of this account?

ency, circumventing the legislature¹⁵³ and the normal political process.¹⁵⁴

Joseph Livio Parisi

153. (e) The Legislature finds and declares that the subject of the financing of school facilities with development fees is a matter of statewide concern. For this reason the legislature hereby occupies the subject matter of mandatory development fees and other development requirements for school facilities finance to the exclusion of all local measures on the subject.

CAL. GOV. CODE § 65995(e) (1991).

154. See Note, *supra* note 143, at 1006-08.

Premises Liability in Florida After *Holiday Inns, Inc. v. Shelburne*; Will Florida Extend a Landowner's Duty of Care Beyond the Physical Boundaries of His Property?

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I. INTRODUCTION

On August 28, 1982, Robert Shelburne, Scott Turner, David Rice, and Lisa Fuston drove to the Holiday Inn in Fort Pierce, Florida to go to the Rodeo Bar located inside the hotel.¹ When the group arrived and attempted to park in the hotel's lot, they were instructed by a security

1. *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 324 (Fla. 4th Dist. Ct. App. 1991).

guard not to park on the lot, as it was reserved for hotel guests.² Instead, the group parked on an adjacent lot owned by Ingram's Fruit Stand. After several hours in the bar, the group left and walked towards their car. As they were approaching the car, a fight broke out on Ingram's lot between members of the group and two individuals, Carter and Bennett. During the fight, Carter shot Turner, Rice, and Shelburne, killing Rice.

After the incident, Shelburne, Turner, and Rice's parents sued Holiday Inns under a negligence theory, and were awarded damages approaching \$5,000,000 for the injuries to Shelburne and Turner, and for Rice's death.³ On appeal, Holiday Inns argued that as a matter of law, their duty of care with respect to patrons ended at the physical boundaries of the hotel's property.⁴ However, the Fourth District Court of Appeal disagreed and affirmed the lower court's decision, finding Holiday Inns liable even though the incident did not take place on the hotel's property.⁵ This holding represents Florida's recognition of off-premises liability, because *Shelburne* was the first case in Florida in which a landowner was held liable for an injury occurring on adjacent property not owned by the landowner. The Fourth District Court of Appeal utilized various factors to support its decision to hold Holiday Inns liable for the off-premises incident. For instance, the court relied on the fact that the hotel knew its patrons used adjacent lots for parking, and even suggested that patrons park on neighboring lots.⁶ Also, the court regarded the hotel as having extended its business activities beyond its legal boundaries by instructing bar patrons to park on adjacent property.⁷ In addition, the fact that the hotel was economically benefitting from its rent-free use of the Ingram lot factored into the court's decision to hold the hotel liable.⁸ Although the court held Holiday Inns liable for the off-premises incident, the court certified a question to the Florida Supreme Court as to whether an invitor who has extended its business activities beyond the premises owned or leased can be held liable to an invitee who is injured in the extended area.⁹

2. *Id.* at 324, 328.

3. *Id.*

4. *Id.* at 328.

5. *Shelburne*, 576 So. 2d at 328.

6. *Id.* at 329.

7. *Shelburne*, 576 So. 2d at 328.

8. *Id.*

9. *See id.* at 337. The certified question read, "[w]hen an invitor has extended its business activities beyond the area actually owned or leased and an invitee is injured in

In order to answer this question, this article examines the current state of off-premises liability in Florida, and discusses how other jurisdictions have approached the off-premises liability issue. Following this discussion, the article focuses on various factors useful in making an accurate prediction of the certified question's final determination by the Florida Supreme Court. The article then discusses the Fourth District's opinion in *Shelburne*, and based on the facts of this decision, applies the five factors to the *Shelburne* case. The final section is reserved for determining the future impact of *Shelburne* on Florida premises liability.

II. THE HISTORICAL RELUCTANCE OF RECOGNIZING OFF-PREMISES LIABILITY

An invitor's duty of care with respect to invitees extends only as far as the scope of the invitor's invitation.¹⁰ Traditionally, most courts have held that the scope of an invitation ends at the physical boundary lines of the invitor's property.¹¹ One reason why these courts have used boundary lines to govern the scope of liability was that if an injury occurred outside of a landowner's premises, the landowner could not have had the requisite control over the dangerous situation to prevent the injury.¹²

Currently, other jurisdictions such as Louisiana refuse to hold a landowner liable for an off-premises injury unless the landowner created the hazardous condition which caused the injury.¹³ Still other courts refuse to recognize off-premises liability due to policy considerations concerning the difficulty in drawing the line as to where such lia-

that extended area, can the invitor be liable under a negligence theory?" *Id.*

10. RESTATEMENT (SECOND) OF TORTS § 332 cmt. 1 (1965).

11. *Delvaux v. Langenberg*, 387 N.W.2d 751, 762 (Wis. 1986); *see also* *Cothorn v. LaRocca*, 232 So. 2d 473, 478 (La. 1970) ("[O]wner owes only to invitees upon his premises the reasonable care providing a safe place for them upon that property.") (emphasis added).

12. *Rodriguez v. Detroit Sportsmen's Congress*, 406 N.W.2d 207, 210 (Mich. Ct. App. 1987); *see also* *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 914 (7th Cir. 1985).

13. *George v. Western Auto Supply Co.*, 527 So. 2d 428, 430 (La. Ct. App. 1988) (store owner not liable for a slippery sidewalk because he did not create the hazard); *see* *Udy v. Calvary Corp.*, 780 P.2d 1055, 1058 (Ariz. Ct. App. 1989) (landowner held liable for the death of a boy hit by a truck after running into the street, because the accident was caused by the landowner's failure to erect a fence around his property).

bility should end.¹⁴

Prior to *Shelburne*, the only Florida case dealing with an incident which occurred off the invitor's premises was *Chateloin v. Flanigan's Enterprises*.¹⁵ In *Chateloin*, a patron of a bar was shot by another patron.¹⁶ However, the shooting took place several miles from the bar and "a considerable time" after the patrons had left the bar.¹⁷ The Third District Court of Appeal refused to hold the bar owner liable, because the shooting was "too remote as to time and place."¹⁸

Although the facts in *Chateloin* did not warrant the imposition of off-premises liability on the bar owner, *Chateloin* conceivably set the stage for Florida's recognition of off-premises liability in *Shelburne*. The majority in *Shelburne* distinguished *Chateloin*, because the shooting on Ingram's lot took place next door to the hotel and "only minutes after the individuals crossed the property line,"¹⁹ as opposed to the "considerable" period of time which had elapsed in *Chateloin*. Thus, by distinguishing *Chateloin*, the *Shelburne* court was implicitly saying that although the facts in *Chateloin* did not warrant the imposition of off-premises liability, the facts in the instant case do give rise to off-premises liability.

Although most jurisdictions today do not adhere to a general rule holding landowners liable for off-premises incidents,²⁰ the current trend

14. *E.g.*, *Rodriguez*, 406 N.W.2d at 210; *see* *Mostert v. C.B.L. & Assoc.*, 741 P.2d 1090, 1099 (Wyo. 1987) (movie theater was not liable for failing to warn patrons about flash flooding of streets surrounding the theater property). The policy consideration behind the court's decision in *Mostert* was the concern that extending liability would stretch the landowner's duty too far, because it would be difficult to place a limitation on off-premises liability. 741 P.2d at 1099.

15. 423 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1982).

16. *Id.*

17. *Id.*

18. *Id.* at 1002. Unfortunately, the court did not elaborate on the accident as to the invitee's distance from the premises, or how long after the invitee left the premises did the incident occur. If these facts were given, it would have been easier to formulate a standard for off-premises liability as to time and distance constraints. For example, if the injury occurred several miles from the invitor's premises, it seems reasonable to conclude that the invitor should not be held liable for such a distant injury. Similarly, if the incident occurred hours after the invitee left the bar, then it would have been difficult for the injured party to prove the proximate causation element needed to recover under negligence.

19. *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 328 (Fla. 4th Dist. Ct. App. 1991) (construing *Chateloin v. Flanigan's Enters.*, 423 So. 2d 1002 (Fla. 3d Dist. Ct. App. 1982)).

20. *E.g.*, *Delvaux v. Langenberg*, 387 N.W.2d 751, 761 (Wis. 1986) (tavern

is that courts will hold a landowner liable for off-premises injuries when certain factors are present. These factors are: whether an invitee still had invitee status at the time of the injury;²¹ whether the landowner had control over the adjacent premises where the injury occurred;²² whether the activities of the landowner were the legal cause of the injury on the adjacent property;²³ whether the landowner benefited economically from the adjacent property;²⁴ and whether the injury was foreseeable, regardless of where the injury occurred.²⁵ These five factors have been used singularly and in various combinations by courts in finding landowners liable for off-premises injuries, and are the common denominator as to when such liability will apply.²⁶

III. *SHELBURNE AND THE FIVE FACTORS*

A. *Status as an Invitee*

Premises liability in Florida, as well as most other jurisdictions, has traditionally been dependent upon the entrant's status as an invitee.²⁷ A business invitee is defined as anyone who enters the land for a purpose connected with the business;²⁸ a possessor of land owes a duty

owner owes no duty to invitees beyond his business premises).

21. *Maynard v. Walker*, 345 P.2d 478, 480 (Cal. Ct. App. 1959).

22. *Orthmann v. Apple River Campground*, 757 F.2d 909, 914 (7th Cir. 1985) ("[W]hoever controls the land is responsible for its safety."); *Gordon v. Schultz Savo Stores, Inc.*, 196 N.W.2d 633, 635 (Wis. 1972) (same); *Rodriguez*, 406 N.W.2d at 210 (same).

23. *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So. 2d 98, 101 (Fla. 3d Dist. Ct. App. 1980); *George v. Western Auto Supply Co.*, 527 So. 2d 428, 430 (La. Ct. App. 1988).

24. *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 773 (Ind. Ct. App. 1986).

25. *Piedaloe v. Clinton Elementary Sch. Dist. No. 32*, 692 P.2d 20, 23 (Mont. 1984); *see Stevens v. Jefferson*, 436 So. 2d 33, 34 (Fla. 1983).

26. *See, e.g., Ember*, 490 N.E.2d at 772-73 (the court used the invitee status factor in addition to the economic benefit and foreseeability factors); *Udy v. Calvary Corp.*, 780 P.2d 1055, 1058-59 (Ariz. Ct. App. 1989) (court used both the causation and foreseeability factors).

27. *Concrete Constr., Inc. v. Petterson*, 216 So. 2d 221, 222 (Fla. 1968) (status as either invitee or trespasser determines whether the party will be able to recover for negligence); W. PAGE KEATON ET AL., *PROSSER AND KEATON ON THE LAW OF TORTS* § 62 (1984). This article focuses on invitor/invitee law, thus the classifications of licensee and trespasser will not be discussed.

28. *RESTATEMENT (SECOND) OF TORTS* § 332 (1965).

to exercise reasonable care for the safety of business invitees.²⁹ Using this definition, it is clear that the *Shelburne* group consisted of business invitees while they were in the bar, since they entered the hotel's property to patronize the bar. But did they lose their status as invitees when they were walking back to their car by crossing the boundary line between the hotel's parking lot and Ingram's Fruit Stand?

The general rule is that an invitor's duty of care normally extends only to the boundaries of its premises.³⁰ Hence, under this rule, the *Shelburne* individuals would cease to be invitees once they crossed onto Ingram's lot. However, courts have recognized that there are certain situations in which a person retains invitee status even when that person leaves the premises owned by the invitor.³¹ One situation where a person retains his invitee status is when the landowner knows his invitees regularly use an adjacent lot for parking.³²

For example, the Indiana case of *Ember v. B.F.D., Inc.*³³ is similar to *Shelburne* in that a tavern owner failed to provide sufficient parking for his patrons, and knew that patrons customarily used an adjacent lot for parking.³⁴ The *Ember* court held that because the tavern owner knew its patrons used the adjacent lot, the owner had impliedly extended his business activities beyond the premises owned.³⁵ As a result, the tavern was held liable to a patron assaulted on the adjacent lot, because the court determined that the patron was still an invitee.³⁶

Similarly, in *Shelburne*, the Fort Pierce Holiday Inn had a practice of requesting bar patrons to park off the premises in order to preserve the limited number of parking spaces for hotel guests.³⁷ The hotel had extended its business activities to include the use of Ingram's property. Under this theory, the *Shelburne* individuals continued to be invitees of the hotel when the incident on Ingram's lot occurred. Therefore, the Fort Pierce Holiday Inn owed a duty of reasonable care to these people.

29. *Casby v. Flint*, 520 So. 2d 281, 282 (Fla. 1988) (There is a "duty of reasonable care owed to the invitee."); RESTATEMENT (SECOND) OF TORTS § 332 cmt. 1 (1965).

30. *E.g.*, *Ember*, 490 N.E.2d at 772.

31. *E.g.*, *id.*

32. *Id.*

33. *Id.* at 764.

34. *Id.*

35. *Ember*, 490 N.E.2d at 764.

36. *Id.*

37. *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 328 (Fla. 4th Dist. Ct. App. 1991).

In addition to the extension of business activities theory, Florida courts have also extended the scope of invitee status to include means of ingress to and egress from the invitor's property.³⁸ This would include approaches to the property which the invitee would be reasonably expected to use to get to the invitor's place of business.³⁹ Similarly, other jurisdictions have held that a patron does not lose his status as an invitee by using a means of ingress or egress which the invitor has told him to use, or which he has been led to believe is the appropriate means of reaching the invitor's property.⁴⁰

Applying this logic, because the Fort Pierce Holiday Inn had a practice of instructing bar patrons to park on adjacent lots, such as Ingram's, the *Shelburne* individuals remained invitees for the purpose of using Ingram's lot as a means of ingress to and egress from the Rodeo Bar. Thus, Holiday Inn's duty of care to Shelburne and the rest of his group did not end when they stepped off the hotel's property.

B. Control

Control is a prerequisite to liability of the landowner, regardless of where the injury occurred.⁴¹ Generally, an occupier of land is deemed to have control only over the area which he possesses.⁴² However, when a landowner treats his neighbor's property as an integral part of his own, he is conceivably exercising control over the adjoining land.⁴³ This

38. *Shields v. Food Fair Stores, Inc.*, 106 So. 2d 90, 92 (Fla. 3d Dist. Ct. App. 1958), *cert. denied*, 109 So. 2d 168 (1959).

39. *Id.* In *Shields*, a supermarket was held liable for the appellant's injuries sustained when he fell off his motorcycle at an entrance to the store's parking lot. *Id.* at 90. The accident was caused by potholes in the entrance. *Id.* Even though the supermarket did not legally own the entrance to its store, the court held that the store should have maintained the entrances to its parking lot, because patrons must use the entrances as a means of approach. *Id.* at 92.

40. *See, e.g., Johnston v. De La Guerra Properties*, 170 P.2d 5, 7 (Cal. 1946) (restaurant owner held liable for an injury on an adjacent walkway leading up to the restaurant because the owner knew that many patrons used the walkway to approach the restaurant). The California Supreme Court determined that the injured patron was entitled to the protection of an invitee because she was led to believe that the walkway was an appropriate means of reaching the restaurant. *Id.*

41. *Rodriguez v. Detroit Sportsmen's Congress*, 406 N.W.2d 207, 210 (Mich. Ct. App. 1987).

42. *E.g., id.*

43. *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 915 (7th Cir. 1985).

control may allow an invitee to recover from a landowner for an injury occurring on adjacent property.⁴⁴

In *Johnston v. De La Guerra Properties*,⁴⁵ control over the adjoining land formed the basis of off-premises liability. A restaurant owner, in *Johnston*, had made arrangements with the service station next door to allow restaurant patrons to park on the gas station's lot.⁴⁶ However, after this arrangement had been terminated restaurant patrons continued to use the gas station's lot for parking. When a restaurant patron sued for an injury sustained on the adjacent lot, the California Supreme Court found the restaurant liable for the patron's injury, because the restaurant owner knew his patrons were still using the adjacent lot.⁴⁷ Thus, the restaurant was exercising control over the gas station's lot and was responsible for the injury occurring on that lot.⁴⁸

On the other hand, adjacent lots may be used by the public in general and not exclusively by patrons of an invitor. This situation acts as a shield to protect the invitor from liability for patrons injured on the adjacent lot, since the invitor is not considered to have the requisite control over an adjacent public lot.⁴⁹ For example, in *Gordon v. Schultz Savo Stores, Inc.*,⁵⁰ a grocery store was held not liable to a patron for an injury which occurred in the parking lot in front of the store.⁵¹ The Wisconsin Supreme Court reasoned that the parking lot was used by the public in general.⁵² Therefore, because the grocer had little direct contact with the lot, he did not have the level of control over the public lot needed to hold him responsible for the injury.⁵³ Similarly, in *La Fleur v. Astrodome-Astrohall Stadium Corp.*⁵⁴ the owners of the Houston Astrodome were not liable for an assault on a patron which

44. *Id.*

45. 170 P.2d 5 (Cal. 1946).

46. *Id.* at 7.

47. *Id.*

48. *Id.* Even though the parking arrangement made between the restaurant and service station had ended, the restaurant continued to control the use of the service station's lot in the evenings when the station was closed. *Id.*

49. *See, e.g., Gordon v. Shultz Savo Stores, Inc.*, 196 N.W.2d 633, 636 (Wis. 1972); *La Fleur v. Astrodome-Astrohall Stadium Corp.*, 751 S.W.2d 563, 566 (Tex. Ct. App. 1988).

50. 196 N.W.2d 633 (Wis. 1972).

51. *Id.* at 636.

52. *Id.*

53. *Id.*

54. 751 S.W.2d 563 (Tex. Ct. App. 1988).

occurred on an adjacent public street corner.⁵⁵ In both of these cases, the corporations had no control over the public property adjacent to their own property where the injuries occurred. As a result, neither company was held liable for the off-premises injury.

However, in *Shelburne*, patrons of the Rodeo Bar were the exclusive users of Ingram's lot when the incident occurred, since the fruit stand was closed for vacation.⁵⁶ On this basis, the "public lot" defense would not work in *Shelburne*, as applied in *Gordon* and *La Fleur*. Also, Holiday Inns was using Ingram's property as an integral part of its own, because the hotel regularly "suggested" to bar patrons that they use adjacent lots, including Ingram's lot, for parking.⁵⁷ Thus, the Fort Pierce Holiday Inn was exercising dominion and control over the Ingram lot by treating the lot as if it belonged to the hotel. Under the control factor, the plaintiffs' recovery against Holiday Inns was justified, regardless of the fact that the shooting occurred outside the hotel's boundaries.

C. Causation

Traditionally, courts are more inclined to attach off-premises liability when the injury was caused by a negligent landowner.⁵⁸ For example, in *Udy v. Calvary Corp.*,⁵⁹ a child was hit by a truck when he ran out into a street.⁶⁰ The Arizona Appellate Court determined that the accident was caused by the apartment complex's failure to provide a fence around its property.⁶¹ As a result, the apartment complex owner was held liable for the off-premises injury because the injury was caused by an act of negligence on the part of the apartment complex in failing to provide a fence.⁶²

An owner was also held liable in the Florida case of *Holley v. Mt.*

55. *Id.* at 566.

56. *Shelburne*, 576 So. 2d at 328.

57. *Id.* at 329.

58. *Udy v. Calvary Corp.*, 780 P.2d 1055, 1059 (Ariz. Ct. App. 1989); see *Holley v. Mt. Zion Terrace Apartments, Inc.*, 782 So. 2d 98, 101 (Fla. 3d Dist. Ct. App. 1980) (landlord liable because inadequate security caused the murder of a tenant inside a unit).

59. 780 P.2d 1055 (Ariz. Ct. App. 1989).

60. *Id.* at 1058.

61. *Id.*

62. *Id.* at 1062.

Zion Terrace Apartments, Inc.,⁶³ when a woman was raped and murdered inside her apartment.⁶⁴ Normally, a landlord does not owe a tenant any duty of care inside an apartment unit because the landlord lacks the requisite control over the unit.⁶⁵ The Third District Court of Appeal, however, determined that the incident inside the apartment unit was caused by the landlord's failure to provide adequate security for the common areas over which the landlord had control.⁶⁶ As a result, the apartment complex was held liable, even though the incident technically occurred off its premises because the attack took place inside a unit.⁶⁷

In *Shelburne*, the legal cause of the harm stemmed from the fact that the security guard "suggested" to bar patrons that they park next door.⁶⁸ This created a duty on the part of the Fort Pierce Holiday Inn to provide additional security to patrol neighboring lots used by the hotel's patrons. Thus, Holiday Inns' failure to hire an additional security guard was the legal cause of the shooting, since the shooting may not have occurred if an extra security guard was there to break up the fight. The Fourth District Court in *Shelburne* noted that the jury considered the issue of whether inadequate security was the legal cause of the shooting,⁶⁹ thus making it evident that the causation factor played a role in *Shelburne* as well.

D. *Economic Benefit*

The "economic benefit" factor receives a great deal of attention, and is heavily weighed in opinions holding a landowner liable for off-premises injuries.⁷⁰ Courts often utilize this factor in making a policy argument in favor of extending liability to include adjacent property.⁷¹

63. 382 So. 2d 98 (Fla. 3d Dist. Ct. App. 1980).

64. *Id.* at 99.

65. *E.g., id.* at 101.

66. *Id.*

67. *Id.* at 102.

68. *Shelburne*, 576 So. 2d at 328.

69. *Id.* ("The jury in the instant case also properly determined the issue of whether the appellants' alleged breach of duty on its premises was a legal cause of the shooting off its premises.").

70. *See, e.g., Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 773 (Ind. Ct. App. 1986); *Davis v. Pecorino*, 350 A.2d 51, 55 (N.J. 1975). This is evidenced by the fact that the economic benefit factor is discussed in depth by courts utilizing this factor in holding landowners liable for off-premises injuries.

71. *Ember*, 490 N.E.2d at 773; *see Davis*, 350 A.2d at 54 (One gaining "com-

Such an argument was used in the Indiana case of *Ember v. B.F.D., Inc.*⁷²

In *Ember*, a bar patron was assaulted in an adjacent parking lot used regularly by bar patrons.⁷³ The court, in holding the tavern liable for the off-premises injury, concluded that if a business invitor was not held liable for off-premises injuries which occur on adjacent property providing economic benefit to the invitor, then "a business invitor could invade the public streets for its economic benefit while simultaneously absolving itself from liability otherwise imposed just a few feet away under identical circumstances."⁷⁴ Likewise, if a business invitor is deriving a commercial benefit from its special use of adjacent property, then the invitor is deemed to be in the best position to prevent injury to patrons who venture onto the adjacent land.⁷⁵

On the other hand, other courts argue that the derivation of an economic benefit alone should not be enough to impose liability on an invitor.⁷⁶ For example, the Illinois Appellate Court in *Brunsfeld v. Mineola Hotel and Restaurant, Inc.* reasoned:

If we were to hold that places of business which benefit economically from the existence of a publicly-owned recreational facility in close proximity to their premises are liable for the off-premises actions of their customers . . . then, to protect themselves, they would be forced to . . . place appropriate warning signs, and to monitor and control the actions of all who used those public facilities. We do not believe that the law does or should impose such a

mercial benefit" from his use of adjacent land "is in the best position to be aware of and guard against any dangerous condition caused by this use.").

72. 490 N.E.2d 764 (Ind. Ct. App. 1986).

73. *Id.* at 766.

74. *Id.* at 773. The term "economic benefit" or its equivalent is used by most courts in off-premises liability cases to refer to a situation where a landowner is using his neighbor's property for his own gain, without having to pay rent. *See, e.g.*, *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 329 (Fla. 4th Dist. Ct. App. 1991) (the hotel was using the adjacent property "rent free for their own business purposes"); *cf.* *Brunsfeld v. Mineola Hotel & Restaurant, Inc.*, 456 N.E.2d 361, 366 (Ill. App. Ct. 1983) (race track did not benefit economically from an adjacent lake).

75. *Davis*, 350 A.2d at 54-55. In *Davis*, a woman was injured when she fell on a snow-covered public sidewalk in front of a service station. *Id.* at 52. The court determined that even though the sidewalk was public, the service station's owner was liable because the hazard was caused by his special use of the sidewalk as cars drove in and out of the station, which packed the snow on the sidewalk. *Id.* at 53, 55.

76. *See, e.g.*, *Brunsfeld*, 456 N.E.2d at 366.

heavy burden upon such places of business.⁷⁷

However, the Fourth District Court of Appeal in *Shelburne* did not accept this reasoning. The court found that the Fort Pierce Holiday Inn was directly benefiting from its use of the Ingram lot because the hotel was using the lot "rent free for their own business purposes."⁷⁸ Accordingly, the court utilized the economic benefit factor in holding Holiday Inns liable for the injury on the neighboring lot.⁷⁹

E. *Foreseeability*

Foreseeability is the key factor in determining whether an invitor should be liable for an off-premises injury.⁸⁰ Rather than limiting liability to strictly on-premises injuries, courts are now beginning to use foreseeability as the standard for finding an owner liable for injuries occurring off the owner's premises.⁸¹

Courts utilize the foreseeability factor in a variety of ways. One common variation of foreseeability used in cases dealing with actions of third parties is the "prior similar acts" rule.⁸² Under the prior similar acts rule, an attack on a patron by a third party is only considered foreseeable if the premises has a history of prior similar acts.⁸³

This rule has been adopted by Florida courts, as they often look to whether the premises had a history of problems similar to whatever

77. *Id. Brunsfeld* involved a snowmobile operator who was injured while operating his snowmobile on a frozen lake adjacent to the Mineola Hotel & Restaurant. *Id.* at 363.

78. *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 329 (Fla. 4th Dist. Ct. App. 1991).

79. *Id.*

80. See *Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 692 P.2d 20, 23 (Mont. 1984); *Udy v. Calvary*, 780 P.2d 1055, 1059 (Ariz. Ct. App. 1989). As with the economic benefit factor, the foreseeability factor's utility to courts is evidenced by the fact that foreseeability receives more attention than any other factor in opinions holding landowners liable for off-premises injuries.

81. See, e.g., *Mostert v. C.B.L. & Assoc.*, 741 P.2d 1090, 1096 (Wyo. 1987); *Piedalue*, 692 P.2d at 23 (unnecessary that owner control the adjacent property if the hazard "created a foreseeable risk of harm to business invitees . . ."); *Udy*, 780 P.2d at 1059 ("foreseeability of harm" is the governing standard once a duty is established); *Bach v. State*, 730 P.2d 854, 857 (Ariz. Ct. App. 1986).

82. Gregory A. Eiesland, *Attacks in Parking Lots: Driving Home Liability of Owners*, 23 TRIAL 108, 108 (Sept. 1990).

83. *Id.*

activity caused the injury at hand.⁸⁴ However, to date, Florida has only used the prior similar acts rule in determining whether a landowner is liable for an on-premises injury.⁸⁵ For example, in *Stevens v. Jefferson*, which involved an on-premises shooting at a bar, the Florida Supreme Court held for the plaintiff because the plaintiff proved the shooting was foreseeable by demonstrating that the bar "was a rough place with a history of fights and gunplay"⁸⁶

The Fourth District Court of Appeal in *Shelburne* was the first Florida court to use the prior similar acts rule to find a landowner liable for an off-premises injury.⁸⁷ In fact, the court went even further by allowing evidence of prior dissimilar acts as well.⁸⁸ The court argued that it would be against Florida's public policy to limit evidence of foreseeability to only prior similar acts.⁸⁹ In fact, the Fourth District Court allowed as evidence fifty-eight similar and dissimilar criminal acts committed at the Rodeo Bar prior to the shooting.⁹⁰

Another variation of the foreseeability factor used extensively in jurisdictions throughout the country in off-premises liability cases is whether the invitor knew its invitees were using the adjacent property at the time of the off-premises injury.⁹¹ As previously discussed, an invitor's knowledge of patron use of an adjacent property may extend a patron's status as an invitee to include the use of neighboring property.⁹² But in addition, an invitor's knowledge is important in determining whether the off-premises injury was foreseeable. For example, in *Margrave v. Graves*,⁹³ the First District Court of Appeal reasoned that a business invitor cannot be held liable for an injury on an adjacent lot where the invitor had no reason to believe that his patrons would use

84. *Allen v. Babrab, Inc.*, 438 So. 2d 356, 357 (Fla. 1983); *Stevens v. Jefferson*, 436 So. 2d 33, 35 (Fla. 1983).

85. *Stevens*, 436 So. 2d at 35.

86. *Id.*

87. *Shelburne*, 576 So. 2d at 325.

88. *Id.* at 331.

89. *Id.* A rule limiting evidence to only prior *similar* acts would be against public policy because such a rule would "contravene the policy of preventing future harm Surely, a landowner should not get one free assault before he can be held liable for criminal acts which occur on his property." *Id.*

90. *Id.*

91. *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 772 (Ind. Ct. App. 1986); see *Cothern v. LaRocca*, 232 So. 2d 473, 478 (La. 1970); 52 C.J.S. *Landlord and Tenant* § 442 (1968).

92. *Ember*, 490 N.E. 2d at 772.

93. 97 So. 2d 498 (Fla. 1st Dist. Ct. App. 1957).

the adjacent lot for parking.⁹⁴

However, in *Shelburne*, even though it was disputed at trial as to whether the security guard told Shelburne's group to park on Ingram's lot, it cannot be disputed that the Fort Pierce Holiday Inn had knowledge that the Ingram lot was being used by its bar patrons, since the hotel required bar patrons to park on the lots adjacent to the hotel.⁹⁵ In fact the *Shelburne* court noted this on several occasions in its opinion,⁹⁶ and this knowledge gave rise to liability on the part of Holiday Inns.

In addition, the *Shelburne* court could also have addressed the issue of foreseeability of patrons using adjacent lots by utilizing the rule of implied invitation.⁹⁷ Under this reasoning, if an invitor impliedly extends an invitation to its invitees to use an adjacent premises, then the invitor is deemed to have knowledge of use of the adjacent premises by its invitees.⁹⁸ For example, in *Shelburne*, even if the hotel did not expressly invite bar patrons to park on Ingram's lot, the Fort Pierce Holiday Inn impliedly extended to bar patrons an invitation to park on the Ingram lot, because the hotel required bar patrons to park off the premises.⁹⁹ However, by telling patrons to park off hotel property, the Fort Pierce Holiday Inn was implying that patrons should park on any of the lots adjacent to the hotel, including the Ingram lot. Thus, under the implied invitation rule, Holiday Inns would be deemed to have the knowledge of its patrons' use of the Ingram lot since it was foreseeable that patrons might park on Ingram's lot. In sum, whichever approach to foreseeability is used, the shooting on the Ingram lot was properly labeled by the court as foreseeable.

F. *Reconciliation of the Five Factors*

In allowing the cause of action giving rise to off-premises liability, the Fourth District Court in *Shelburne* utilized the five factors previously discussed. The Florida Supreme Court should use these factors in

94. *Id.* at 499. The landowner did not know the invitees were using the adjacent property. Therefore he was not liable for an injury to an invitee when she fell in a sunken driveway on the neighboring lot, since this injury was unforeseeable. *Id.*

95. *Shelburne*, 576 So. 2d at 328-29.

96. *Id.* ("[T]he evidence in the present case shows that appellants knew their patrons customarily used adjacent premises for parking in order to patronize the Rodeo Bar.").

97. See *Cothorn v. La Rocca*, 232 So. 2d 473, 478 (La. 1970).

98. *Id.*

99. *Shelburne*, 576 So. 2d at 328.

deciding which way to answer the certified question, and should do an analysis similar to the above analysis of these five factors. After looking at these factors, the Florida Supreme Court could only answer the certified question in the affirmative. This makes perfect sense, because the Florida Supreme Court should extend premises liability to include off-premises injuries when an invitor has extended its activities beyond the boundaries of its property.

IV. *SHELBURNE'S IMPACT ON FLORIDA BUSINESSES AND THE LAW OF PREMISES LIABILITY*

A. *Will Florida Be Able to Place a Practical Limitation on Off-Premises Liability After Shelburne?*

Jurisdictions refusing to recognize off-premises liability have often reasoned that it would be difficult to determine which off-premises injuries a landowner should be liable for.¹⁰⁰ Most assuredly, using a physical boundary line as a limitation on liability is a simplified, bright line approach to determining liability. This is why certain jurisdictions still recognize the property line as the extent of premises liability.¹⁰¹ It is judicially convenient to do so because it provides courts with a simple ascertainable standard. However, as an ever increasing number of courts begin to recognize off-premises liability, a new standard must emerge to limit the extent of off-premises liability. Fortunately, there are several workable options available.¹⁰²

For example, as previously noted, foreseeability has been used effectively by courts as a limitation on off-premises liability in cases recognizing liability for off-premises injuries.¹⁰³ In using foreseeability as the limiting factor, the scope of the duty of care is determined by whether the off-premises injury was foreseeable, rather than having the scope of duty governed by the landowner's property line.¹⁰⁴ This is a more fair and reasonable limitation on liability than boundary lines,

100. See, e.g., *Mostert v. C.B.L. & Assoc.*, 741 P.2d 1090, 1099 (Wyo. 1987) (refused to recognize off-premises liability because it would be difficult to place a practical limitation on such liability).

101. See, e.g., *Delvaux v. Langenberg*, 387 N.W.2d 751, 761 (Wis. 1986); *Rodriguez v. Detroit Sportsmen's Congress*, 406 N.W.2d 207, 210 (Mich. Ct. App. 1987).

102. For a discussion of possible factors which could be used to limit off-premises liability, see *supra* section II of the text.

103. E.g., *Udy*, 780 P.2d at 1059.

104. *Id.*; see also *Bach v. State*, 730 P.2d 854, 857 (Ariz. Ct. App. 1986).

because if an injury was foreseeable, the injured party should be able to recover from a negligent landowner regardless of where the injury occurred, since the landowner breached a duty owed to the invitee.¹⁰⁵

Causation is another factor that could be used as a new limitation on liability instead of boundary lines. The Third District Court of Appeal in *Holley v. Mt. Zion Terrace Apartments*¹⁰⁶ hinted at the possibility of using causation as the limitation on liability instead of focusing on where the injury occurred. In *Holley*, an apartment owner was held liable for a murder in an apartment unit, because the incident was legally caused by the landlord's failure to provide adequate security to patrol the common areas.¹⁰⁷ Causation in this sense is a more reasonable limitation on liability than physical boundary lines, since a landowner who legally causes an injury to someone should not escape liability simply because the injury did not occur on the landowner's property.¹⁰⁸ Those who cause injuries should be liable for such injuries regardless of the ownership rights in the underlying property where the injury occurred.

B. *Will Shelburne Overwhelm Florida Courts With Off-Premises Liability Actions?*

In decisions that chart new areas of the law, courts are often concerned with whether such decisions will impose extra obligations on the already overburdened judicial system.¹⁰⁹ This is particularly true with the issue of off-premises liability.¹¹⁰ The concern in recognizing off-premises liability is that it would open up the "floodgates" to substantial numbers of cases involving patrons who suffered off-premises injuries.¹¹¹

105. *Udy v. Calvary Corp.*, 780 P.2d 1055 (Ariz. Ct. App. 1989), provides one of the best examples of why boundary lines are an inequitable standard. In *Udy*, a child was killed when he ran into the street and was hit by a truck. *Id.* at 1058. In a jurisdiction which recognized boundary lines as the extent of liability, the landowner would not be liable, even though the accident was entirely caused by his negligent failure to erect a fence around his property.

106. 382 So. 2d 98 (Fla. 3d Dist. Ct. App. 1980).

107. *Id.* at 101.

108. For an illustration of the inequities of using the boundary lines standard, see *supra* note 108.

109. See *Gates v. Richardson*, 719 P.2d 193, 197 (Wyo. 1986); see also *Mostert v. C.B.L. & Assoc.*, 741 P.2d 1090, 1104 (Wyo. 1987).

110. *Gates*, 719 P.2d at 197.

111. See *Mostert*, 741 P.2d at 1100 (Thomas, J., concurring in part and dissent-

Shelburne does not necessarily mean that courts will be swamped with off-premises accident claims. The issue of whether *Shelburne* will overburden our court system depends entirely on whether, Florida courts choose a workable standard to use as a practical limitation on off-premises liability. As mentioned before, several options exist which could be used effectively to limit off-premises liability.¹¹² Florida courts will simply have to set forth which standard will be applied to off-premises cases as a limitation on off-premises liability.¹¹³ The most efficient way to set up a standard in off-premises liability cases is simply for the Florida Supreme Court to determine the standard when it answers the certified question. The Florida Supreme Court could prevent a wave of inconsistent holdings from Florida's lower courts involving cases where invitees suffered off-premises injuries.

Furthermore, foreseeability is the most effective standard the Florida Supreme Court could choose as the governing standard in off-premises liability cases, because foreseeability provides courts and landowners with a simple ascertainable limitation on liability. A landowner can easily determine his duty of care with respect to adjacent land by asking himself whether it is foreseeable that one of his invitees might come into contact with a hazard on adjacent land which the landowner himself created.¹¹⁴ In addition, foreseeability could be applied when deciding cases involving an injury that occurred several miles from an in-

ing in part). Expressing concern about the majority's recognition of off-premises liability, Justice Thomas argued that a business proprietor will now have to warn invitees of every risk that they might encounter: even danger that is "remote from the place of business and over which the proprietor has no control." *Id*; see also Richard E. Wolverton, *Current Trends in Bar-Lounge Liability*, 7 TRIAL AD Q. 17 (1988); David G. Ditto, Comment, *Wyoming Extends the Duty of Owners and Occupiers to Warn Invitees of Dangers Beyond the Premises*, 23 LAND & WATER L. REV. 641 (1988).

The "floodgates" argument is that if a jurisdiction adopts off-premises liability, courts in that jurisdiction would become swamped with all sorts of off-premises cases, including cases where a person was injured perhaps many miles from a landowner's property, or several hours after the injured person left the landowner's premises.

112. For a discussion of these options, see *supra* section III (A) of the text.

113. Although the *Shelburne* court utilized several factors such as foreseeability, economic benefit, and extension of business activity in its decision to recognize off-premises liability, the court never set forth a standard to be used as a limitation to off-premises liability. This is why the task of choosing such a standard will be the responsibility of future Florida courts.

114. Arguably, the creation of the hazardous condition gives rise to its foreseeability. If the landowner created the condition, then notice of such a condition should be imputed on that owner. Thus, the landowner has a duty to warn invitees of the hazardous condition.

ditor's premises, or perhaps several hours after an invitee wandered off an invitor's premises. The likely result would be that injuries occurring several miles from an invitor's premises, or several hours later, are probably unforeseeable and no liability would exist for such injuries.

Thus, the Florida Supreme Court should choose foreseeability as the standard to be used in off-premises liability cases by expressly setting forth this intention when it answers the certified question. By following this course, *Shelburne* would not represent an overburdening of the court system.

C. *Shelburne's Effect on Property Insurance of Florida Businesses*

Perhaps the biggest concern of Florida businesses in light of *Shelburne* is that their premises liability insurance rates will soar since they now have to obtain extended coverage to insure the risk of being held liable for an off-premises injury to a patron. But in reality, it is unlikely that businesses will really feel the impact of higher insurance rates. *Shelburne's* impact on insurance rates will ultimately be borne by consumers, because economists tell us that the most efficient way for companies to manage increased costs is to pass those additional costs on to consumers in the form of higher prices.¹¹⁵

Of course, courts are not blind to this elementary rule of economics.¹¹⁶ In *Mostert v. C.B.L. & Associates*,¹¹⁷ Justice Cardine was particularly concerned about the impact of the majority's decision to hold a movie theater liable for an off-premises injury and concluded that:

When the theater must pay expensive insurance premiums to cover these [off-premises] claims, the money must come from somewhere. The only place it can come from is theater tickets It is not unreasonable to believe that the price of theater tickets might double or triple if theater owners might be held liable for [off-

115. Perhaps the best example of how increased costs of insurance are passed on to consumers is in the area of medical care, as the extraordinary costs of medical care in this country are a direct reflection on the costs of medical malpractice insurance. See Bruce C.N. Greenwald, *Medical Malpractice and Medical Costs in THE ECONOMICS OF MEDICAL MALPRACTICE* (Simon Rottenberg ed., 1978).

116. See *Mostert*, 741 P.2d at 1104-05 (Cardine, J., concurring in part and dissenting in part); *Gates v. Richardson*, 719 P.2d 193, 197 (Wyo. 1986).

117. 741 P.2d 1090 (Wyo. 1987).

premises] accidents"¹¹⁸

In the case of hotels and taverns, the extra revenue needed to cover the increased costs of property insurance of a place like the Fort Pierce Holiday Inn or the Rodeo Bar would probably come in the form of higher room rates or more expensive drinks. The most effective way businesses can keep their insurance costs from significantly increasing in light of *Shelburne* is for businesses to examine their property closely and re-evaluate their duty of care. Businesses should ask themselves whether it is foreseeable that patrons will use adjacent property. If the answer is "yes," then that business should make every effort to satisfy its duty of care with respect to adjacent land, because in light of *Shelburne*, liability no longer ends at the property line.

V. CONCLUSION

The Florida Supreme Court should answer the certified question in the affirmative, which means that *Shelburne* should become the precedent case in Florida holding an invitor liable for an off-premises injury as a result of an invitor's extension of its activities to adjacent land. Florida's recognition of off-premises liability in this type of situation is a judicial step in the right direction. *Shelburne* fills a needed gap in the area of premises liability, because people like Turner, Rice, and *Shelburne* deserve compensation under these circumstances.

Bruce G. Warner

118. *Id.* at 1105 (Cardine, J., concurring in part and dissenting in part).