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Construction Law: 1991/1992 Survey of Florida Law

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Abstract

There were several appellate decisions concerning construction law from mid - 1991 through mid 1992.

KEYWORDS: contracts, licensing, negligence

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I. INTRODUCTION

There were several appellate decisions concerning construction law from mid-1991 through mid-1992. Perhaps the most significant cases were the cases of *Casa Clara Condominium Assn. v. Charley Toppino & Sons, Inc.*,¹ and *American Home Assurance Co. v. Larkin General Hospital*,² both described herein. The following are brief digests of appellate cases of interest in the area of construction law in Florida for the time period indicated.

II. BID ISSUES

In Florida, a public body has wide discretion in soliciting and accepting bids for public improvements, and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous, and even if reasonable persons may disagree.³ This principal was highlighted in *Central Florida Equipment Rentals Inc. v. Lowell Dunn Co.*⁴ In *Central Florida Equipment*, the Third District Court of Appeal determined that the trial court erroneously granted a temporary injunction prohibiting the contractor awarded the bid from commencing construction on a county project.⁵ The court held that the trial court improperly substituted its judgement for that of the Board of County Commissioners.⁶

1. 588 So. 2d 631 (Fla. 3d Dist. Ct. App. 1991).

2. 593 So. 2d 195 (Fla. 1992).

3. *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982).

4. 586 So. 2d 1171 (Fla. 3d Dist. Ct. App. 1991).

5. *Id.* at 1172.

6. *Id.*

In *Courtenay v. Department of Health & Rehabilitative Services*,⁷ the court awarded attorney fees to a bidder who successfully challenged the award of a bid for the lease of office space.⁸ The Fifth District Court of Appeal reasoned that attorney fees should be awarded the appellant because a bidder should have an incentive to challenge the bidding procedure in the face of bureaucratic abuses such as those found in the instant case.⁹ The authority for the award of fees was section 120.57(1)(b)(10), Florida Statutes (1991).¹⁰

In *John G. Grubbs, Inc. v. Suncoast Excavating, Inc.*,¹¹ the Fifth District Court of Appeal considered whether the apparent low bidder should have been permitted by the trial court to intervene in a bid protest action by Suncoast against the Board of County Commissioners seeking declaratory relief and an injunction.¹² The trial court had denied Grubb's motion to intervene finding that Grubbs did not have a sufficient direct and immediate interest in the action.¹³ The reviewing court found that the trial court abused its discretion in failing to allow intervention to assert the claim of a valid contract with the county.¹⁴ The court applied the test set out in *Morgareidge v. Howey*,¹⁵ which states that "the test which will entitle a person to intervene under this provision must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment."¹⁶

In *Asphalt Pavers, Inc. v. Florida Department of Transportation*,¹⁷ the First District Court of Appeal held that the Department of Transportation (DOT) erred in rejecting the findings of the administrative hearing officer to the effect that the contractor had properly filed all bid documents and that the DOT had lost the contractor's disadvantaged business enterprise utilization form.¹⁸ The DOT entered a final order dismissing the bid protest and rejecting the hearing officer's finding of fact that it was more likely that the loss of the missing form occurred after the bid proposal

7. 581 So. 2d 621 (Fla. 5th Dist. Ct. App. 1991).

8. *Id.* at 623.

9. *Id.*

10. *Id.*

11. 594 So. 2d 346 (Fla. 5th Dist. Ct. App. 1992).

12. *Id.* at 347.

13. *Id.*

14. *Id.* at 348.

15. 78 So. 14, 15 (Fla. 1918).

16. *Grubbs*, 594 So. 2d at 347.

17. 602 So. 2d 558 (Fla. 1st Dist. Ct. App. 1992).

18. *Id.* at 560.

packet was opened by DOT.¹⁹ Because the hearing officer's findings were supported by competent, substantial evidence in the record, DOT erred in rejecting it and substituting its own finding.²⁰ DOT's rejection of the hearing officer's findings in light of the evidence showing the lost form was the fault of DOT was clearly arbitrary within the meaning of the test announced in *Department of Transportation v. Groves-Watkins Construction*.²¹

In re: A.R.E. Manufacturing Co.,²² was an attempt to have a bid dispute decided in bankruptcy court. The debtor claimed that the government's action in rejecting debtor's bid on a procurement contract because of debtor's default on the initial contract was in violation of the Bankruptcy Code.²³ The Bankruptcy Court found that it lacked subject matter jurisdiction because jurisdiction to review pre-award bid protest actions is vested exclusively in the United States Claims Court.²⁴

III. CONSTRUCTION CONTRACT PROVISIONS

A. No damage for delay clause—Exceptions to Enforcement

Newberry Square Development Corp. v. Southern Landmark, Inc.,²⁵ concerned a contractor's right to recover damages for the active interference with its performance under a construction contract where the construction contract contained a "no damage for delay clause." The First District Court of Appeal held that the clause does not preclude recovery for delays resulting from a party's fraud, concealment, or active interference with performance under the contract.²⁶ Damages may be awarded upon a "knowing delay" which is sufficiently egregious or upon the willful concealment of foreseeable circumstances which impact timely performance.²⁷ These exceptions to the no damages clause are generally predicated upon an implied promise and obligation not to hinder or impede performance.

19. *Id.*

20. *Id.*

21. 530 So. 2d 912 (Fla. 1988).

22. 138 B.R. 996 (M.D. Fla. 1992).

23. *Id.* at 999.

24. *Id.* at 998.

25. 578 So. 2d 750 (Fla. 1st Dist. Ct. App. 1991).

26. *Id.* at 752.

27. *Id.*

Another issue in *Newberry* concerned the fact that the contractor's damage award included amounts for two subcontractors.²⁸ The First District Court of Appeal stated that such claims, when a contractor sues a project owner on behalf of a subcontractor, have been allowed when the contractor would be liable to the subcontractor, and in situations such as public contracts where the subcontractor is unable to establish an express or implied contract with the project owner.²⁹ Since these circumstances were not present in this case, the order appealed was reversed insofar as the subcontractors' losses were included in the contractor's damages.³⁰

B. Indemnity (Hold harmless) Agreements

In *Cox Cable Corp. v. Gulf Power Co.*,³¹ the Supreme Court of Florida considered the rule to be used in determining whether an indemnification agreement in a contract should be recognized where there was joint negligence on the part of the contracting parties.³² The court stated that the rule to be applied where there is joint liability is the same as the rule applied where the provision indemnifies against the indemnitee's own wrongful acts, i.e., the intent to indemnify must be clear and unequivocal.³³

In *Westinghouse Electric Corp. v. Metropolitan Dade Co.*,³⁴ the complaint contained a claim covered by an indemnity agreement, and a claim that was not covered under the indemnity agreement. The Fourth District Court of Appeal held that in such a situation, the duty to defend extends to the entire lawsuit.³⁵

C. Venue Clause

In *Dataline Corp. v. L.D. Mullins Lumber Inc.*,³⁶ the Third District Court of Appeal reviewed a venue clause. The court noted that Florida courts should decline to exercise jurisdiction where the parties have expressly agreed to litigate elsewhere.³⁷ However, where the clause is per-

28. *Id.* at 753.

29. *Id.*

30. *Newberry Square*, 578 So. 2d at 754.

31. 591 So. 2d 627 (Fla. 1992).

32. *Id.* at 628.

33. *Id.* at 629.

34. 592 So. 2d 1134 (Fla. 3d Dist. Ct. App. 1991).

35. *Id.* at 1136.

36. 588 So. 2d 1078 (Fla. 4th Dist. Ct. App. 1991).

37. *Id.* at 1079.

missive rather than mandatory, there is no requirement to bring suit where the contract recites venue may be.³⁸

D. Contracts—Guaranty

In *United Refrigeration, Inc., v. Evercool Air Conditioning, Inc.*,³⁹ the Fourth District Court of Appeal found no error in entering summary judgment in favor of the individual defendant in an action seeking to hold the owner/president of the defendant corporation personally liable as guarantor.⁴⁰ The court found that the credit application was ambiguous, but there was substantial competent evidence that the parties understood that the president of the defendant corporation did not intend to be personally liable.⁴¹ Two separate lines were provided below the obligatory language of the agreement; one for the name of the guarantor, and another for the signature of the individual guarantor.⁴² The president of the defendant corporation had not signed on the line for the signature of the individual guarantor, and he was therefore held not to be personally liable.⁴³

E. Arbitration

One frequently litigated issue is the scope of disputes which have been agreed to be arbitrated, understanding that arbitration is a consensual forum. Under the AIA documents, which could be described as having a "broad form" arbitration clause, the owner in *Ronbeck Construction Co. v. Savanna Club Corp.*,⁴⁴ argued that his claim for rescission of the contract, as well as the contractor's claims for fraud, conversion, and civil theft against the owner, were not arbitrable claims.⁴⁵ The contract in *Ronbeck* contained an arbitration clause which read, "[a]ll claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration" The appellate court held that the clause required arbitration of the claims.⁴⁶

It is prudent practice to raise the issue of arbitration as soon as possible in any litigation that is filed where an agreement to arbitrate is intended to

38. *Id.*

39. 593 So. 2d 1192 (Fla. 3d Dist. Ct. App. 1992).

40. *Id.* at 1193.

41. *Id.*

42. *Id.*

43. *Id.*

44. 592 So. 2d 344 (Fla. 4th Dist. Ct. App. 1992).

45. *Id.* at 345.

46. *Id.* at 348.

be enforced by the other party. In *Miami Dolphins, Ltd. v. Cowan*,⁴⁷ the existence of an arbitration clause was not raised by the defendant until after the complaint, answer and counterclaim were filed, and the plaintiff filed a Motion for Summary Judgment.⁴⁸ The Third District Court of Appeal noted that the case was only three months old, and that very little discovery had been taken.⁴⁹ The court also noted that the determinative factor was that there was no showing of prejudice as to the timing of raising the issue of arbitration.⁵⁰ The court remanded with instructions to the trial court to refer the dispute to arbitration.⁵¹

In *Trinchitella v. D.R.F., Inc.*,⁵² the trial court's order granting appellee's motion to compel arbitration was reversed. Appellants argued that by express contractual language, a 1987 agreement, which contained no arbitration provision, superseded a 1981 agreement, which contained the only arbitration provision.⁵³ The Fourth District Court of Appeal determined that due to a merger clause in the 1987 agreement stating, in essence, that there were no collateral agreements which were not expressly contained in the 1987 agreement, the 1981 agreement providing for arbitration was superseded by the 1987 agreement containing no provision for arbitration.⁵⁴

In another case deciding the scope of arbitrability, the trial court, in *C & M Ventures, Inc. v. Wolf*,⁵⁵ held that disputes under the written contract were arbitrable, but that disputes under oral change orders were not arbitrable. The Third District Court of Appeal reversed and held that disputes under the written agreement, and disputes arising out of oral changes or additions to the written agreement, were both arbitrable.⁵⁶

In the case of *Crane Construction Co. v. Collins M Corp.*,⁵⁷ a subcontract contained an arbitration clause, and also contained a clause which recited that the contractor had no duty to exercise any right or remedy and could waive any right or remedy.⁵⁸ The subcontractor argued that the arbitration clause was unenforceable because it was enforceable only at the

47. 601 So. 2d 301 (Fla. 3d Dist. Ct. App. 1992).

48. *Id.* at 302.

49. *Id.*

50. *Id.*

51. *Id.* at 303.

52. 584 So. 2d 35 (Fla. 4th Dist. Ct. App. 1991).

53. *Id.* at 36.

54. *Id.*

55. 587 So. 2d 512 (Fla. 3d Dist. Ct. App. 1991).

56. *Id.* at 513.

57. 579 So. 2d 870 (Fla. 2d Dist. Ct. App. 1991).

58. *Id.* at 872.

option of contractor.⁵⁹ Thus, the subcontractor argued, and the trial court agreed that there was no mutuality of remedy.⁶⁰ The Second District Court of Appeal held that a better interpretation was that the contractor could elect not to proceed with arbitration, but that the contractor's choice was eliminated when the subcontractor elected to proceed with arbitration.⁶¹ The appellate court held that arbitration should proceed.⁶²

Attorney fees are not to be assessed by the arbitrator(s). Such fees are to be assessed by the court. Awarding attorney fees exceeded the arbitrators' authority in *Fridman v. Citicorp Real Estate, Inc.*⁶³ The Second District Court of Appeal in *Fridman* also determined that it would be error for a court to vacate an arbitration award without directing a rehearing of the arbitration, as to the arbitrable issues.⁶⁴

One of the writer's primary concerns about arbitration is the rule of law that an arbitration award is not to be overturned if there is a mistake of law or mistake of fact. This result can, however, be dealt with by expressly providing in the arbitration agreement for vacating an award for error of law or mistake of fact. In *Keyes Co. v. Gomez*,⁶⁵ the rule of not vacating an award based on an error of law was followed based on *Schnurmacher v. Noriega*.⁶⁶

F. Determination of Architect—Finality

James A. Cummings, Inc. v. Young,⁶⁷ concerned disputes which arose between the appellant contractor and appellee subcontractor. The contract between the contractor and the subcontractor provided that the decisions of the project's architect were to be binding on both parties.⁶⁸ In making its determination, the Third District Court of Appeal stated that in Florida, when parties to a contract agree by its express terms to be bound to the determination made by an architect, that agreement is binding on the parties.⁶⁹ In the absence of fraud, or such mistake as would amount to

59. *Id.*

60. *Id.*

61. *Id.*

62. *Crane*, 579 So. 2d at 873.

63. 596 So. 2d 1128 (Fla. 2d Dist. Ct. App. 1992).

64. *Id.* at 1130.

65. 590 So. 2d 954 (Fla. 3d Dist. Ct. App. 1991).

66. 542 So. 2d 1327 (Fla. 1989).

67. 589 So. 2d 950 (Fla. 3d Dist. Ct. App. 1992).

68. *Id.* at 952.

69. *Id.* at 954.

fraud, the determination made by the architect shall be final.⁷⁰

IV. CONSTRUCTION CLAIMS

A. Licensing

In *O'Kon & Co. v. Riedel*,⁷¹ the First District Court of Appeal considered whether a Georgia architectural firm was precluded from recovering architectural fees for services where it lacked a Florida certificate of authorization to perform architectural services, as required by section 481.219(1)(b), Florida Statutes.⁷² The individual who participated in the preparation of the plans and gave his professional assistance on the project was not licensed in Florida as an architect.⁷³ The court determined that these facts precluded the architectural firm from enforcing the contract for architectural services in Florida.⁷⁴

B. Breach of Duty by Construction Manager

In *St. Lucie County v. Federal Construction Co.*,⁷⁵ the defendant, Federal, was a construction manager. A dispute arose with the tile contractor which the owner, St. Lucie County, felt was not effectively resolved by the construction manager.⁷⁶ The county sued the construction manager for breach of contract in failing to assist in resolving the dispute. A directed verdict in favor of the construction manager was reversed. The Fourth District Court of Appeal also determined that the trial court acted contrary to prevailing case law in assessing costs for an expert witness who never appeared at trial.⁷⁷

C. Failure to Obtain Building Permit

In *Braverman v. Van Bower, Inc.*,⁷⁸ the Third District Court of Appeal found that a subcontractor's failure to obtain a required building permit for

70. *Id.*

71. 588 So. 2d 1025 (Fla. 1st Dist. Ct. App. 1991).

72. FLA. STAT. § 481.219(1)(b) (1987).

73. *O'Kon*, 588 So. 2d at 1026.

74. *Id.*

75. 584 So. 2d 122 (Fla. 4th Dist. Ct. App. 1991).

76. *Id.* at 123.

77. *Id.*

78. 583 So. 2d 381 (Fla. 3d Dist. Ct. App. 1991).

a screen enclosure was a material breach of a contract for construction of a pool and screen enclosure.⁷⁹ The breach precluded the subcontractor's recovery under his mechanic's lien.⁸⁰ The court reversed the trial court and held that the subcontractor could not have substantially performed the contract without obtaining the permit.⁸¹

D. Implied Warranty of Constructibility

The *Spearin* doctrine holds that there is an implied warranty from the owner to the contractor that the plans and specifications are adequate for the construction intended.⁸² In the case of *Phillips & Jordan, Inc. v. State*,⁸³ the contractor unsuccessfully attempted to use the *Spearin* doctrine. The contractor submitted a bid to the Department of Transportation (DOT) to do clearing and grubbing work based on plans and specifications which called for clearing of a strip of land ten feet wide along a length of highway.⁸⁴ Prior to submitting its bid, the contractor had inspected the job site and determined that heavy equipment was necessary to do the job.⁸⁵ The instructions to bidders allowed the contractors to inspect the site. This contractor inspected the site and used a twelve foot wide machine to do the initial investigatory inspection.⁸⁶ Without seeking an extra, or reformation, the contractor cleared a twelve foot wide area when the specifications called for ten feet of width to be cleared.⁸⁷ At the end of the job, the contractor sought payment based on the twelve foot width, claiming that it was necessary to use a twelve foot machine, due to the clearing needed because of intense growth.⁸⁸ The court denied the contractor relief, due to the early knowledge in the investigation and the failure to seek either an extra or reformation before doing the work.⁸⁹ Therefore, the contractor could not claim the existence of a latent defect in the job specifications as would warrant the application of the *Spearin* doctrine.

79. *Id.* at 382.

80. *Id.*

81. *Id.*

82. *United States v. Spearin*, 248 U.S. 132 (1918).

83. 602 So. 2d 1310 (Fla. 1st Dist. Ct. App. 1992).

84. *Id.* at 1313.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Phillips*, 602 So. 2d at 1313.

89. *Id.* at 1314.

E. Negligence

1. Economic Loss Rule

Casa Clara Condominium Ass'n v. Charley Toppino & Sons, Inc.,⁹⁰ was probably the most significant case of the last year. In *Casa Clara*, condominium owners sued the general contractor and the supplier of defective concrete, for damages caused to the building components, particularly rust and expansion of the concrete reinforcing steel.⁹¹ The Third District Court of Appeal held that the "economic loss rule" precluded tort action against the concrete supplier who sold to the general contractor.⁹² The rule prohibits tort recovery on contracted goods or services, absent personal injury or damage to other property.⁹³ Costs to repair damage to the product itself were not recoverable.⁹⁴ The condominium association argued that the defective concrete caused other property damage, i.e. rusting of the reinforcing steel embedded in the concrete.⁹⁵ The district court explained that the reinforcing steel and concrete became integral components of the buildings. They were not separate property for purposes of economic loss analysis.⁹⁶ The court concluded that, owing to the rule, tort damages were not recoverable against the concrete supplier.⁹⁷ The Florida Supreme Court has accepted certiorari jurisdiction of this case with oral argument set for January, 1993.

In *Butchkosky v. Enstrom Helicopter Corp.*,⁹⁸ the plaintiff claimed breach of warranty damages against a helicopter manufacturer. The claim stemmed from a helicopter crash caused by the malfunction of the helicopter's tail rotor.⁹⁹ The federal district court for the Southern District of Florida thoroughly analyzed the economic loss rule, including the exceptions recognized in *A.R. Moyer, Inc. v. Graham*,¹⁰⁰ and *Latite Roofing Co. v. Urbanek*.¹⁰¹ The court decided that since there was no

90. 588 So. 2d 631 (Fla. 3d Dist. Ct. App. 1991).

91. *Id.* at 633.

92. *Id.* at 632.

93. See *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987).

94. *Casa Clara*, 588 So. 2d at 633.

95. *Id.* at 632.

96. *Id.* at 633.

97. See *id.* at 633-34.

98. 784 F. Supp. 882 (S.D. Fla. 1992).

99. *Id.*

100. 285 So. 2d 397 (Fla. 1973).

101. 528 So. 2d 1381 (Fla. 4th Dist. Ct. App. 1988).

alternative theory of recovery, that the economic loss rule would not preclude the claim.¹⁰²

2. Sovereign Immunity

In *Eiler v. Camp, Dresser & McKee, Inc.*,¹⁰³ the plaintiff was an independent contractor's employee who suffered an electric shock while working on a county sewer line project.¹⁰⁴ The court held that the county was entitled to immunity from tort liability for injuries to employees of general contractors or subcontractors unless exceptional circumstances could be established, such as the county meddling with the job by assuming responsibility for the work or directing the work effort or negligently creating a dangerous condition.¹⁰⁵ Short of such "exceptional circumstances," the county could not be liable for the employee's injuries.¹⁰⁶

In *Jefcoat v. State Department of Transportation*,¹⁰⁷ a wrongful death action was filed against State. The plaintiff's son was killed in an accident on the Pensacola Bay Bridge.¹⁰⁸ The plaintiff's allegations included negligence in the design and maintenance of the bridge, particularly the state's failure to correct design deficiencies when they became apparent.¹⁰⁹ The claim also included negligence for failure to warn of a dangerous condition. The First District Court of Appeal held that a governmental entity can be liable for failing to maintain existing roads or traffic control devices in accordance with their original design.¹¹⁰ However, it cannot be held liable where the allegation of failure to maintain was used to indicate obsolescence and the need to upgrade.¹¹¹ The decisions regarding design of a bridge are judgmental, planning level governmental decisions and thereby immune from suit under section 768.28 of the Florida Statutes.¹¹²

102. See *Butchkosky*, 784 F. Supp. at 885.

103. 583 So. 2d 1086 (Fla. 5th Dist. Ct. App. 1991).

104. *Id.* The actual plaintiff was the guardian/spouse who brought suit on behalf of her injured husband.

105. See *id.* at 1087.

106. *Id.*

107. 584 So. 2d 167 (Fla. 1st Dist. Ct. App. 1991).

108. *Id.* at 167.

109. *Id.* at 167-68.

110. *Id.* at 168 (discussing *Perez v. Department of Transp.*, 435 So. 2d 830, 831 (Fla. 1983)).

111. *Id.* (quoting *Department of Transp. v. Neilson*, 419 So. 2d 1071, 1078 (Fla. 1982)).

112. FLA. STAT. § 768.28 (1991).

3. Contractor/Subcontractor Negligence

In *Keene v. Chicago Bridge & Iron Co.*,¹¹³ the plaintiff, a subcontractor's employee, was injured when he tried to move a sandblasting machine. The machine had been placed on a stack of scaffolding boards by the defendant, another subcontractor. The case went to the jury to decide whether the government was negligent in failing to warn of a dangerous condition.¹¹⁴ The First District Court of Appeal held that the duty to warn of a dangerous condition can be excused only if plaintiff's knowledge is conclusively shown by the evidence to be equal to or greater than that of defendant.¹¹⁵ The plaintiff's knowledge of a dangerous condition is a valid defense to breach of a duty to warn, but it is not a defense to a charge of maintaining a dangerous condition.¹¹⁶

In *White v. Am-Sprad Metals, Inc.*,¹¹⁷ a plumber brought a personal injury action against Am-Sprad Metals, Inc. when he was struck by a concrete core at a construction site.¹¹⁸ The concrete cores had been drilled by an unauthorized subcontractor, who had left the drilled cores lying around the building.¹¹⁹ The Fourth District Court of Appeal held Am-Sprad could not avoid liability by virtue of the subcontractor working under an unauthorized subcontract.¹²⁰

4. Corporate Officers and Agents

In *Munder v. Circle One Condominium Ass'n*,¹²¹ the condominium association brought an action against the corporate developer and against the individual president/sole stockholder.¹²² The Fourth District Court of Appeal held that the president/sole stockholder of the developer corporation

113. 596 So. 2d 700 (Fla. 1st Dist. Ct. App. 1992).

114. *Id.* at 704.

115. *Id.* (citing *A.O. Smith Harvestore Prods. Inc. v. Suber Cattle Co.*, 416 So. 2d 1176 (Fla. 1st Dist. Ct. App. 1982); *Horton v. Gulf Power Co.*, 401 So. 2d 1384 (Fla. 1st Dist. Ct. App.), *review denied*, 411 So. 2d 382 (Fla. 1981)).

116. *Id.* at 705 (citing *Kolosky v. Winn-Dixie Stores, Inc.*, 472 So. 2d 891 (Fla. 4th Dist. Ct. App. 1985), *review denied*, 482 So. 2d 350 (Fla. 1986); *Ferber v. Orange Blossom Ctr., Inc.*, 388 So. 2d 1074 (Fla. 5th Dist. Ct. App. 1980); *Bennett v. Mattison*, 382 So. 2d 873 (Fla. 1st Dist. Ct. App. 1980)).

117. 583 So. 2d 769 (Fla. 4th Dist. Ct. App. 1991).

118. *Id.* at 770.

119. *Id.*

120. *Id.*

121. 596 So. 2d 144 (Fla. 4th Dist. Ct. App. 1992).

122. *Id.* at 145.

could not be held liable for the corporation's breach of duty in failing to renew the fire policy on the clubhouse.¹²³ Even though the Association's failure was obviously wrong,¹²⁴ no basis was alleged for piercing the corporate veil.¹²⁵ Directors, officers and stockholders may lose their insulation from liability for corporate acts if they engage in fraud, self-dealing, unjust enrichment or betrayal of trust, but are not liable simply by reason of their official relation to the corporation.¹²⁶ The court acknowledged that its holding conflicted with the ruling in *B & J Holding Corp. v. Weiss*,¹²⁷ where personal liability was found for failure of developer to make the maintenance payments required by statute.¹²⁸

Finkle v. Mayerchak,¹²⁹ concerned the appeal of a homeowner from an adverse summary judgement in a negligence action against the builder and its qualifying agent.¹³⁰ The homeowner claimed that the qualifying agent was responsible for damages because the building permit was issued to him, and because he allowed an unlicensed person (the builder) the use of his license.¹³¹ The Third District Court of Appeal, looking to legislative intent, held that neither section 489.119, Florida Statutes,¹³² nor section 489.129, Florida Statutes,¹³³ creates a private cause of action against the qualifying agent as the individual qualifier for a corporation acting as a general contractor. The court determined, however, that the homeowner's claim against the qualifying agent for common law negligence did state a cause of action.¹³⁴

In *Mitchell v. Edge*,¹³⁵ a homeowner sued the qualifying agent alleging that the qualifying agent "breached his nondelegable statutory duty to supervise the construction of appellant's home and that, as a result of his failure to supervise, the home was not built in a good and workmanlike

123. *Id.*

124. *See id.*

125. *Id.*

126. *Munder*, 596 So. 2d at 145.

127. 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1978).

128. *Munder*, 596 So. 2d at 145.

129. 578 So. 2d 396 (Fla. 3d Dist. Ct. App. 1991).

130. *Id.* at 397.

131. *Id.*

132. FLA. STAT. § 489.119 (1989) (entitled, "Business Organizations; qualifying agents").

133. *Id.* § 489.129 (1989) (entitled, "Disciplinary Proceedings").

134. *Finkle*, 353 So. 2d at 397-98.

135. 598 So. 2d 125 (Fla. 2d Dist. Ct. App. 1992).

manner and contained numerous defects and building code violations."¹³⁶ The trial court granted the qualifying agent's motion for summary judgement which argued that the previous unsatisfied judgement entered in favor of the homeowner and against the corporation, of which the qualifying agent was the vice president, barred the current action against the qualifying agent.¹³⁷ The Second District Court of Appeal held that since the prior judgement against the construction corporation was not satisfied, the action against the qualifying agent was not barred.¹³⁸ Had the prior judgement been satisfied, the qualifying agent perhaps would have a viable defense.¹³⁹

5. Architect/Engineer Negligence

In *Hohn v. Amcar, Inc.*,¹⁴⁰ a design firm designed a coal fuel system for a kiln.¹⁴¹ The system was subsequently redesigned in improvident manner by a second party after installation. When a malfunction resulted in personal injury, the original design firm was included among those sued.¹⁴² Since the original design was not shown to be the proximate cause of the accident, any design defect by the original design firm had a tenuous relationship to the plaintiff's injuries.¹⁴³ Therefore, notwithstanding the fact that the original design may have been negligent, that was not the proximate cause of the accident.

F. Lender Liability

In *Inversiones Inmobiliarias Internacionales De Orlando Sociedad Anonima v. Barnett Bank*,¹⁴⁴ the appellant-second mortgagee argued that the first mortgagee, the construction lender, owed appellant a fiduciary duty to supervise the expenditure of disbursements, to make the developer-mortgagor account for construction loan proceeds, and to otherwise oversee the development.¹⁴⁵ The Fifth District Court of Appeal held that "a construction lender does not owe a fiduciary duty to a purchase money

136. *Id.* at 127.

137. *Id.*

138. *Id.*

139. *Id.*

140. 584 So. 2d 1089 (Fla. 5th Dist. Ct. App. 1991).

141. *Id.* at 1090.

142. *Id.* at 1091.

143. *Id.* at 1092.

144. 584 So. 2d 110 (Fla. 5th Dist. Ct. App. 1991).

145. *Id.*

mortgagee who has subordinated his purchase money mortgage."¹⁴⁶ The court reasoned that "it is within the power of the subordinator to refuse to subordinate if the terms of the subordination are not acceptable."¹⁴⁷

In *Comet Development Corp. v. Prudential Insurance Co. of America*,¹⁴⁸ the Third District Court of Appeal stated that where a construction mortgage is involved, the duty to disburse the funds with reasonable care is owed to the owner of the building, and not to the appellant-contractor.¹⁴⁹

In *Mercantile Intercontinental, Inc. v. Generalbank*,¹⁵⁰ a construction lender was found not to take priority over a purchase money mortgage.¹⁵¹ The purchase money mortgagee gave the construction lender a phased-in subordination agreement, which required that construction funds be disbursed for a single family residence on each lot, and for no other purpose.¹⁵² Where the lender disbursed funds that were used for other lots, the construction lender was deprived of its priority in regard to the improper disbursements on the unsubordinated lots.¹⁵³

G. Delays

Broward County v. Russell, Inc.,¹⁵⁴ was a case involving use of the Eichleay formula in computing home office overhead. In *Russell*, the Fourth District Court of Appeal held that "the use of the Eichleay formula for the calculation of home office overhead damages is proper as long as there is competent evidence of actual damages of this variety having been sustained by the party seeking relief."¹⁵⁵

V. CONSTRUCTION LITIGATION

A. Measure of damages

In *Indian River Colony Club, Inc. v. Schopke Construction &*

146. *Id.* at 110-11.

147. *Id.* at 111.

148. 579 So. 2d 355 (Fla. 3d Dist. Ct. App. 1991).

149. *Id.* at 355-56.

150. 601 So. 2d 293 (Fla. 3d Dist. Ct. App. 1992).

151. *Id.* at 295.

152. *Id.* at 294.

153. *Id.* at 295.

154. 589 So. 2d 983 (Fla. 4th Dist. Ct. App. 1991).

155. *Id.* at 984.

Engineering Inc.,¹⁵⁶ the Fifth District Court of Appeal considered the proper measure of damages due a project manager wrongfully terminated by the developer.¹⁵⁷ The trial court awarded the unpaid balance of the contract price.¹⁵⁸ The appellate court pointed out that the project manager would have incurred costs to complete the contract.¹⁵⁹ The balance of the contract price was not all profit.¹⁶⁰ The project manager must show its total costs and expenses necessary to perform the contract and then deduct that sum from the balance owing on the contract price.¹⁶¹ In order to prove its prospective lost profits, the appellee "must deduct the actual supervisory salary paid or, if no salary is paid, the reasonable value of the supervisory services that would have been attributable to performing the contract."¹⁶²

In *Smith v. Mark Coleman Construction, Inc.*,¹⁶³ the end result of the construction included a 1 3/8 inch hump in a bedroom floor.¹⁶⁴ The trial court found in favor of the owner, but only awarded damages based on a "cosmetic fix" of the hump.¹⁶⁵ The trial court excluded evidence of the diminution of the value of the house due to the hump.¹⁶⁶ The Second District Court of Appeal held that the damages should be either the reasonable cost of removing the hump (if no unreasonable economic waste), or the difference in value of the house with the hump versus without the hump.¹⁶⁷

One type of damage that is difficult to prove is lost profits resulting from lost bonding. The difficulty is that most contractors try to prove those damages by showing their past track record in connection with their percentage of success on bids applied to their profitability. This is subject to conjecture because other factors, such as the economy, or the contractor's own sharpening of the pencil based on the desire to obtain work at a particular time is difficult to show. One case holding that proof of lost profits from loss of bonding was too speculative was *Daniel International*

156. 592 So. 2d 1185 (Fla. 5th Dist. Ct. App. 1992).

157. *Id.* at 1186-87.

158. *Id.* at 1186.

159. *Id.* at 1187.

160. *Id.*

161. *Indian River*, 592 So. 2d at 1187.

162. *Id.*

163. 594 So. 2d 812 (Fla. 2d Dist. Ct. App. 1992).

164. *Id.* at 813.

165. *Id.*

166. *Id.*

167. *Id.* at 815.

*Corp. v. Better Construction, Inc.*¹⁶⁸ It would seem that if the following factors were shown, that a claim for lost profits due to lack of bonding would not be speculative:

1. Contractor bids work and actually would have been low and thereby be awarded but for the lack of a bond; and
2. The contractor can show that there was profit in the bid; and
3. The bid was within five percent of the next reasonable low bidder to show that the contractor did not just prepare a low bid.

B. Attorney Fees

In *Max Dial Porsche, Audi, Inc. v. Kushner, Inc.*,¹⁶⁹ the Fourth District Court of Appeal reversed the trial court's award of attorney fees to appellee-defendant because the only defensive pleading was an answer that did not contain a request for attorney fees.¹⁷⁰ While appellee-defendant filed a motion for leave to file an amended answer which did contain a request for attorney fees, appellant-plaintiff voluntarily dismissed the case before the hearing on the pending motion.¹⁷¹ Under the Florida Supreme Court case of *Stockman v. Downs*,¹⁷² it is error to award attorney fees absent a demand for such fees in the pleadings.¹⁷³ It was common to demand attorney fees in an affirmative claim. There was not as widespread a practice of demanding attorney's fees in an answer, which now should be done to assure entitlement to attorney's fees for defense.

In *Aetna Casualty & Surety Co. v. Buck*,¹⁷⁴ the Florida Supreme Court interpreted section 713.24, Florida Statutes, with regard to whether the 1987 revisions make a surety liable for all reasonable attorney fees incurred by a lien claimant in an action on a surety bond.¹⁷⁵ The court agreed with the district court's interpretation that section 713.24 does not limit attorney's fees to \$500.00.¹⁷⁶ However, the court disagreed that section 713.24 allows a surety's liability to be increased beyond the amount of the bond in order to cover costs.¹⁷⁷ The court said that while section 713.24(3) allows

168. 593 So. 2d 524 (Fla. 3d Dist. Ct. App. 1991).

169. 596 So. 2d 156 (Fla. 4th Dist. Ct. App. 1992).

170. *Id.*

171. *Id.*

172. 573 So. 2d 835 (Fla. 1991).

173. *Id.* at 837-38.

174. 594 So. 2d 280 (Fla. 1992).

175. *Id.* at 282-83.

176. *Id.* at 283.

a trial court to order the party providing the bond to either purchase an additional bond or increase the existing bond, or to otherwise provide increased security, the statute does not permit the trial court to increase the liability of the surety beyond the amount of the bond.¹⁷⁸ Hence, the full amount of the lien-transfer bond is exposed for the principal, interest, and costs, including attorney fees. However, the lienor is left with an unsecured judgment against the owner for any costs which exceed the amount of the bond.

C. Prejudgment Interest

In *Hays v. Altamira Construction Corp.*,¹⁷⁹ the Fourth District Court of Appeal ruled that the trial court should have awarded prejudgment interest to the contractor as of the date that the owner refused payment resulting in withdrawal from the job.¹⁸⁰

D. Limitation of Actions

In *Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Ass'n*,¹⁸¹ the owner of an apartment complex hired Baskerville-Donovan Engineers, Inc. to prepare a report in connection with the conversion of the apartment complex into residential condominiums.¹⁸² Subsequently, a group of unit owners and directors of the Pensacola Executive House Condominium Association filed a complaint with the Bureau of Condominiums against Executive House, Inc. and Baskerville-Donovan.¹⁸³ The complaint alleged that the report was improperly prepared, that the report misrepresented the actual condition of the roof, and that the roof had been in poor condition since July of 1982.¹⁸⁴ After the Bureau of Condominiums declared these allegations to be outside its jurisdiction, the Association refiled the suit in circuit court.¹⁸⁵ In its complaint to the circuit court, the Association claimed that Baskerville-Donovan inadequately examined the roof and inaccurately prepared the report, causing damage to

178. *Id.*

179. 591 So. 2d 257 (Fla. 4th Dist. Ct. App. 1991).

180. *Id.* at 259.

181. 581 So. 2d 1301 (Fla. 1991).

182. *Id.* at 1302.

183. *Id.*

184. *Id.*

185. *Id.*

the Association and its members.¹⁸⁶ The trial court granted Baskerville-Donovan's motion for summary judgment on the ground that the lawsuit was barred under the two-year statute of limitations for professional malpractice, pursuant to section 95.11, Florida Statutes.¹⁸⁷ The First District Court of Appeal found no privity between the parties and reversed, concluding that section 95.11 was applicable only where direct contractual privity exists.¹⁸⁸ The Florida Supreme Court affirmed the appellate court's holding.¹⁸⁹ Thus, the existing rule in Florida is that the two year statute of limitations found in section 95.11, Florida Statutes, applies to malpractice actions only when direct privity of contract between the parties is present.¹⁹⁰

Additionally, the Florida Supreme Court, in *Garden v. Frier*,¹⁹¹ has determined that a land surveyor is not a "professional" for purposes of applying the two year statute of limitations for professional malpractice.¹⁹²

E. Discovery Issues

In *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*,¹⁹³ the Florida Supreme Court was faced with the issue of whether an architectural firm under contract with the School Board to perform architectural services for the construction of a school was subject to the provisions of Chapter 119 of the Florida Statutes.¹⁹⁴ The appellant newspaper sued the architectural firm seeking disclosure of documents under the public records act of Chapter 119, Florida Statutes.¹⁹⁵ The trial court held that the architectural firm was not an agency within the meaning of Chapter 119 and therefore did not have to produce the records.¹⁹⁶ The court held that "[t]he term 'agency' as used in the Florida Public Records Act is defined broadly to include private entities that act on behalf of any public agency."¹⁹⁷ This broad definition serves to insure that a public

186. *Baskerville*, 581 So. 2d at 1302.

187. FLA. STAT. § 95.11 (1983).

188. *Baskerville*, 581 So. 2d at 1302.

189. *Id.* at 1304.

190. *Id.*

191. 602 So. 2d 1273 (Fla. 1992).

192. *Id.* at 1277.

193. 596 So. 2d 1029 (Fla. 1992).

194. *Id.* at 1030.

195. FLA. STAT. §§ 119.01-.16 (1989).

196. *Sun-Sentinel*, 596 So. 2d at 1031.

197. *Id.*

agency cannot avoid disclosure under the act by contractually delegating to a private entity that which otherwise would be the agency's responsibility. However, the Florida Supreme Court rejected petitioner's contention that a private corporation acts on behalf of a public agency merely by entering into a contract to provide professional services to the agency.¹⁹⁸ Instead, the court held that a totality of factors approach is to be used in determining whether a private corporation is acting on behalf of a public agency.¹⁹⁹ These factors include, but are not limited to the following:

1) the level of public funding; 2) the commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's [sic] benefit the private entity is functioning.²⁰⁰

The facts in the instant case reveal that pursuant to the above-noted factors, the architectural firm was not acting on behalf of the school board for purposes of the Public Records Act.²⁰¹

In *Plantation-Simon, Inc. v. Al Bahloul*,²⁰² the respondent/tenant served a notice on "an officer, director, or managing agent having knowledge of the matters in the complaint,"²⁰³ as provided in rule 1.310(b)(6), Florida Rules of Civil Procedure.²⁰⁴ The respondent then served a second notice of deposition, this time noticing a named individual, who was the corporate general partner of the petitioner.²⁰⁵ Petitioner then moved for a protective order, alleging that petitioner's motion for protective order was based on the position that the subpoena sought a specific individual, and thus required a subpoena to compel attendance. The trial court denied the protective order, and the petitioner sought certiorari review. The Fourth

198. *Id.*

199. *Id.*

200. *Id.*

201. *Sun-Sentinel*, 596 So. 2d at 1032.

202. 596 So. 2d 1159 (Fla. 4th Dist. Ct. App. 1992).

203. *Id.* at 1161.

204. FLA. R. CIV. P. 1.310.

205. *Plantation-Simon*, 596 So. 2d at 1161.

District Court of Appeal denied the petition for certiorari, holding that the petitioner was not required to serve notice of deposition according to the procedure set forth in rule 1.310(b)(6).²⁰⁶ Instead, the court held that "a party has the right to take the deposition of an officer . . . of a corporation . . . already named and served as a party, by simple notice and without the necessity of serving the official with a witness subpoena."²⁰⁷

In *Scientific Games, Inc. v. Dittler Bros., Inc.*,²⁰⁸ Dittler Brothers filed a request for production of documents which, in effect, sought discovery of information regarding Petitioner's bid on a public contract to print lottery tickets. Petitioners complied in part but resisted discovery in other respects, relying on a number of theories for non-disclosure. Scientific Games "contended that its proposal contain[ed] highly confidential information protected by statute and rule."²⁰⁹ The court agreed with petitioners that respondent did not make a requisite showing for all discovery it sought. The test set forth by the First District Court of Appeal in determining whether a party should be allowed to compel production is as follows:

When confronted with a claim for trade secrets or proprietary information in opposition to a discovery request, the trial court (or, as in this case, an administrative hearing officer) must first determine if the materials sought to be protected are, in fact, trade secrets and proprietary information. Upon such a showing, the party seeking discovery must demonstrate a reasonable necessity to obtain the information.²¹⁰

Thus, in the instant case, the court found that the respondent did not make the required showing necessary to compel production, and the parties could litigate the matter without full disclosure.²¹¹

F. Expert Witness Costs

In *St. Lucie County v. Federal Construction Co.*,²¹² Federal, a construction manager, entered into a construction management agreement with St. Lucie County. A dispute arose from the tile contractor which the

206. *Id.*

207. *Id.* at 1162.

208. 586 So. 2d 1128 (Fla. 1st Dist. Ct. App. 1991).

209. *Id.* at 1130.

210. *Id.* at 1131 (citing *Goodyear Tire & Rubber Co. v. Cooney*, 359 So. 2d 1200 (Fla. 1st Dist. Ct. App. 1978) (footnote omitted)).

211. *Id.* at 1131.

212. 584 So. 2d 122 (Fla. 4th Dist. Ct. App. 1991).

owner, St. Lucie County, felt was not effectively resolved by the construction manager.²¹³ The county sued Federal for breach of contract in failing to assist in resolving the dispute.²¹⁴ The Fourth District Court of Appeal reversed the trial court's directed verdict in favor of Federal.²¹⁵ The court also determined that the trial court did not follow precedent in assessing costs for an expert witness who never appeared at trial.²¹⁶

VI. LIENS

In *Palm Beach Mall, Inc. v. Southeast Millwork, Inc.*,²¹⁷ the Fourth District Court of Appeal held that a retail kiosk constructed for a lessee at a shopping mall was not permanently affixed to the realty by virtue of the electric being "hard wired" into the mall's existing electrical outlet.²¹⁸ The materials furnished for the kiosk could not be the basis for a lien against the mall.²¹⁹

Business Men's Assurance Co. of America v. A-1 Chattahoochee Patios, Inc.,²²⁰ was a case where the Fourth District Court of Appeal took a very paternalistic view of the law for the lienor. The court found that the subcontractor substantially complied with the construction lien law by the timely mailing of a notice to owner prior to filing its construction lien although such notice was actually delivered to the owner after the time of recording the lien.²²¹ The court reasoned that there was no resulting prejudice or injury to the owner and the lien was immediately bonded off.²²² Pursuant to section 713.06(2)(d), Florida Statutes, substantial compliance without adverse effect was all that was required.²²³

In *Lacentra Trucking, Inc. v. Flagler Federal Savings & Loan Ass'n*,²²⁴ the Fourth District Court of Appeal found that ascertainment of boundary monuments and flagging and staking a construction site for an

213. *Id.* at 123.

214. *Id.*

215. *Id.* at 122.

216. *St. Lucie*, 584 So. 2d at 123.

217. 593 So. 2d 1121 (Fla. 4th Dist. Ct. App. 1992).

218. *Id.*

219. *Id.*

220. 592 So. 2d 324 (Fla. 4th Dist. Ct. App. 1992).

221. *Id.* at 325.

222. *Id.*

223. *Id.*

224. 586 So. 2d 474 (Fla. 4th Dist. Ct. App. 1991).

improvement within thirty days of recordation of a notice of commencement can constitute the "actual commencement" of the improvement by section 713.07(2), Florida Statutes, for construction liens to relate back to the date of filing such notice.²²⁵

In *Rite-Way Painting & Plastering, Inc. v. Tetor*,²²⁶ the Second District Court of Appeal found that a notice to owner delivered on the forty-eighth day from first work was timely served where the forty-eighth day was the first business day after the forty-fifth day which fell on a Saturday, and the following Monday was a legal holiday.²²⁷ The court also sustained the unjust enrichment claim of Rite-way, reciting the essential elements for this theory to be a benefit conferred upon a defendant by the plaintiff, the defendant's appreciation of the benefit, and the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for that to occur without paying the value thereof.²²⁸ While contracts implied in fact require the assent of the parties, contracts implied in law do not require such assent.²²⁹

In *Stresscon v. Madiedo*,²³⁰ the Florida Supreme Court considered whether the failure to notarize an otherwise timely and accurate statement of account under Florida Statute, section 713.16(2) (1987), may be cured by verification after the fact, so long as there was no prejudice to the opposing party.²³¹ The court answered the question in the negative and stated that "the mechanics' lien law is to be strictly construed in every particular and strict compliance is an indispensable prerequisite for a person seeking affirmative relief under the statute."²³² Furthermore, this section dealing with sworn statements of account contains no language permitting either substantial compliance or lack of prejudice to be considered in determining the validity of a lien.

In *Liberty International, Inc. v. Water Place, Inc.*,²³³ the Third District Court of Appeal stated that the fact that the landlord filed a notice regarding prohibition of mechanic's liens pursuant to Florida Statutes, section 713.10(2)(1987) did not preclude appellant from maintaining an action

225. *Id.* at 475.

226. 582 So. 2d 15 (Fla. 2d Dist. Ct. App. 1991).

227. *Id.* at 17.

228. *Id.* at 17-18.

229. *Id.* at 17.

230. 561 So. 2d 1351 (Fla. 1991).

231. *Id.* at 1359.

232. *Id.* at 1360.

233. 507 So. 2d 410 (Fla. 3d Dist. Ct. App. 1992).

for an equitable lien.²³⁴ The lease and notice thereof did prevent the claimant from maintaining an action for a construction lien on the landlord's property.²³⁵

The Florida Supreme Court in *DiStefano Construction, Inc. v. Fidelity & Deposit Co.*,²³⁶ determined that the recovery of costs on a claim of lien transferred to bond is not limited to \$500., but is recoverable up to the full penal sum of the lien transfer bond. *DiStefano* further held that the authority for recovery of attorney fees against a lien transfer bond surety is section 713.29 and not section 627.428.²³⁷ Another case so holding is *J.M. Beeson Co. v. Sartori*.²³⁸ The *DiStefano* court also held that it was error to order the bond increased to include the full amount of the attorney fees awarded.²³⁹

In *Maplewood Phase One Homeowner's Ass'n, v. Cecil*,²⁴⁰ the Fourth District Court of Appeal stated, in dicta, that there is no good reason why a trial court might not include the attorney fees in setting the amount of the bond if the facts and circumstances required.²⁴¹

In *M & P Concrete Products, Inc. v. Woods*,²⁴² the Fourth District Court of Appeal considered whether section 713.29, Florida Statutes (1987) authorizes an owner to recover attorney fees against a lien claimant who failed to recover on the lien claim, but recovered judgment on a related claim for damages.²⁴³ The court determined that, under these circumstances, the owner cannot be the prevailing party and, therefore, is not entitled to attorney fees under the statute.²⁴⁴

In *Oliver General Fence, Inc. v. Roche*,²⁴⁵ the lien action was ordered to go to mediation prior to trial.²⁴⁶ At the mediation proceedings, the parties entered into a stipulated settlement, which provided that "the issue of attorney fees and costs will be decided by the trial judge at a hearing held

234. *Id.* at 411.

235. *Id.*

236. 597 So. 2d 248 (Fla. 1992).

237. *Id.* at 249. This was also codified in the 1992 special session of the Legislature.

238. 584 So. 2d 572 (Fla. 4th Dist. Ct. App. 1991).

239. *Id.* at 573.

240. 585 So. 2d 370 (Fla. 4th Dist. Ct. App. 1991).

241. *Id.*

242. 590 So. 2d 429 (Fla. 4th Dist. Ct. App. 1991).

243. *Id.* at 430.

244. *Id.*

245. 594 So. 2d 339 (Fla. 5th Dist. Ct. App. 1992).

246. *Id.*

within sixty days."²⁴⁷ At the hearing on attorneys fees, the trial court denied both parties' request for attorney fees, holding that the case was resolved by settlement and thus, there was no "prevailing party" pursuant to section 713.29, Florida Statutes.²⁴⁸ On appeal, the Fifth District Court of Appeal found that since no additional evidence was submitted subsequent to the mediation, the trial court committed fundamental error when it enforced the lien.²⁴⁹ However, the appellate court did affirm the trial court's denial of statutory attorney's fees.²⁵⁰ Thus, contractors should take heed in drafting mediation settlements, and in submitting proof based on a default in the settlement.

In *Gentile v. F. Gaudio Tile & Marble Creations, Inc.*,²⁵¹ the Fourth District Court of Appeal found that the owner was entitled to recover as damages the cost in having an invalid mechanic's lien transferred to bond.

In *Freedman v. Collier Commercial Builders, Inc.*,²⁵² a contractor, after recording a claim of lien, filed for arbitration to collect from the owner pursuant to the construction contract.²⁵³ After the arbitration award, the contractor filed suit to confirm the award and enter judgment, plus attorney fees, pursuant to the lien law.²⁵⁴ The Second District Court of Appeal found that the contractor was not entitled an award of attorney fees, pursuant to section 713.29, Florida Statutes (1990), as the amendment to the statute allowing fee awards in arbitration proceedings did not become effective until after the contractor began the action to enforce its lien.²⁵⁵

In *Stevens v. Site Developers, Inc.*,²⁵⁶ the contractor included in his claim of lien amounts claimed as items of damages for breach of contract in the nature of loss of profits and construction delay.²⁵⁷ The amounts claimed for these items made the amount of the claimed lien greatly in excess of the amount of the mechanic's lien finally found by the trial judge.²⁵⁸ The Fifth District Court of Appeal found, however, that "the amounts claimed as a mechanic's lien and the amount finally allowed by the

247. *Id.*

248. *Id.* at 340.

249. *Id.*

250. *Roche*, 594 So. 2d at 340.

251. 596 So. 2d 175 (Fla. 4th Dist. Ct. App. 1992).

252. 596 So. 2d 115 (Fla. 2d Dist. Ct. App. 1992).

253. *Id.* at 116.

254. *Id.*

255. *Id.*

256. 584 So. 2d 1064 (Fla. 5th Dist. Ct. App. 1991).

257. *Id.*

258. *Id.*

trial judge do not alone determine the lien to be fraudulent as a matter of law.²⁵⁹ The court further held that trial judge still has discretion in determining the intent and existence of bad faith of the lienor when the lienor states the amount of the lien claimed.²⁶⁰ Thus, without intent to inflate the lien, a fraudulent lien should not be found. One key factor the court relied on in its holding was that fact that the lienor sought advice of counsel before recording the lien.²⁶¹

In *Mode, Inc. v. Hardrives Co.*,²⁶² the Fourth District Court of Appeal stated that the lien claimant was entitled to prejudgment interest from the earliest date that payment was demanded from the owner.²⁶³ In this case, for the major part of damages recovered, that date was the date of filing a claim of lien.²⁶⁴ An order discharging a lien pursuant to a motion to discharge for failure to respond to a twenty day summons to show cause is not an appealable order. As indicated in *A & M Painting v. Jennings*,²⁶⁵ the proper review for such an order would be by certiorari.²⁶⁶

VII. BONDS AND INSURANCE

A. Payment and Performance Bonds

The Florida Supreme Court resolved the conflict among the Florida appellate districts on the issue of whether a performance bond surety may be liable for delay damages under a performance bond which does not specifically include coverage for delay damages. In *American Home Assurance Co. v. Larkin General Hospital, Ltd.*,²⁶⁷ the Florida Supreme Court held that a performance bond surety is not liable for delay damages under a performance bond unless the bond expressly provides coverage for such a loss.²⁶⁸

In *St. Paul Mercury Insurance Co. v. Department of State*,²⁶⁹ a

259. *Id.* at 1065.

260. *Id.*

261. *Stevens*, 584 So. 2d at 819.

262. 583 So. 2d 819 (Fla. 4th Dist. Ct. App. 1991).

263. *Id.* at 820.

264. *Id.*

265. 598 So. 2d 335 (Fla. 4th Dist. Ct. App. 1992).

266. *Id.* at 336.

267. 593 So. 2d 195 (Fla. 1992).

268. *Id.* at 198.

269. 581 So. 2d 976 (Fla. 1st Dist. Ct. App. 1991).

performance bond was issued by the contractor in favor of the owner, Department of State.²⁷⁰ When the contractor defaulted, the State sued the surety, claiming the full penal sum of the bond.²⁷¹ Reversing the trial court judgment against the surety in the amount of the bond, the First District Court of Appeal pointed out that the penal sum of the bond is the outside limit of liability, not a liquidated damage.²⁷² The case was remanded to the trial court for entry of judgment against the surety in the amount of the damages suffered in completing the work, which was less than the penal sum of the bond.²⁷³

Centex-Rodgers Construction Co. v. Hensel Phelps Construction Co.,²⁷⁴ addressed the issue of whether service of process upon the Insurance Commissioner as agent of the surety constitutes perfected service, or whether such service is complete only upon transmission by the Insurance Commissioner and receipt by the surety.²⁷⁵ The First District Court of Appeal ruled that "[t]he plain meaning of the language of Florida Statutes, sections 624.422 and 624.423 indicates that service of process is complete when the Insurance Commissioner, in his role as process agent for the insurer is served."²⁷⁶

In *Mursten Construction Co. v. C.E.S. Industries, Inc.*,²⁷⁷ a subcontractor's material supplier sued the general contractor and surety seeking to recover under a payment bond.²⁷⁸ The materials supplier filed suit against the owner to enforce a lien.²⁷⁹ The answer of the owner raised the defense of the existence of a payment bond pursuant to section 713.23, Florida Statutes. The claimant then amended its complaint and served an amended complaint substituting a claim against the payment bond for the claim to enforce the lien.²⁸⁰ However, there was no notice of nonpayment served on the surety.²⁸¹ The claimant argued that the service of the amended complaint acted as the notice of nonpayment in that the amended complaint

270. *Id.* at 977.

271. *Id.*

272. *Id.*

273. *Id.*

274. 591 So. 2d 1117 (Fla. 1st Dist. Ct. App. 1992).

275. *Id.* at 1119.

276. *Id.*

277. 588 So. 2d 1061 (Fla. 3d Dist. Ct. App. 1991).

278. *Id.* at 1062.

279. *Id.*

280. *Id.*

281. *Mursten*, 588 So. 2d at 1062.

was served on counsel within the ninety days from last delivery.²⁸² The Third District Court of Appeal strictly construed the statute which requires service of the notice of nonpayment as a precondition to bringing the action and dismissed the claim against the surety for failure to timely serve the notice.²⁸³

In *Burke Co. v. Bruce M. Ross Co.*,²⁸⁴ the First District Court of Appeal interpreted the notice requirement of section 255.05(2)(198), Florida Statutes as such notice requirement applies to a rental equipment supplier.²⁸⁵ The court determined that ninety day notice period for recovery under a public construction payment bond runs from the last date of actual use of rental equipment, not the last date of delivery.²⁸⁶ This created conflict with the case of *Moretrench American Corp. v. Taylor Woodrow Construction Corp.*,²⁸⁷ in which the Second District Court of Appeal held that the ninety day notice must be served within ninety days from last delivery of the rental equipment to the site, regardless of the time of use.²⁸⁸ The Florida legislature resolved this conflict in the special session by amending both section 713.23 and section 255.05 to provide that the ninety day notice must be served within ninety days from when the rental equipment was last available for use.²⁸⁹

In *Ohio Casualty Ins. Co. v. MRK Construction, Inc.*,²⁹⁰ the unpaid subcontractor sued the prime contractor and the payment bond surety more than one year from the last date of performance by the subcontractor alleged in the complaint.²⁹¹ The surety raised the defense of untimely suit.²⁹² During trial, the subcontractor adduced testimony that the last work was performed at a time later than that alleged in the complaint, and the surety objected.²⁹³ The plaintiff then asked the court for leave to amend the pleadings to conform to the proof.²⁹⁴ The trial court allowed the amend-

282. *Id.* at 1062-63.

283. *Id.* at 1063.

284. 585 So. 2d 382 (Fla. 1st Dist. Ct. App. 1991).

285. *Id.* at 384.

286. *Id.* at 385.

287. 565 So. 2d 861 (Fla. 2d Dist. Ct. App. 1990).

288. *Id.* at 862.

289. FLA. STAT. §§ 713.23, 255.05 (1991).

290. 602 So. 2d 976 (Fla. 2d Dist. Ct. App. 1992).

291. *Id.* at 977.

292. *Id.*

293. *Id.*

294. *Id.*

ment, and later entered judgment in favor of the unpaid subcontractor.²⁹⁵ On appeal, the Second District Court of Appeal acknowledged the discretionary authority of the trial court to allow the amendment to conform to the proof, but held that the surety was prejudiced.²⁹⁶ The court then ordered the trial court to allow the pleadings to be amended, including an opportunity for the surety to amend its defenses before trial.²⁹⁷

B. Insurance Certificate

In *Criterion Leasing Group v. Gulf Coast Plastering & Drywall*,²⁹⁸ an insurer provided a certificate of insurance indicating that subcontractor's employees were covered by workers' compensation.²⁹⁹ The subcontractor overlooked notifying the agency which handles its personal matters that it recently hired an employee.³⁰⁰ When that employee became injured at a construction project, the insurer denied liability.³⁰¹ The First District Court of Appeal held that the insurer was estopped from denying liability under the principle of promissory estoppel.³⁰² The court stated that it was foreseeable to the insurer that the subcontractor would use the certificate of insurance as proof of workers' compensation coverage.³⁰³ Had the certificate of insurance not been submitted to the general contractor as proof of workers' compensation coverage, the general contractor's policy would cover the subcontractor's employees.³⁰⁴

Additionally, in *Mandico v. Taos Construction, Inc.*,³⁰⁵ the Florida Supreme Court determined that if a general contractor provided workers' compensation insurance for a subcontractor by deducting premiums from payments due, and where the injured worker claimed and recovered workers' compensation benefits, the general contractor was entitled to the workers' compensation immunity from suit.³⁰⁶

295. *Ohio Casualty*, 602 So. 2d at 977.

296. *Id.*

297. *Id.*

298. 582 So. 2d 799 (Fla. 1st Dist. Ct. App. 1991).

299. *Id.* at 800.

300. *Id.*

301. *Id.*

302. *Id.* at 800-01.

303. *Criterion*, 582 So. 2d at 801.

304. *Id.*

305. 17 Fla. L. Weekly S445 (1992).

306. *Id.*

VIII. CONCLUSION

This year was a significant year for construction law due to the devastation left by Hurricane Andrew. The impact of Hurricane Andrew has been an increase in litigation involving defective design and faulty construction. The result will undoubtedly be an increase in case law involving construction claims.